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These reports contain references, which follow after the headnotes, to the following major works of legal reference described in the manner indicated below—

Halsbury's Laws of England, Simonds Edition

The reference 2 Halsbury's Laws (3rd Edn) 20, para 48, refers to paragraph 48 on page 20 of volume 2 of the third edition of Halsbury's Laws of England, of which the late Viscount Simonds was Editor-in-Chief.

Halsbury's Statutes of England

The reference 5 Halsbury's Statutes (3rd Edn) 302 refers to page 302 of volume 5 of the third edition of Halsbury's Statutes of England.

English and Empire Digest

References are to the replacement volumes (including reissue volumes) of the Digest, and to the continuation volumes of the replacement volumes.

The reference 31 Digest (Repl) 244, 3794, refers to case number 3794 on page 244 of Digest Replacement Volume 31.

The reference Digest (Cont Vol B) 287, 7540b, refers to case number 7540b on page 287 of Digest Continuation Volume B.

The reference 28 (1) Digest (Reissue) 167, 507, refers to case number 507 on page 167 of Digest Replacement Volume 28 (1) Reissue.

Halsbury's Statutory Instruments

The reference 12 Halsbury's Statutory Instruments (Second Re-issue) 124, refers to page 124 of the second re-issue of volume 12 of Halsbury's Statutory Instruments; references to subsequent re-issues are similar.

Encyclopaedia of Forms and Precedents

The reference 7 Ency Forms & Precedents (4th Edn) 247, Form 12, refers to Form 12 on page 247 of volume 7 of the fourth edition, of the Encyclopaedia of Forms and Precedents.

Cases reported in volume 2

	Page		Page
Aldus v Watson [QBD Divl Ct]	1018	— [CA]	558
Amalgamated Union of Engineering Workers, Langston v [NIRC]	430	Coupe v Guyett [QBD Divl Ct]	1058
Angelia, The [QBD]	144	Coupe, Heron Service Stations Ltd v [HL]	110
Applin v White (Inspector of Taxes) [Ch D]	637	Cripps (Pharmaceuticals) Ltd v Wickenden [Ch D]	606
Applin, Race Relations Board v [CA]	1190	Cripps (R A) & Son Ltd v Wickenden [Ch D]	606
Arenson v Arenson [CA]	235	Crispin's Will Trusts, Re [Ch D]	141
Arkwright v Thurlay [Ch D]	141	Crompton (Alfred) Amusement Machines Ltd v Commissioners of Customs and Excise (No 2) [HL]	1169
Armstrong v Whitfield [QBD Divl Ct]	546	Cross (Patrick), R v [CA]	920
Arron, R v [CA]	1221	Croydon (London Borough), Frank Bucknell & Son Ltd v [QBD]	165
Ashmore, Benson, Pease & Co Ltd v A V Dawson Ltd [CA]	856	D (minors) (wardship: jurisdiction), Re [Fam D]	993
Atlantic Star, The [HL]	175	Dawson (A V) Ltd, Ashmore, Benson, Pease & Co Ltd v [CA]	856
Attorney-General, Childs v [Ch D]	108	Deacon, R v [CA]	1145
Attorney-General, More v [CA]	1136	Dickinson (Inspector of Taxes) v Downes [CA]	657
Automobile Proprietary Ltd, Smith v [NIRC]	1105	Dickinson (Inspector of Taxes), Kilmore (Aldridge) Ltd v [CA]	657
Avery (No 2), Lewis v [CA]	229	Director of Public Prosecutions v Ellis [QBD Divl Ct]	540
Azam v Secretary of State for the Home Department [HL]	765	Director of Public Prosecutions, Kamara v [HL]	1242
Azam, ex parte. R v Governor of Pentonville Prison [CA]	741	Director of Public Prosecutions, Riches v [CA]	935
Barnet London Borough Council v Eastern Electricity Board [QBD Divl Ct]	319	Director of Public Prosecutions, Taylor v [HL]	1108
Barton-upon-Humber Urban District Council, Hauxwell v [Ch D]	1022	Domestic Installations Co Ltd, Simplicity Products Co (a firm) v [CA]	619
Bates, R v [CA]	509	Downes, Dickinson (Inspector of Taxes) v [CA]	657
Best-Shaw, Perkins (H G) Ltd v [QBD]	924	Downes's Settlement Trustees, Grant (Inspector of Taxes) v [CA]	657
Bingham, R v [CA]	89	Dowty Boulton Paul Ltd v Wolverhampton Corporation (No 2) [CA]	491
Bithell, ex parte. R v Talgarth Justices [QBD Divl Ct]	717	Duncan, Martindale v [CA]	355
Board of Governors of the United Liverpool Hospitals, Dunning v [CA]	454	Dunning v Board of Governors of the United Liverpool Hospitals [CA]	454
Bogacki, R v [CA]	864	Durkin, R v [CA]	872
Boughton Estates Ltd, McAlwane v [NIRC]	299	Eastern Electricity Board, Barnet London Borough Council v [QBD Divl Ct]	319
Bourlet v Porter [HL]	800	Edkins v Knowles [QBD Divl Ct]	503
Breeze, R v [CA]	1141	Ellis, Director of Public Prosecutions v [QBD Divl Ct]	540
Brenner v Rose [Ch D]	535	Ellis v Jones [QBD Divl Ct]	893
British Broadcasting Corporation, London Computer Operators Training Ltd v [CA]	170	Elphick, Hardy v [CA]	914
British Waterways Board, Burnett v [CA]	631	English Clays Lovering Pochin & Co Ltd v Plymouth Corporation [Ch D]	730
Broome, Hunt v [QBD Divl Ct]	1035	Epps v Esso Petroleum Co Ltd [Ch D]	465
Brown, Stoneman v [CA]	225	Esher Urban District Council, Hutton v [CA]	1123
Bucknell (Frank) & Son Ltd v London Borough of Croydon [QBD]	165	Esso Petroleum Co Ltd, Epps v [Ch D]	465
Burke, McGinley v [QBD]	1010	Export Credits Guarantee Department, Lucas (L) Ltd v [CA]	984
Burnett v British Waterways Board [CA]	631	Fazackerley, R v [CA]	819
Carlton v Theodore Goddard & Co [Ch D]	877	Flemming, R v [CA]	401
Castle, Coulson & MacDonald Ltd, Re [Ch D]	814	Foley, Midland Greyhound Racing Co Ltd v [QBD Divl Ct]	324
Centaploy Ltd v Matlodge Ltd [Ch D]	720	Ford Motor Co Ltd, Morris v [CA]	1084
Central Electricity Generating Board v Coleman [NIRC]	709	Ford-Hunt v Ragbir Singh [Ch D]	700
Chapman v Goonvean & Rostowrack China Clay Co Ltd [CA]	1063	Fox v Lawson [QBD Divl Ct]	303
Chapman, R v [CA]	624	Francis v Chief of Police [PC]	251
Chief of Police, Francis v [PC]	251	Fuller (otherwise Penfold) v Fuller [CA]	650
Childs v Attorney-General [Ch D]	108	G v G (Practice: Transfer of applications) [Fam D]	1187
Clark, Halifax Building Society v [Ch D]	33	Garfield v Maddocks [QBD Divl Ct]	303
Clark, St Edmundsbury and Ipswich Diocesan Board of Finance v [Ch D]	1155	Gee, Wilkes v [CA]	1214
Clark (C & J) Ltd v Inland Revenue Comrs [Ch D]	513	Goddard (Theodore) & Co, Carlton v [Ch D]	877
Coleman, Central Electricity Generating Board v [NIRC]	709	Goff, Shields Furniture Ltd v [NIRC]	653
Commissioner of Police of the Metropolis, Reid v [CA]	97	Good (Inspector of Taxes), Taylor v [Ch D]	785
Commissioners of Customs and Excise, Norwich Pharmacal Co v [HL]	943	Goodlad, R v [CA]	1200
Commissioners of Customs and Excise (No 2), Crompton (Alfred) Amusement Machines Ltd v [HL]	1169	Goonvean & Rostowrack China Clay Co Ltd, Chapman v [CA]	1063
Cory Lighterage Ltd v Transport and General Workers Union [Ch D]	341		

	Page		Page
Gossage ex parte. R v Woking Justices [QBD Divl Ct]	621	Lennard, R v [CA]	831
Governor of Pentonville Prison, R v, ex parte Azam [CA]	741	Lewis v Averay (No 2) [CA]	229
Governor of Pentonville Prison, Tzu-Tsai Cheng v [HL]	204	Liverpool Corporation, Hibernian Property Co Ltd v [QBD]	1117
Grant (Inspector of Taxes) v Downes's Settlement Trustees [CA]	657	Lloyds Bank Ltd v Marcan [Ch D]	359
Grazebrook (M & W) Ltd v Wallens [NIRC]	868	London Borough of Croydon, Frank Bucknell & Son Ltd v [QBD]	165
Greater Birmingham Appeal Tribunal, R v, ex parte Simper [QBD Divl Ct]	461	London Borough of Sutton, Grimes v [NIRC]	448
Greaves (Arthur) (Lees) Ltd, Lees v [NIRC]	21	London Computer Operators Training Ltd v British Broadcasting Corporation [CA]	170
Grimes v London Borough of Sutton [NIRC]	448	Longman (J F) (Meat Salesmen) Ltd, Heath v [NIRC]	1228
Guilfoyle, R v [CA]	844	Lowe's Will Trusts, Re [CA]	1136
Guyett, Coupe v [QBD Divl Ct]	1058	Lucas (L) Ltd v Export Credits Guarantee Department [CA]	984
Haigh Castle & Co Ltd, Hammond v [NIRC]	289	M v M (child: access) [Fam D]	81
Halfdan Grieg & Co A/S v Sterling Coal & Navigation Corporation [CA]	1073	McAlwane v Boughton Estates Ltd [NIRC]	299
Halifax Building Society v Clark [Ch D]	33	McCann v Sheppard [CA]	881
Hammond v Haigh Castle & Co Ltd [NIRC]	289	McGibbon v McGibbon [Fam D]	836
Hardy v Elphick [CA]	914	McGinley v Burke [QBD]	1010
Harnett v Harnett [Fam D]	593	Maddocks, Garfield v [QBD Divl Ct]	303
Hauxwell v Barton-upon-Humber Urban District Council [Ch D]	1022	Magna Merchants Ltd, Stocks v [QBD]	329
Heath v J F Longman (Meat Salesmen) Ltd [NIRC]	1228	Manisty v Manisty [Ch D]	1203
Henlys (Folkestone) Ltd, Morrish v [NIRC]	137	Manisty's Settlement, Re [Ch D]	1203
Heron Service Stations Ltd v Coupe [HL]	110	Marcan, Lloyds Bank Ltd v [Ch D]	359
Herring v Templeman [Ch D]	581	Marsden (J L) v Marsden (A M) [Fam D]	851
Hibernian Property Co Ltd v Liverpool Corporation [QBD]	1117	Martindale v Duncan [CA]	355
Higgs, Ransom (Inspector of Taxes) v [CA]	657	Matlodge Ltd, Centaploy Ltd v [Ch D]	720
Higgs's Settlement Trustees, Motley (Inspector of Taxes) v [CA]	657	Meesse, R v [CA]	1103
Hodgson, R v [CA]	552	Meredith, ex parte [QBD Divl Ct]	234
Holwell Securities Ltd v Hughes [Ch D]	476	Midland Foot Comfort Centre Ltd v Richmond [NIRC]	294
Hughes, Holwell Securities Ltd v [Ch D]	476	Midland Greyhound Racing Co Ltd v Foley [QBD Divl Ct]	324
Hunt v Broome [QBD Divl Ct]	1035	Miller, Warmington v [CA]	372
Hunter, Pugsley v [QBD Divl Ct]	10	Mizel v Warren [QBD Divl Ct]	1149
Hutton v Esher Urban District Council [CA]	1123	More v Attorney-General [CA]	1136
Icknield Development Ltd, Re [Ch D]	168	Morris v Ford Motor Co Ltd [CA]	1084
Iino Kaiur Kaisha Ltd, Trade and Transport Incorporated v [QBD]	144	Morrish v Henlys (Folkestone) Ltd [NIRC]	137
Industrial Dwelling Society Ltd, Stiffel v [CA]	1131	Motley (Inspector of Taxes) v Higgs's Settlement Trustees [CA]	657
Ingram (Inspector of Taxes), Murphy v [Ch D]	523	Murphy v Ingram (Inspector of Taxes) [Ch D]	523
Inland Revenue Comrs, Clark (C & J) Ltd v [Ch D]	513	Murphy (J) and Sons Ltd v Secretary of State for the Environment [QBD]	26
Inland Revenue Comrs v Joiner [Ch D]	379	Nash v Nash [CA]	704
Inland Revenue Comrs, Wilover Nominees Ltd v [Ch D]	977	New Zealand Netherlands Society 'Oranje' Incorporated v Kuys [PC]	1222
Inwood, R v [CA]	645	North West Metropolitan Regional Hospital Board, Trollope & Colls Ltd v [HL]	260
J (a minor) (adoption order: conditions), Re [Fam D]	401	Norwich Pharmacal Co v Commissioners of Customs and Excise [HL]	943
Jackson (S M) v Jackson (E L) [Fam D]	395	O'Callaghan, Stapylton v [QBD Divl Ct]	782
Joiner, Inland Revenue Comrs v [Ch D]	379	Parkinson (Sir Lindsay) & Co Ltd v Triplan Ltd [QBD & CA]	273
Jones, Ellis v [QBD Divl Ct]	893	Pasternack v Poulton [QBD]	74
Jones, Law v [CA]	437	Peacock, Tarmac Roadstone Holdings v [CA]	485
Kamara v Director of Public Prosecutions [HL]	1242	Perkins (H G) Ltd v Best-Shaw [QBD]	924
Kernochan, Texaco Antilles Ltd v [PC]	118	Phillips v Phillips [CA]	423
Khan, ex parte. R v Secretary of State for Social Services [CA]	104	Plymouth Corporation, English Clays Lovering Pochin & Co Ltd v [Ch D]	730
Khera, ex parte. R v Secretary of State for the Home Department [CA]	741	Porter, Bourlet v [HL]	800
Killick v Second Covent Garden Property Co Ltd [CA]	337	Poulton, Pasternack v [QBD]	74
Kilmorie (Aldridge) Ltd v Dickinson (Inspector of Taxes), [CA]	657	Practice Direction (Chancery Division: Contentious probate) [Ch D]	334, 422
Knowles, Edkins v [QBD Divl Ct]	503	Practice Direction (Costs: Taxation: Counsel's fees)	1135
Kowalczyk v Kowalczyk [CA]	1042	Practice Direction (Costs: Taxation: Value added tax) [Fam D]	335, 464
Kuys, New Zealand Netherlands Society 'Oranje' Incorporated v [PC]	1222	Practice Direction (Divisions of High Court: Jurisdiction)	233
Langston v Amalgamated Union of Engineering Workers [NIRC]	430	Practice Direction (Family Division: Child: Application) [Fam D]	400
Law v Jones [CA]	437	Practice Direction (Family Division: Divorce: Adultery: Proof: Undefended cases) [Fam D]	983
Lawson, Fox v [QBD Divl Ct]	309	Practice Direction (Family Division: Nullity: Petition: Title of suit) [Fam D]	880
Lees v Arthur Greaves (Lees) Ltd [NIRC]	21		

	Page		Page
Practice Direction (Matrimonial causes: Royal Courts of Justice) [Fam D]	288	Secretary of State for the Home Department, R v, ex parte Khara [CA]	741
Practice Direction (National Industrial Relations Court: Appeals from industrial tribunals) [NIRC]	1264	Secretary of State for the Home Department, R v, ex parte Sidhu [CA]	741
Practice Direction (Protected tenancy: Claim for possession) [QBD]	336	Sheppard, McCann v [CA]	881
Practice Direction (Queen's Bench Division: Practice: Payment into court) [QBD]	64	Shields Furniture Ltd v Goff [NIRC]	653
Practice Direction (Ward of court) [Fam D]	512	Sidhu, ex parte. R v Secretary of State for the Home Department [CA]	741
Practice Note (Criminal law: Costs: Acquittal) [QBD Divl Ct]	592	Simper, ex parte. R v Greater Birmingham Appeal Tribunal [QBD Divl Ct]	461
Price, Thompson v [QBD]	846	Simplicity Products Co (a firm) v Domestic Installations Co Ltd [CA]	619
Provan (Inspector of Taxes), Taylor v [CA] ..	65	Singer, ex parte. R v Supplementary Benefits Commission [QBD Divl Ct]	931
Pugsley v Hunter [QBD Divl Ct]	10	Smith v Automobile Proprietary Ltd [NIRC] ..	1105
R v Arron [CA]	1221	Smith (Donald), R v [CA]	1161
R v Bates [CA]	509	Smith (Roger Daniel), R v [CA]	896
R v Bingham [CA]	89	Sparrow, R v [CA]	129
R v Bogacki [CA]	864	Squires, Rouse v [CA]	903
R v Breeze [CA]	1141	Stapylton v O'Callaghan [QBD Divl Ct] ..	782
R v Chapman [CA]	624	Sterling Coal & Navigation Corporation, Halfdan Grieg & Co A/S v [CA]	1073
R v Cross (Patrick) [CA]	920	Stiffel v Industrial Dwelling Society Ltd [CA] ..	1131
R v Deacon [CA]	1145	Stocks v Magna Merchants Ltd [QBD] ..	329
R v Durkin [CA]	872	Stoneman v Brown [CA]	225
R v Fazackerley [CA]	819	Sunair Holidays Ltd, R v [CA]	1233
R v Flemming [CA]	401	Supplementary Benefits Commission, R v, ex parte Singer [QBD Divl Ct]	931
R v Goodlad [CA]	1200	Sutcliffe v Thackrah [CA]	1047
R v Governor of Pentonville Prison, ex parte Azam [CA]	741	Sutton (London Borough), Grimes v [NIRC] ..	448
R v Greater Birmingham Appeal Tribunal, ex parte Simper [QBD Divl Ct]	461	Talgarth Justices, R v, ex parte Bithell [QBD Divl Ct]	717
R v Guilfoyle [CA]	844	Tarmac Roadstone Holdings Ltd v Peacock [CA] ..	485
R v Hodgson [CA]	552	Taylor v Director of Public Prosecutions [HL] ..	1108
R v Inwood [CA]	645	Taylor v Good (Inspector of Taxes) [Ch D] ..	785
R v Lennard [CA]	831	Taylor v Provan (Inspector of Taxes) [CA] ..	65
R v Meese [CA]	1103	Templeman, Herring v [Ch D]	581
R v Secretary of State for Social Services, ex parte Khan [CA]	104	Texaco Antilles Ltd v Kernochan [PC] ..	118
R v Secretary of State for the Home Department, ex parte Khara [CA]	741	Thackrah, Sutcliffe v [CA]	1047
R v Secretary of State for the Home Department, ex parte Sidhu [CA]	741	Thompson v Price [QBD]	846
R v Smith (Donald) [CA]	1161	Thurley, Arkwright v [Ch D]	141
R v Smith (Roger Daniel) [CA]	896	Trade and Transport Incorporated v Iino Kaiun Kaisha Ltd [QBD]	144
R v Sparrow [CA]	129	Transport and General Workers Union, Cory Lighterage Ltd v [Ch D]	341
R v Sunair Holidays Ltd [CA]	1233	— [CA]	558
R v Supplementary Benefits Commission, ex parte Singer [QBD Divl Ct]	931	Triplan Ltd, Parkinson (Sir Lindsay) v [QBD & CA]	273
R v Talgarth Justices, ex parte Bithell [QBD Divl Ct]	717	Trippas v Trippas [CA]	1
R v Turner [CA]	828	Troilope & Colls Ltd v North West Metropolitan Regional Hospital Board [HL] ..	260
R v Woking Justices, ex parte Gossage [QBD Divl Ct]	621	Turner, R v [CA]	828
Race Relations Board v Applin [CA]	1190	Tzu-Tsai Cheng v Governor of Pentonville Prison [HL]	204
Raghubir Singh, Ford-Hunt v [Ch D]	700	Wallens, M & W Grazebrook Ltd v [NIRC] ..	868
Ransom (Inspector of Taxes) v Higgs [CA] ..	657	Warmington v Miller [CA]	372
Read, Westward Circuits Ltd v [NIRC]	1013	Warren, Mizel v [QBD Divl Ct]	1149
Reid v Commissioner of Police of the Metropolis [CA]	97	Watson, Aldus v [QBD Divl Ct]	1018
Riches v Director of Public Prosecutions [CA] ..	935	Westward Circuits Ltd v Read [NIRC]	1013
Richmond, Midland Foot Comfort Centre Ltd, v [NIRC]	294	White (Inspector of Taxes), Aplin v [Ch D] ..	637
Rose, Brenner v [Ch D]	535	Whitfield, Armstrong v [QBD Divl Ct]	546
Rouse v Squires [CA]	903	Wickenden, Cripps (Pharmaceuticals) Ltd v [Ch D]	606
St Edmundsbury and Ipswich Diocesan Board of Finance v Clark [Ch D]	1155	Wickenden, Cripps (R A) and Son Ltd v [Ch D] ..	606
Schuler (L) A G v Wickman Machine Tool Sales Ltd [HL]	39	Wickman Machine Tool Sales Ltd, Schuler (L) A G v [HL]	39
Second Covent Garden Property Co Ltd, Killick v [CA]	337	Wilkes v Gee [CA]	1214
Secretary of State for Social Services, R v, ex parte Khan [CA]	104	Willcocks (W R) & Co Ltd, Re [Ch D]	93
Secretary of State for the Environment, Murphy (J) and Sons Ltd v [QBD]	26	Wilover Nominees Ltd v Inland Revenue Comrs [Ch D]	977
Secretary of State for the Environment, Wood v [QBD Divl Ct]	404	Wilson v Wilson [CA]	17
Secretary of State for the Home Department, Azam v [HL]	765	Woking Justices, R v, ex parte Gossage [QBD Divl Ct]	621
		Wolverhampton Corporation (No 2), Dowty Boulton Paul Ltd v [CA]	491
		Wood v Secretary of State for the Environment [QBD Divl Ct]	404
		Y v Y (child: surname) [PDA]	574

Index

	Page
ACCESS	
Child, to—Spouse not having custody. <i>See</i> Divorce (Custody—Access).	
Adopted child. <i>See</i> Infant (Custody—Access—Adopted child).	
ACCOUNTANT	
Appointment as liquidator of company. <i>See</i> Company (Winding-up—Liquidator—Appointment).	
ACT OF PARLIAMENT	
<i>See</i> Statute .	
ACTION	
Dismissal—Abuse of process of court—Second action relating to same subject-matter and parties as earlier action—Purpose of second action to make use of pleadings in first action to defeat defence available in first action—Action for specific performance of agreement for sale of land—Defence that no sufficient memorandum in writing of agreement—Particulars of defence setting forth further terms of agreement—Second action brought by plaintiff in order to rely on particulars in first action as constituting or contributing to a sufficient memorandum—Second action having different cause of action—Whether second action an abuse of process of court—RSC Ord 18, r 19. Hardy v Elphick	914
Foreign defendant—Stay of proceedings. <i>See</i> Practice (Stay of proceedings).	
Stay of proceedings—Generally. <i>See</i> Practice (Stay of proceedings).	
Transfer—County court to High Court. <i>See</i> County Court (Transfer of action).	
ADMINISTRATION OF ESTATES	
Interest of Crown—Order for sale—Power of court—Application of Attorney-General—Power to order sale in any proceedings in High Court when it appears to court that Crown entitled to estate or interest in hereditament—Scope of power—Escheat to Crown—Freehold estate devised by testator in 1851—Estate subject to lease—Rents collected by solicitors—Solicitors unable to trace any person claiming to be beneficially entitled to freehold reversion—Solicitors seeking directions of High Court as to disposal of accumulated rents—Crown appearing to have interest by escheat—Title of Crown not established for purpose of proceedings—Whether court having power to order sale—Intestates Estates Act 1884, s 5. Re Lowe's Will Trusts	1136
ADOPTION	
Custody—Access—Spouse not having custody. <i>See</i> Infant (Custody—Access—Adopted child).	
Order—Terms and conditions—Terms and condition which may be imposed—Enforcement—Method of enforcement—Adoption Act 1958, s 7 (3). Re J (a minor) (adoption order: conditions)	410
Welfare of infant—Severance of adopted child from natural parents—Desirability—Circumstances in which adoption order may be made even though child may see natural parent thereafter. Re J (a minor) (adoption order: conditions)	410
ADULTERY	
Admission. <i>See</i> Divorce (Adultery).	
ADVERTISEMENT	
Control of advertisements. <i>See</i> Town and Country Planning (Advertisement—Control of advertisements).	
AFFRAY	
<i>See</i> Criminal Law .	
AGREEMENT	
Specific performance. <i>See</i> Specific Performance .	
AGRICULTURE	
Agricultural holding—Notice to quit—Validity—Service of notice by landlord requiring payment of rent due within two months—Failure by tenant to pay within two months—Payment after expiry of two months and before service of notice to quit—Whether landlord entitled to serve valid notice to quit after payment—Agricultural Holdings Act 1948, s 24 (2) (d). Stoneman v Brown	225
ALCOHOL	
Driving with blood-alcohol proportion above prescribed limit. <i>See</i> Road Traffic (Driving with blood-alcohol proportion above prescribed limit).	
ALLOWANCE	
Supplementary. <i>See</i> National Insurance (Non-contributory benefit—Supplementary allowance).	
APPEAL	
Charity—Scheme. <i>See</i> Charity (Scheme—Power of commissioners or of Secretary of State for Education and Science to establish scheme).	
Costs—Appeal to Court of Appeal—Criminal proceedings. <i>See</i> Criminal Law (Costs).	
Criminal appeal. <i>See</i> Criminal Law .	
Criminal law. <i>See</i> Criminal Law .	
Crown Court, to. <i>See</i> Crown Court (Appeal to).	

APPEAL—continued

National Industrial Relations Court, to—Jurisdiction of court. *See Industrial Relations (National Industrial Relations Court).*

APPOINTMENT

Receiver—Company—Debenture. *See Company (Debenture—Receiver).*

APPORTIONMENT

Close company—Apportionment of income among participators. *See Income Tax (Close company—Apportionment of income).*

ARBITRATION

Arbitrator—Negligence. *See Negligence (Duty to take care—Arbitrator).*

Costs—Taxation—Discretion of arbitrator—Award directing costs to be taxed 'in the High Court'—Discretion of taxing master—Appropriate scale of costs—Discretion of arbitrator to award costs on any basis he regards as proper—Taxing master acting as delegate of arbitrator in taxing costs—Direction in award to be construed as direction to tax costs on High Court scale. *H G Perkins Ltd v Best-Shaw* 924

Special case—Direction by court—Direction to arbitrator to state question of law or award in form of a special case—Discretion of court—Exercise of discretion—Issue involving question of law—When discretion to direct a special case should be exercised—Dispute as to construction of contract terminating time charter—Delay in bringing dispute to arbitration—Arbitration Act 1950, s 21 (1). *Halfdan Grieg & Co A/S v Sterling Coal & Navigation Corporation* 1073

ARCHITECT

Negligence—Certificate. *See Negligence (Duty to take care—Arbitrator—Person acting in arbitral capacity—Exercise of professional skill and judgment—Architect).*

ARREST

Arrest without warrant—What constitutes arrest—Suspect voluntarily visiting police station to assist police with enquiries into theft—Suspect informed after questioning that he would be charged—Police proceeding with appropriate formalities—Suspect deciding to leave police station—Police officers restraining suspect—Suspect charged with assaulting officers in execution of their duty—Issue whether suspect under arrest—Duty of police to make clear to suspect that he has been arrested—Issue whether made clear to him one of fact for jury. *R v Inwood* 645

ASSAULT

Criminal. *See Criminal Law.*

ASSESSMENT

Damages—Fatal accident. *See Fatal Accident.*

Income tax, to. *See Income Tax.*

ASSIGNMENT

Lease. *See Landlord and Tenant (Lease—Assignment).*

ATTEMPT

Crime. *See Criminal Law.*

ATTORNEY-GENERAL

Charity—Party to proceedings. *See Charity (Proceedings—Parties).*

AWARD

Arbitrator's. *See Arbitration.*

BENEFIT

See National Insurance.

BETTING

See Gaming.

BILL OF COSTS

Taxation. *See Costs (Taxation).*

BINDING-OVER

See Magistrates (Jurisdiction).

BOOKMAKER

Licensed track—Charges. *See Gaming (Betting—Licensed track—Charges to bookmakers).*

BREATH TEST

See Road Traffic (Driving with blood-alcohol proportion above prescribed limit—Evidence—Provision of specimen—Breath test).

BRITISH WATERWAYS BOARD

Negligence—Exclusion of liability—Statutory duty to have regard to safety of operations in provision of services and facilities. *See Negligence (Defence—Exclusion of liability—Statutory board).*

BUILDING

Contract—Implied term. *See Contract (Implied term—Implication of term to give business efficacy to contract).*

Late night refreshment house—Licensing. *See Licensing (Late night refreshment house).*

BUILDING CONTRACT

Architect's certificate—Negligence. *See Negligence (Duty to take care—Arbitrator—Person acting in arbitral capacity—Exercise of professional skill and judgment—Architect).*

Extension of time—Implication of term to give business efficacy to contract. *See Contract (Implied term—Implication of term to give business efficacy to contract).*

BUILDING SCHEME

Restrictive covenant. *See* **Restrictive Covenant** (Restrictive covenant affecting land).

BURDEN OF PROOF

Proceedings relating to customs or excise. *See* **Customs** (Forfeiture—Imported goods—Goods on which duty chargeable and unpaid—Onus of proof).

BUSINESS

Premises—Display of advertisement on—Restriction. *See* **Town and Country Planning** (Advertisement—Control of advertisements).

CASE STATED

Special case. *See* **Arbitration**.

CERTIORARI

Crown Court. *See* **Crown Court** (Supervisory jurisdiction of High Court).

CHANCERY DIVISION

Jurisdiction—Grant of remedy or relief where proceedings for such remedy or relief assigned to another Division. *See* **Court** (Jurisdiction—High Court of Justice).

Practice. *See* **Practice** (Chancery Division).

Probate—Practice. *See* **Probate** (Practice).

CHARITY

Proceedings—Parties—Attorney-General—Local charity—Local inhabitants—Action against trustees—Action to establish existence of charitable trust—Local authority—Park held by local authority—Action by local inhabitants for declaration that park held by local authority subject to charitable trust—Whether action 'charity proceedings'—Whether local inhabitants proper plaintiffs—Charities Act 1960, s 28. **Hauxwell v Barton-upon-Humber Urban District Council**

1022

Scheme—Power of commissioners or Secretary of State for Education and Science to establish scheme—Appeal against order establishing scheme—Certificate of commissioners or Secretary of State or leave of judge—Appeal by person interested in charity or by inhabitants of area in case of a local charity in that area—Whether certificate or leave required—Charities Act 1960, s 18 (11), (12). **Childs v Attorney-General**

108

CHARTERPARTY

See **Shipping**.

CHILD

Adoption. *See* **Adoption**.

Care—Local authority—Child boarded out with foster parents—Discrimination on ground of colour. *See* **Race Relations** (Discrimination—Unlawful discrimination—Provision of goods facilities and services—Discrimination by person concerned with goods etc to a section of the public—Section of the public—Local authority—Children in care of local authority).

Custody—Access—Spouse not having custody—Adopted child. *See* **Infant** (Custody—Access—Adopted child).

Divorce proceedings, in. *See* **Divorce** (Custody).

Income tax—Relief. *See* **Income Tax** (Relief).

Matrimonial causes—Applications relating to children—Application for order prohibiting removal of child out of England and Wales—Ex parte application to registrar—Application to remove child out of England and Wales—Application to judge—Matrimonial Causes Rules 1971 (SI 1971 No 953), rr 94 (1), (3) 97, 114 (1) (a) (as amended by the Matrimonial Causes (Amendment) Rules 1973 (SI 1973 No 177), r 4). **Practice Direction**

400

Name. *See* **Infant** (Name).

Ward of court. *See* **Ward of Court**.

CLOCKS

Will—Gift—Personal chattels. *See* **Will** (Gift—Personal chattels—Articles of personal use).

CLOSE COMPANY

Taxation. *See* **Income Tax** (Close company).

COLLECTION

Exhibition in public place—Removal of article from collection. *See* **Criminal Law** (Removal of articles from places open to the public—Public having access to building to view collection housed in it)

COLLEGE

See **Education**.

COMMON LAND

Registration—Disputed claims—Jurisdiction—Commons Commissioner—Residual jurisdiction of High Court—Circumstances in which residual jurisdiction exercisable—Application for registration not made bona fide. **Wilkes v Geo**

1214

COMMONWEALTH CITIZEN

Detention—Illegal entrant. *See* **Immigration** (Detention).

COMPANY

Costs—Security for costs. *See* **Costs** (Security for costs—Company).

COMPANY—continued

Debenture—Receiver—Appointment—Validity—Premature appointment—Demand by debenture holder for payment—Appointment of receiver valid only if effected after demand made—Appointment complete on communication to and acceptance by receiver—Time for company to comply with demand for payment—Loan repayable on demand under debenture—Time to comply with demand before appointment of receiver effected—Company not having means to comply with demand. **Cripps (Pharmaceuticals) Ltd v Wickenden** 606

Liquidator. *See* Winding-up—Liquidator, *post*.

Officer—Fiduciary duty. *See* **Fiduciary Duty**.

Winding-up—Compulsory winding-up—Petition—Striking out—Contributory's petition—Petition alleging deadlock between company's two directors and equal shareholders—No particulars given of allegations in petition—Petition supported by short affidavit in statutory form—Whether petition in conjunction with affidavit should be struck out as embarrassing. **Re W R Willcocks & Co Ltd** 93

Costs—Compulsory winding-up—Substitution of petitioner—Original petitioner's debt and costs paid by company and another creditor substituted as petitioner—Winding-up order made—No provision made for costs of original petitioner—Costs of petition to include original petitioner's costs—Original petitioner's costs limited to fee on presentation of petition and costs of advertisement—Form of 'usual compulsory order' in such circumstances. **Re Castle, Coulson & MacDonald Ltd** 814

Liquidator—Appointment—Qualifications and experience—Discretion of court—Practice—**Re Icknield Development Ltd** 168

COMPENSATION

Unfair industrial practice. *See* **Industrial Relations** (Unfair industrial practice).

COMPLAINT

Unfair industrial practice. *See* **Industrial Relations** (Unfair industrial practice—Complaint).

CONCILIATION OFFICER

Industrial relations. *See* **Industrial Relations** (Conciliation officers).

CONDITION

Contract—Breach of condition. *See* **Contract** (Condition).

CONSENT

Assignment of lease. *See* **Landlord and Tenant** (Lease—Assignment).

CONSPIRACY

Criminal. *See* **Criminal Law**.

CONSTITUTIONAL LAW

Freedom—Freedom of speech—St Christopher, Nevis and Anguilla. *See* **Privy Council** (St Christopher, Nevis and Anguilla).

CONSTRUCTION

Contract. *See* **Contract**.

Statute. *See* **Statute** (Construction).

CONTRACT

Breach—Damages—County court—Transfer of action to High Court. *See* **County Court** (Transfer of action).

Condition—Breach of condition—Right of other party to terminate contract forthwith—Written contract—Clause of contract expressed to be a 'condition'—Breach of clause—Breach trivial—Whether breach entitling other party to repudiate contract. **L Schuler A G v Wickman Machine Tool Sales Ltd** 39

Construction—Conduct of parties—Conduct subsequent to execution of contract—Written agreement—Ambiguity—Relevance of conduct in ascertaining intention of parties. **L Schuler A G v Wickman Machine Tool Sales Ltd** 39

Implication of term. *See* **Implied term, post**.

Exception clause—Charterparty. *See* **Shipping** (Charterparty).

Fundamental breach of contract—Non-performance—Clause excepting liability of party for non-performance where due to circumstances beyond party's control—Contract imposing only qualified obligation on party—Whether non-performance capable of amounting to fundamental breach where due to circumstances beyond party's control. **The Angela** 144

Illegality—Performance—Illegal performance by one party—Claim for damages by other party—Participation in illegality by party claiming damages—Contract of carriage—Contract by defendants to carry plaintiffs' goods—Weight of defendants' vehicle when goods loaded in excess of statutory limit—Plaintiffs' transport manager present when goods loaded—Manager raising no objections—Goods damaged in course of journey—Claim by plaintiffs for negligence and/or breach of contract—Whether plaintiffs debarred from claim by reason of illegal performance of contract. **Ashmore, Benson, Pease & Co Ltd v A V Dawson Ltd** 856

Implied term—Implication of term to give business efficacy to contract—Circumstances in which term may be implied—Express term clear and unambiguous—Term unreasonable—Several alternative fair and reasonable terms which might be implied—Building contract—Work to be carried out in phases—Date for commencement of third phase fixed by reference to date of completion of first phase—Third phase to be completed by specified date—Delay in completing first phase leaving unreasonably short time to complete third phase by specified date—Whether term to be implied extending date for completion of third phase. **Trollope & Colls Ltd v North West Metropolitan Regional Hospital Board** 260

CONTRACT—continued	
Indemnity. <i>See</i> Indemnity.	
Offer and acceptance—Acceptance by post—Mode of acceptance prescribed—Notice in writing to offeror—Option—Option to purchase freehold property—Notice—Option 'exercisable by notice in writing to' vendor within prescribed period—Purchaser writing letter to vendor giving notice of exercise of option—Letter sent by ordinary post—Letter never delivered to vendor—Whether option validly exercised—Law of Property Act 1925, s 196. <i>Holwell Securities Ltd v Hughes</i>	476
Sale of land. <i>See</i> Sale of Land.	
Service of. <i>See</i> Master and Servant (Contract of service).	
Specific performance. <i>See</i> Specific Performance.	
Threat to break or frustrate—Industrial dispute—Intimidation. <i>See</i> Industrial Relations (Industrial dispute)—Acts done in contemplation or furtherance of industrial dispute—Intimidation).	
CONTRIBUTION	
Husband and wife, between—Property—Matrimonial home. <i>See</i> Husband and Wife (Property—Matrimonial home).	
CONTRIBUTORY NEGLIGENCE	
Generally. <i>See</i> Negligence (Contributory negligence).	
CONVEYANCE	
Fraud. <i>See</i> Fraudulent Conveyance.	
CORROBORATION	
Criminal cases. <i>See</i> Criminal Law (Evidence).	
COSTS	
Acquittal—Criminal proceedings. <i>See</i> Criminal Law (Costs—Acquittal).	
Criminal cases. <i>See</i> Criminal Law (Costs).	
Legal aid. <i>See</i> Legal Aid.	
Security for costs—Company—Limited company as plaintiff—Company likely to be unable to pay costs of defendant if successful in his defence—Discretion of court whether or not to order security—Exercise of discretion—Circumstances to be taken into account—Claim bona fide—Payment into court by defendant—Lateness of application by defendant—Companies Act 1948, s 447. <i>Sir Lindsay Parkinson & Co Ltd v Triplan Ltd</i>	273
Taxation—Arbitration. <i>See</i> Arbitration (Costs—Taxation).	
Counsel's fees—Voucher—Receipt—Signature of counsel—RSC Ord 62, App 2, Part X, para 2. <i>Practice Direction</i>	1135
Solicitor—Bill of costs for contentious business—Gross sum bill—Power of party chargeable to require solicitor to deliver to him in lieu thereof bill containing detailed items—Three month time limit—Solicitor delivering to client gross sum bill—Client seeking taxation of costs—Client asking for bill to be prepared and lodged for taxation four months after delivery of original bill—Solicitor delivering detailed bill of costs—Detailed bill for larger amount than original bill—Whether client 'required' solicitor to deliver bill containing detailed items—Whether three month time limit can be waived by solicitor—Solicitors Act 1957, s 64, proviso (a). <i>Carlton v Theodore Goddard & Co</i>	877
Value added tax—Matrimonial proceedings—Divorce county court. <i>Practice Direction</i> Procedure where government department involved—Finance Act 1972, s 19 (2). <i>Practice Direction</i>	335 464
Winding-up. <i>See</i> Company (Winding-up).	
COUNSEL	
Fees—Taxation of costs. <i>See</i> Costs (Taxation).	
COUNTY COURT	
Costs—Taxation—Value added tax—Matrimonial proceedings. <i>See</i> Costs (Taxation—Value added tax—Matrimonial proceedings).	
Transfer of action—Transfer to High Court—Plaintiff's right to transfer action in contract or tort—Application when reasonable ground for supposing amount of damages recoverable to be in excess of amount recoverable in county court—Discretion of judge—Judge bound to order transfer when reasonable expectation that damages would exceed county court limit established—County Courts Act 1959, s 43. <i>Stiffel v Industrial Dwelling Society Ltd</i>	1131
COURT	
Crown Court. <i>See</i> Crown Court.	
Jurisdiction—High Court of Justice—Divisions of High Court—Supreme Court of Judicature (Consolidation) Act 1925, s 57. <i>Practice Direction</i>	233
Magistrates. <i>See</i> Magistrates.	
Payment into—Practice. <i>See</i> Practice (Payment into court).	
Ward of. <i>See</i> Ward of Court.	
COURT OF APPEAL	
Criminal cause or matter—Appeals generally. <i>See</i> Criminal Law (Appeal).	
Evidence—Further evidence—Character of witness—Witness having died since date of trial—Fresh evidence of witness's criminal record—No opportunity for challenge or explanation—Whether evidence admissible. <i>McCann v Sheppard</i>	881

COURT OF APPEAL—Evidence—Further evidence—continued

Page

Damages for personal injuries—Basis of assessment falsified by events occurring after trial—Death of plaintiff—Death occurring after notice of appeal lodged—Pain-killing drug prescribed for plaintiff after accident—Plaintiff becoming addicted to drug—Plaintiff dying from overdose of drug—Whether evidence of death admissible in Court of Appeal—Effect on general damages and damages for lost future earnings. **McCann v Sheppard**

881

COVENANT.

Restrictive—Covenant affecting land. *See Restrictive Covenant* (Restrictive covenant affecting land).

CREDITOR

Conveyance with intent to defraud creditors. *See Fraudulent Conveyance.*

CRIMINAL LAW

Affray—Terror—Bystanders—Proof that bystanders might reasonably be expected to have been frightened—Unnecessary to prove actual fear—Whether necessary to prove presence of bystanders who could have been frightened. **Taylor v Director of Public Prosecutions**

1108

Unlawful fighting—Fight—Meaning—Display of force—Whether violence a necessary element. **Taylor v Director of Public Prosecutions**

1108

Only one person fighting unlawfully—Whether one person alone may be guilty of offence. **Taylor v Director of Public Prosecutions**

1108

Appeal—Court of Appeal—Judgement or order—Alteration—Jurisdiction of court to alter its own judgment or order. **R v Cross (Patrick)**

920

No miscarriage of justice—Power to substitute alternative verdict—No miscarriage of justice if jury had convicted of alternative offence—Finding by jury of facts essential to establish alternative offence—Conviction of murder—Evidence of accused's wife—Wife only eye-witness—Wife's evidence inadmissible—Ample other evidence to support a conviction of manslaughter—Whether court having power to substitute verdict of manslaughter—Criminal Appeal Act 1968, ss 2 (1) proviso, 3 (1). **R v Deacon**

1145

Arrest. *See Arrest.*

Attempt—Belief of accused that his acts constitute an offence—Acts not in fact an offence—Handling stolen goods—Goods having ceased to be stolen goods—Accused handling goods in belief that they were stolen goods—Whether accused guilty of an attempt to handle stolen goods. **R v Smith (Roger Daniel)**

896

Binding-over. *See Magistrates* (Jurisdiction).

Burden of proof—Customs offence—Improper importation of goods—Forfeiture of goods. *See Customs* (Forfeiture—Imported goods—Goods on which duty chargeable and unpaid).

Conspiracy—Conspiracy to trespass—Indictable offence. *See Conspiracy*—Indictable offence—Agreement to do unlawful act—Tort—Trespass, *post*.

Indictable offence—Scope of offence—Agreement to do unlawful act—Tort—Trespass—Circumstances in which agreement to commit a tort indictable—Invasion of public domain—Intention to inflict more than purely nominal damage on victim—Agreement to enter and occupy building of High Commission of Sierra Leone. **Kamara v Director of Public Prosecutions**

1242

Indictment—Particulars of offence—Conspiracy to trespass—Necessity of alleging circumstances which render agreement indictable—Indictment Rules 1971 (SI 1971 No 1253), r 5 (1). **Kamara v Director of Public Prosecutions**

1242

Costs—Acquittal—Discretion—Appeal—Costs of successful appellant—Payment of costs out of central funds—Appellant legally aided—Criminal Appeal Act 1968, s 24 (1), (3) (as amended by the Criminal Justice Act 1972, s 39, Sch 3). **R v Arron**

1221

Discretion—Costs of successful defendant—Costs out of central funds unless positive reasons for making different order—Reasons for making different order. **Practice Note**

592

Crown Court. *See Crown Court.*

Dangerous driving. *See Road Traffic* (Dangerous driving).

Evasion of prohibition on importation of prohibited goods. *See Customs* (Importation of prohibited goods).

Evasion of restriction or requirement imposed by Exchange Control Act 1947. *See Currency Control* (Exchange control—Evasion of restrictions or requirements imposed by Act).

Evidence—Corroboration—Rejection of defendant's evidence—Whether rejection corroboration of otherwise uncorroborated evidence against the defendant. **R v Chapman**

624

Identity—Written statement. *See Evidence*—Written statement, *post*.

Written statement—Identity—Proof of identity—Written statement admissible as evidence to the like extent as oral evidence—Accused charged with making false declaration for purpose of obtaining sickness benefit—Declaration that he had not been working during relevant period—Evidence by company director that accused had worked for him—Evidence in form of written statement including reference to 'Clive Jones'—Name of accused Clive Jones—Whether positive evidence required that accused was the person referred to in statement—Criminal Justice Act 1967, s 9. **Ellis v Jones**

893

False trade description. *See Trade Description.*

Fugitive offender. *See Extradition.*

Handling stolen goods—Attempt—Accused handling goods in belief that they were stolen goods. *See Attempt*—Belief of accused that his acts constitute an offence, *ante*.

Theft—Alternative charge. *See Theft*—Handling stolen goods, *ante*.

Indecent assault—Alternative offence—Rape. *See* Verdict—Alternative offence—Allegations in indictment amounting to or including allegation of another offence—Rape, *post*.

Indictment—Crown Court—Supervisory jurisdiction of High Court. *See* Crown Court (Supervisory jurisdiction of High Court).

Information. *See* Magistrates (Information).

Jury. *See* Jury.

Obtaining pecuniary advantage by deception—Evasion of debt—Meaning of evasion—Antecedent debt—Worthless cheque—Accused having already incurred liability for debt before cheque handed over—Cheque dishonoured—Whether debt 'evaded'—Theft Act 1968, s 16 (2) (a). *R v Turner*

828

Meaning of evasion—Evasion of payment—Agreement by creditor to cancel or forgive debt—Worthless cheque—Representation that cheque good and valid order for payment—Acceptance of cheque by creditor as payment—Cheque dishonoured—Whether debt 'evaded' although no agreement on part of creditor that debt should be cancelled or forgiven—Theft Act 1968, s 16 (1), (2) (a). *R v Fazackerley*

819

Official secrets—Act preparatory to the commission of an offence under the Official Secrets Act 1911—Offence—Ingredients of offence—Mens rea—What must be proved—Official Secrets Act 1920, s 7. *R v Bingham*

89

Rape—Alternative offence—Indecent assault. *See* Verdict—Alternative offence—Allegations in indictment amounting to or including allegation of another offence—Rape, *post*.

Removal of articles from places open to the public—Public having access to building to view collection housed in it—Removal of article forming part of collection—Removal on day on which public not having access to building—No offence when article not forming part of collection intended for permanent exhibition to public—Collection intended for permanent exhibition—Meaning—Municipal art gallery—Collection of pictures owned by local authority—Only part of collection on exhibition in gallery at any one time—All pictures exhibited at least once a year—Whether collection intended for permanent exhibition—Theft Act 1968, s 11 (1), (2). *R v Durkin*

872

Road traffic offences. *See* Road Traffic.

Sentence—Causing death by dangerous driving. *See* Road Traffic (Dangerous driving—Causing death by dangerous driving).

Life imprisonment—Minimum period of imprisonment—Manslaughter—Power of court to recommend minimum period of imprisonment—Murder (Abolition of Death Penalty) Act 1965, s 1 (2). *R v Flemming*

401

Suspended sentence—Fresh offence committed during period of suspension—Extension of period of suspended sentence—Imposition of immediate sentence of imprisonment for fresh offence—Undesirability of subjecting accused to immediate and suspended sentences at same time—Criminal Justice Act 1967, s 40 (1) (c). *R v Goodlad*

1200

Taking a motor vehicle or other conveyance without authority. *See* Road Traffic (Vehicle—Taking without authority).

Theft—Handling stolen goods—Informations charging defendant with theft and handling stolen goods—Informations relating to the same goods—Goods stolen—Defendant found in possession of goods—Defendant having come by goods dishonestly and intending to keep them—No evidence as to how goods came into defendant's possession—Whether defendant should be convicted of theft or handling—Theft Act 1968, ss 1 (1), 3 (1), 22 (1). *Stapylton v O'Callaghan*

782

Trial—Adjournment—Summary trial. *See* Magistrates (Procedure—Adjournment).

Summing up—Comment on accused not giving evidence—Form of comment. *See* Jury (Direction to jury—Comment by judge on failure of accused to give evidence).

Unlawful assembly—Public place—Danger to peace and tranquility of neighbourhood—Assembly inside building—Persons inside building put in fear—Whether necessary that assembly should be held in public place—Whether necessary to show that fear engendered outside building. *Kamara v Director of Public Prosecutions*

1242

Verdict—Alternative offence—Allegations in indictment amounting to or including allegation of another offence—Rape—Indecent assault on woman—Count alleging rape—Victim aged 14—Age irrelevant to charge of rape—Defence of consent—Consent no defence to indecent assault where victim under age of 16—Acquittal of rape—Whether allegation of rape including allegation of indecent assault—Whether open to jury to convict of indecent assault—Sexual Offences Act 1956, s 14 (1), (2)—Criminal Law Act 1967, s 6 (3). *R v Hodgson*

552

Appeal—Power to substitute alternative verdict—No miscarriage of justice if jury had convicted of alternative offence. *See* Appeal—No miscarriage of justice—Power to substitute alternative verdict, *ante*.

Wilfully obstructing highway—Defence—Peaceful picketing. *See* Trade Dispute (Picketing—Obstruction of highway).

CROWN

Entitlement to estate or interest in hereditament. *See* Administration of Estates (Interest of Crown).

Privilege. *See* Discovery (Production of documents—Privilege—Crown privilege).

CROWN COURT

- Appeal to—Conviction by magistrates—Appeal—Jurisdiction to allow amendment—Amended information alleging different particulars of offence—Appellant convicted on information alleging threatening behaviour with intent to provoke breach of peace—Amended information alleging insulting behaviour whereby breach of peace likely to be occasioned—Whether Crown Court having jurisdiction to allow amendment—Public Order Act 1936, s 5, as substituted by the Race Relations Act 1965, s 7. **Garfield v Maddocks** 203
- Supervisory jurisdiction of High Court—Order of mandamus, prohibition or certiorari—Trial on indictment—High Court having no supervisory jurisdiction in matter relating to trial on indictment—Order of Crown Court relating to costs following trial on indictment—certiorari—Whether High Court having jurisdiction to quash order—Courts Act 1971, s 10 (5). **Ex parte Meredith** 234

CURRENCY CONTROL

- Exchange control—Evasion of restrictions or requirements imposed by Act—Power of Treasury to require information to be furnished for detecting evasion of Act—Extent of power—Exchange Control Act 1947, Sch 5, Part I, para 1 (1), Part II, para 1 (1). **Director of Public Prosecutions v Ellis** 540

CUSTODY

- Child—Adopted child—Access—Spouse not having custody. *See* **Infant** (Custody—Access—Adopted child).
- Divorce proceedings. *See* **Divorce** (Custody).
- Guardianship. *See* **Infant** (Guardianship).
- Jurisdiction—Ward of court. *See* **Ward of Court** (Jurisdiction).

CUSTOMS

- Commissioners of Customs and Excise—Discovery—Production of documents—Commissioners made defendants for purposes of discovery only. *See* **Discovery** (Production of documents—Parties—Defendant for purposes of discovery only).
- Forfeiture—Imported goods—Goods on which duty chargeable and unpaid—Onus of proof—Proceedings by customs and excise officer—Burden on other party where question whether goods of 'description' alleged in information—Secondhand goods bought by accused seized—Complaint preferred by customs and excise officer—Complaint alleging goods of foreign manufacture and duty unpaid—Accused unable to procure evidence goods manufactured in England—Whether reference to foreign manufacture matter concerning 'description' of goods alleged in complaint—Customs and Excise Act 1952, ss 44, 275, 290 (2) (b), Sch 7. **Mizel v Warren** 1149
- Importation of prohibited goods—Knowingly concerned in fraudulent evasion—Importation of drugs—Importation—Meaning—Cannabis—Cannabis sent by air from Nairobi to Bermuda via London—Cannabis unloaded at London airport, transferred to another aircraft and flown to Bermuda—Cannabis not taken outside customs area at London airport—Accused knowing cannabis being sent from Nairobi to Bermuda—Intention merely to use London as pipeline between Nairobi and Bermuda—Whether cannabis 'imported' into, and 'exported' from United Kingdom—Customs and Excise Act 1952, ss 44, 45, 56, 79, 304. **R v Smith (Donald)** 1161

DAMAGES

- Assessment—Fatal Accidents Acts, under. *See* **Fatal Accident**.
- Contract—County court—Transfer of action to High Court. *See* **County Court** (Transfer of action).
- County court—Transfer of action to High Court. *See* **County Court** (Transfer of action).
- Landlord and tenant—Repair. *See* **Landlord and Tenant** (Repair).
- Measure of damages—Wrongful dismissal—Loss of future earnings—Redundancy payment—Deduction from award—Dismissal entitling plaintiff to redundancy payment—Whether redundancy payment to be taken into account in assessing damages. **Stocks v Magna Merchants Ltd** 329
- Mitigation—Impecuniosity—Failure to mitigate through impecuniosity—Motor accident—Damage to plaintiff's car—Delay in effecting repairs to car—Plaintiff unable to afford cost of repairs—Claim against defendant's insurers—Plaintiff awaiting agreement of insurers to estimated cost before putting repairs in hand—Cost of hiring another car during period of delay—Whether plaintiff entitled to recover cost. **Martindale v Duncan** 355
- Personal injury—Appeal—Further evidence. *See* **Court of Appeal** (Evidence—Further evidence).

DANGEROUS DRIVING

- See* **Road Traffic** (Dangerous driving).

DEBENTURE

- Receiver—Appointment. *See* **Company** (Debenture—Receiver).

DECEPTION

- Obtaining pecuniary advantage by. *See* **Criminal Law** (Obtaining pecuniary advantage by deception).

DETENTION

- Illegal entrant. *See* **Immigration** (Detention).

DEVELOPMENT

- Land—Generally. *See* **Town and Country Planning**.

DISCOVERY

Page

Production of documents—Parties—Defendant for purposes of discovery only—No reasonable cause of action against party from whom discovery sought—Purpose of order to obtain information so that proceedings may be brought against third parties—Circumstances in which order may be made—Defendant having innocently facilitated commission of wrongful acts—Commissioners of Customs and Excise—Information in possession of commissioners including names of importers of goods—Information obtained under statutory powers—Importation of goods constituting an infringement of plaintiff's patent—Plaintiffs seeking order for discovery against commissioners to enable plaintiffs to proceed against importers.

Norwich Pharmacal Co v Commissioners of Customs and Excise 943

Privilege—Communications with agents with a view to litigation—Proceedings before Industrial Court and tribunals—Communications with agents other than legal advisers—Communications with a view to litigation—Whether privileged. **M & W Grazebrook Ltd v Wallens** 868

Confidential documents—Documents obtained in confidence from third parties for purposes of litigation—Documents copies of documents belonging to third parties—Whether confidential nature of documents a ground of privilege. **Alfred Crompton Amusement Machines Ltd v Commissioners of Customs and Excise (No 2)** 1169

Documents obtained under statutory powers—Commissioners of Customs and Excise—Information relating to importation of goods—Importation of goods constituting an infringement of plaintiffs' patent—Plaintiffs wishing to obtain information as to names of importers in order to bring proceedings against them—Whether commissioners privileged from disclosing information on grounds of public interest. **Norwich Pharmacal Co v Commissioners of Customs and Excise** 943

Crown privilege—Privilege on ground of public interest—Confidential documents—Documents containing information obtained under statutory powers—Confidential information obtained from third parties—Commissioners of Customs and Excise—Purchase tax—Information obtained from customers of taxpayers—Knowledge of third parties that information could be disclosed likely to hamper future exercise of statutory duties by commissioners. **Alfred Crompton Amusement Machines Ltd v Commissioners of Customs and Excise (No 2)** 1169

Legal professional privilege—Documents coming into existence after litigation anticipated—Documents not prepared primarily with view to litigation—Commissioners of Customs and Excise—Purchase tax—Documents coming into existence for purpose of fixing wholesale value of taxpayer's goods—Commissioners anticipating that valuation would be disputed by taxpayer and that arbitration proceedings would follow—Documents also for use of legal advisers in anticipated arbitration proceedings—Whether documents subject of legal professional privilege. **Alfred Crompton Amusement Machines Ltd v Commissioners of Customs and Excise (No 2)** 1169

Production before commencement of proceedings—Claim in respect of personal injuries—Production where claim likely to be made in subsequent proceedings—Likely to be made—Likelihood of claim depending on outcome of discovery—Claim likely to be made if documents on discovery indicating good cause of action—Whether court precluded from ordering production if only basis for saying claim not likely is absence of documents sought to be discovered—Administration of Justice Act 1970, s 31. **Dunning v Board of Governors of the United Liverpool Hospitals** 454

DISCRETION

Costs—Criminal proceedings. *See Criminal Law (Costs).*

Special case—Arbitration—Discretion of court to refuse to direct statement of special case. *See Arbitration (Special case).*

DISCRIMINATION

Colour, race or ethnic or national origins—Discrimination on ground of. *See Race Relations (Discrimination).*

Employer against worker. *See Industrial Relations (Trade union membership and activities—Rights of worker against employer—Unfair industrial practice by employer).*

DISMISSAL

Action, of—Abuse of process of court. *See Action (Dismissal).*

Employment—Redundancy. *See Employment (Redundancy).*

Student—College. *See Education (College).*

Unfair dismissal. *See Industrial Relations (Unfair dismissal).*

Wrongful—Damages—Measure. *See Damages (Measure of damages—Wrongful dismissal).*

DISQUALIFICATION

Driving licence. *See Road Traffic (Disqualification for holding licence).*

Summary trial—Restriction on disqualifying accused in his absence—Adjournment. *See Magistrates (Procedure—Adjournment—Summary trial—Adjournment after conviction and before sentence—Disqualification).*

DIVORCE

Adultery—Proof—Undefended cases—Procedure. **Practice Direction** 983

Ancillary relief—Application—Financial provision. *See Financial provision—Application, post.*

Costs—Taxation—Value added tax—Divorce county court. *See Costs (Taxation—Value added tax—Matrimonial proceedings).*

DIVORCE—continued

- Custody—Access—Taking child out of jurisdiction—Leave—Application for leave by parent having custody—Mother having custody of child—Mother obtaining appointment at South African university—Mother wishing to teach at university level and unable to obtain appointment within jurisdiction—Father holding strong views hostile to policies of South African government—Views expressed in print—Father fearing child would be indoctrinated—Fearing also that he would not be allowed into South Africa—Whether grounds for refusing to grant mother leave to take child out of jurisdiction. **Nash v Nash** 704
- Financial provision—Application—Application subsequent to petition or answer—Estoppel—Duty of party to disclose to other party intention to make application for financial relief—Failure to disclose causing other party to act to his prejudice—Party estopped from making application. **Marsden (J L) v Marsden (A M)** 851
- Application subsequent to petition or answer—Leave of court—Circumstances in which leave to make application will be refused—Need to show reason or explanation why leave should be given—Need to show reasonable prospect that application will be successful—Application made after decree absolute and remarriage of other party—Application by husband for leave to apply for transfer order or variation of settlement order in relation to matrimonial home—Wife having entered into commitments on basis that no such application would be made—Remarriage of wife precluding her from seeking financial relief—Matrimonial Causes Rules 1971 (SI 1971 No 953), r 68 (1), (2). **Marsden (J L) v Marsden (A M)** 851
- Remarriage of party—Party not entitled to apply for order after remarriage—Apply—Meaning—Initiation of application—Party remarrying after application initiated but before hearing—Whether court having power to hear application after remarriage—Matrimonial Proceedings and Property Act 1970, s 7 (4). **Jackson (S M) v Jackson (E L)** 395
- Conduct of parties—Duty of court to have regard to conduct—Circumstances in which regard should be had to conduct—Conduct obvious and gross—Substantial disparity in conduct of parties to be shown—Meaning of 'obvious and gross'—Matrimonial Proceedings and Property Act 1970, s 5 (1). **Harnett v Harnett** 593
- Lump sum payment—Matters to be considered by court when making order. *See* Financial provision—Matters to be considered by court when making order, *post*.
- Matters to be considered by court when making order—Duty to place parties in financial position in which they would have been in absence of breakdown—Allocation of family assets—Matrimonial home only asset—Home owned by husband—Ascertainment of wife's beneficial interest in asset—Estimate of value of beneficial interest—Matrimonial Proceedings and Property Act 1970, s 5 (1). **Harnett v Harnett** 593
- Loss of chance of acquiring benefit—Lump sum payment—Compensation to wife for loss of benefit which she might have received if marriage had not been dissolved—Husband having share in family business—Husband and wife separating after 27 years of marriage—Wife going to live with another man—Husband going to live with another woman—Sale of family business after separation and before divorce—Husband receiving substantial capital sum—Reasonable prospect that he would have settled share of proceeds of sale of business on wife—Matrimonial Proceedings and Property Act 1970, ss 2 (1) (c), 5 (1) (g). **Trippas v Trippas** 1
- Hearing—Royal Courts of Justice—Judges. *See* Practice (Hearing—Matrimonial causes—Royal Courts of Justice).
- Infant—Name—Change of surname. *See* Infant (Name—Change of surname).
- Removal of child from jurisdiction—Application. *See* Child (Matrimonial causes—Applications relating to children).
- Injunction—Restraint against molestation. *See* Injunction (Husband and wife—Restraint against molestation).
- Matrimonial home—Rights of spouses. *See* Husband and Wife (Property—Matrimonial home).
- Practice—Hearing—Royal Courts of Justice. *See* Practice (Hearing—Matrimonial causes—Royal Courts of Justice).
- Proof—Adultery. *See* Adultery, *ante*.
- Property. *See* Husband and Wife (Property).
- Separation—Financial protection for respondent—Decree nisi granted—Refusal to make decree absolute—Refusal unless court satisfied that financial provision made by petitioner fair and reasonable or best that can be made in the circumstances—Proposals for financial provision in petition—Proposals fair and reasonable—Proposals not constituting making of provision—Necessity for securing that proposals will be carried out before making decree absolute—Divorce Reform Act 1969, s 6 (2). **Wilson v Wilson** 17
- Living apart—Meaning—Parties 'living apart' unless living with each other in the same household—Parties living in same house—Parties living with each other otherwise than as husband and wife—Wife leaving husband to live with another man as his wife—Husband coming to live in other man's house as paying lodger—Parties treating marriage as at an end—Parties living apart—Divorce Reform Act 1969, s 2 (1) (e), (5). **Fuller (otherwise Penfold) v Fuller** 650

DOCUMENT

- Construction—False trade description or statement. *See* Trade Description (Document—Meaning—Interpretation).
- Discovery. *See* Discovery (Production of documents).

DRINK

Driving motor vehicle with excess alcohol in body. *See Road Traffic* (Driving with blood-alcohol proportion above prescribed limit).

DRIVER

Breath test. *See Road Traffic* (Driving with blood-alcohol proportion above prescribed limit—Evidence—Provision of specimen).

Disqualification. *See Road Traffic* (Disqualification for holding licence).

Goods vehicle. *See Road Traffic* (Goods vehicle).

DRIVING

Motor vehicle—Offences. *See Road Traffic*.

DRIVING LICENCE

Disqualification for holding. *See Road Traffic* (Disqualification for holding licence).

DWELLING-HOUSE

Possession—Protected tenancy. *See Rent Restriction* (Possession—Protected tenancy).

EDUCATION

College—Governing body—Power of Minister to prevent unreasonable exercise of functions—Governing body of teacher-training college—Governing body passing resolution accepting recommendation of college's academic board that student be dismissed—Student alleging breach of rules of natural justice—Student bringing action against governing body—Whether student precluded by statute from resort to courts—Education Act 1944, s 68. **Herring v Templeman**

581

Visitor—Jurisdiction—Teacher-training college—College governed by trust deed—Appointment of visitor under trust deed—Governing body of college passing resolution accepting recommendation of academic board that student be dismissed—Student alleging resolution contrary to terms of trust deed and in breach of rules of natural justice—Student bringing action against governing body—Whether complaint within exclusive jurisdiction of visitor. **Herring v Templeman**

581

EMPLOYMENT

Contract of service, under. *See Master and Servant* (Contract of service).

Dismissal—Hospital staff. *See National Health Service* (Hospital—Staff—terms and conditions of service—Dismissal).

Unfair dismissal. *See Industrial Relations* (Unfair dismissal).

Industrial relations. *See Industrial Relations*.

Redundancy—Dismissal by reason of redundancy—Cessation of or diminution in requirements of business for employees to carry out work of particular kind—Test to be applied—Whether account to be taken of terms and conditions of employment of employee claiming redundancy payment—Employees brought to work from long distance at employers' expense—Provision of transport ceasing to be economic—Employers withdrawing transport—Employees dismissed by reason of employers' repudiation of contract—Employers engaging other men living nearby in place of dismissed employees—Whether employees dismissed by reason of redundancy—Redundancy Payments Act 1965, s 1 (2) (b). **Chapman v Goonvean & Rostowrack China Clay Co Ltd**

1063

Dismissal—Meaning—Notice to employee to terminate contract of employment—Employee verbally requesting termination of contract on date prior to expiry of notice—Employers agreeing to request—Employee leaving before expiry date—Whether employee 'dismissed' or whether consensual termination of contract—Redundancy Payments Act 1965, s 4 (1), (2). **McAlwane v Boughton Estates Ltd**

299

Termination of contract by employer—Repudiation of contract by employer—Circumstances in which employee will be taken to have accepted repudiation—Employee informed that work being transferred to new premises—Employee not indicating whether prepared to work at new premises—Employee directed to work at new premises—No renewal of contract or offer of new contract by employer—Employee working at new premises for short time and then giving week's notice—Whether employee having accepted employer's repudiation of contract—Whether contract terminated by employer alone or by mutual agreement between employer and employee. **Shields Furniture Ltd v Goff**

653

Payment—Amount—Normal working hours—Overtime—Employee entitled to overtime pay—Contract fixing minimum number of working hours—Minimum number of working hours exceeding number of working hours without overtime—Contract guaranteeing employment for 40 hours a week at basic hourly rate—Contract obliging employee to work overtime when required by employer—Employer not obliged to provide overtime work—Employee regularly working 57 hour week—Whether contract 'fixing' minimum number of working hours in excess of number of hours without overtime—Whether normal working hours 57 hours a week—Contracts of Employment Act 1963, Sch 2, para 1 (1), (2). **Tarmac Roadstone Holdings Ltd v Peacock**

485

Damages for wrongful dismissal—Deduction from award. *See Damages* (Measure of damages—Wrongful dismissal—Loss of future earnings—Redundancy payment).

Unfair dismissal. *See Industrial Relations* (Unfair dismissal—Redundancy).

Termination—Meaning—Employment being unfairly terminated. *See National Health Service* (Hospital—Staff—Terms and conditions of service—Dismissal—Hospital medical and dental staff—Representations against dismissal—Member of staff considering that employment being unfairly terminated).

Unfair dismissal. *See Industrial Relations* (Unfair dismissal).

EMPLOYMENT—continued

Written particulars of terms. *See* **Master and Servant** (Contract of service—Written particulars of terms of employment).

Wrongful dismissal—Damages—Measure. *See* **Damages** (Measure of damages—Wrongful dismissal).

EQUITY

Fiduciary duty. *See* **Fiduciary Duty**.

ESTATE AGENT

Income tax—Interest of money—Client's money paid into bank deposit account in agent's name—Whether interest to be charged on taxpayer as interest of money received by him. *See* **Income Tax** (Persons chargeable—Profits and interest of money).

ESTOPPEL

Divorce—Financial provision—Application. *See* **Divorce** (Financial provision—Application—Application subsequent to petition or answer).

EVIDENCE

Admissibility—Communications to conciliation officers. *See* **Industrial Relations** (Conciliation officers—Communications made to conciliation officers).

Appeal—Further evidence. *See* **Court of Appeal** (Evidence).

Breath test. *See* **Road Traffic** (Driving with blood-alcohol proportion above prescribed limit—Evidence).

Corroboration. *See* **Criminal Law** (Evidence).

Criminal proceedings, in. *See* **Criminal Law** (Evidence).

Specimen of breath. *See* **Road Traffic** (Driving with blood-alcohol proportion above prescribed limit—Evidence—Provision of specimen—Breath test).

EXCEPTION

Clause—Charterparty. *See* **Shipping** (Charterparty—Exception clause).

EXCHANGE CONTROL

See **Currency Control**.

EXECUTION

Possession—Mortgaged property—Suspension of execution of order for possession. *See* **Mortgage** (Possession of mortgaged property—Suspension of execution of order for possession).

EXHIBITION

Collection exhibited in public place—Removal of article from. *See* **Criminal Law** (Removal of articles from places open to the public—Public having access to building to view collection housed in it).

Deduction for assessment to income tax. *See* **Income Tax** (Income—Emoluments from office or employment—Expenses).

EXPORT

Export credit guarantee insurance. *See* **Insurance**.

EXTRADITION

Political offence—Offence of political character only as between offender and state other than requesting state—Offence committed in United States—Offence committed in course of dispute between governing regime of Taiwan and movement dedicated to its overthrow—Offence committed in furtherance of purposes of movement—United States requesting extradition of offender—Whether offence 'one of a political character'—Extradition Act 1870, s 3 (1). *Tzu-Tsai Cheng v Governor of Pentonville Prison*

204

FAMILY DIVISION

Jurisdiction—Grant of remedy or relief where proceedings for such remedy or relief assigned to another Division. *See* **Court** (Jurisdiction—High Court of Justice).

Ward of court. *See* **Ward of Court**.

FATAL ACCIDENT

Damages—Assessment—Widow—Remarriage or prospects of remarriage—Dependent child—Damages payable for benefit of child—Whether widow's remarriage or prospects of remarriage to be taken into account in calculating damages for child—Law Reform (Miscellaneous Provisions) Act 1971, s 4 (1). *Thompson v Price*

846

FIDUCIARY DUTY

Duty not to profit from position of trust—Society—Officer—Special arrangement displacing fiduciary duty—Incorporated society—Secretary undertaking to publish newspaper containing society's news—Society undertaking to guarantee purchase by members of 2,000 copies at 1s per copy for six months—Newspaper property of secretary—Secretary undertaking risk of financial loss—Whether secretary under duty to account to society for profits of newspaper—Whether special arrangement displacing fiduciary duty. *New Zealand Netherlands Society 'Oranje' Incorporated v Kuys*

1222

FINANCIAL PROVISION

Divorce. *See* **Divorce**.

FORFEITURE

Goods improperly imported. *See* **Customs** (Forfeiture—Imported goods).

	Page
FOSTER CHILD	
Discrimination on ground of colour. <i>See Race Relations</i> (Discrimination—Unlawful discrimination—Discrimination against person seeking to obtain or use goods facilities or services—Discrimination on ground of colour—Foster parents).	
FRAUD	
Obtaining pecuniary advantage by deception. <i>See Criminal Law</i> (Obtaining pecuniary advantage by deception).	
FRAUDULENT CONVEYANCE	
Conveyance of property with intent to defraud creditors—Intent to defraud—Intent to deprive creditors of timely recourse to property otherwise applicable for their benefit—Property subject to legal charge in favour of bank—Grant of lease of premises by mortgagor to wife at rack rent—Lease granted after issue of summons by bank for possession—Purpose of lease to enable mortgagor and wife to continue living in property—Mortgagor not appreciating that property subject to lease less valuable than with vacant possession—Whether intent to defraud bank—Law of Property Act 1925, s 172 (1). <i>Lloyds Bank Ltd v Marcan</i> ..	359
Validity—Bona fide purchaser—Conveyance for valuable consideration and in good faith—Conveyance to person not having notice of intent to defraud creditors—'Notice' including constructive notice—Law of Property Act 1925, s 172 (3). <i>Lloyds Bank Ltd v Marcan</i> ..	359
FRAUDULENT EVASION	
Prohibition on importation of prohibited goods. <i>See Customs</i> (Importation of prohibited goods).	
FREEDOM OF SPEECH	
St Christopher, Nevis and Anguilla. <i>See Privy Council</i> (St Christopher, Nevis and Anguilla).	
FUGITIVE OFFENDER	
<i>See Extradition.</i>	
GAMING	
Betting—Licensed track—Charges to bookmakers—Authorised charges—Charges other than authorised charges—Charges demanded or received as a consideration for facilities being given to bookmaker—Facilities—Charges made for provision of betting boards and accessories and maintenance, lighting, storage etc—Charge made for use of licensee's copyright in betting lists—Whether charges made as consideration for facilities—Betting, Gaming and Lotteries Act 1963, s 18 (1), (2). <i>Midland Greyhound Racing Co Ltd v Foley</i> ..	324
GIFT	
Will, by. <i>See Will.</i>	
GOODS	
Prohibited goods—Importation. <i>See Customs</i> (Importation of prohibited goods).	
Sale of. <i>See Sale of Goods.</i>	
GOODS VEHICLE	
Hours—Limitation on drivers' hours. <i>See Road Traffic</i> (Goods vehicle—Driver).	
GUARANTEE	
Insurance. <i>See Insurance.</i>	
GUARDIAN	
Infant. <i>See Infant</i> (Guardianship).	
HABEAS CORPUS	
Immigrant—Unlawful detention. <i>See Immigration</i> (Detention—Unlawful detention—Remedy).	
HANDLING STOLEN GOODS	
<i>See Criminal Law.</i>	
HEARING	
Matrimonial causes—Royal Courts of Justice. <i>See Practice</i> (Hearing—Royal Courts of Justice).	
HIGH COURT	
Transfer of action—Transfer from county court. <i>See County Court</i> (Transfer of action).	
HIGHWAY	
Dedication—Evidence—Provisional map—Dispute—Determination of quarter sessions—Effect—Issue whether path a public right of way as shown on map—Decision of quarter sessions that path a public path—Decision in rem—Decision binding on court in subsequent litigation—National Parks and Access to the Countryside Act 1949, s 31 (1). <i>Armstrong v Whitfield</i> ..	546
Negligence—Road traffic—Contributory negligence—Causation. <i>See Negligence</i> (Contributory negligence—Causation).	
Trade dispute. <i>See Trade Dispute</i> (Picketing—Obstruction of highway).	
HOSPITAL	
<i>See National Health Service.</i>	
HOUSE	
Late night refreshment house—Licence. <i>See Licensing</i> (Late night refreshment house).	
Matrimonial home—Beneficial interests of spouses. <i>See Husband and Wife</i> (Property).	
HOUSE OF LORDS	
Costs—Legal aid—Unassisted person's costs out of legal aid fund. <i>See Legal Aid</i> (Costs—Unassisted person's costs out of legal aid fund).	

HUSBAND AND WIFEChild—Adoption. *See Adoption.*Costs—Taxation—Value added tax. *See Costs* (Taxation—Value added tax—Matrimonial proceedings).Divorce. *See Divorce.*Financial provision—Divorce. *See Divorce* (Financial provision).Injunction. *See Injunction.*Matrimonial home—Injunction. *See Injunction* (Husband and wife).Property—Improvement—Contribution by spouse in money or money's worth to improvement of property—Contribution of substantial nature—Acquisition of beneficial interest by virtue of contribution—Need for contribution to be identifiable with relevant improvement—More general contributions not sufficient—Matrimonial Proceedings and Property Act 1970, s 37. *Harnett v Harnett* 593Matrimonial home—Both parties contributing to purchase—Contributions by wife—Contributions in looking after home and caring for family—Contributions to cost of improving home—Imputed trust—House purchased by husband before marriage contemplated—Husband sole owner at all times—Wife's contributions in looking after home etc not sufficient to entitle her to beneficial interest in home—Contributions to cost of improving home entitling her to share—Married Women's Property Act 1882, s 17—Matrimonial Proceedings and Property Act 1970, s 37. *Kowalczyk v Kowalczyk* 1042Practice—Related applications—Desirability of applications being heard together—Married Women's Property Act 1882, s 17—Matrimonial Proceedings and Property Act 1970, ss 2, 4. *G v G* (Practice: Transfer of applications) 1187**IDENTITY**Evidence—Criminal proceedings—Written statement. *See Criminal Law* (Evidence—Written statement).**ILLEGAL ENTRANT***See Immigration.***ILLEGALITY**Contract. *See Contract.***IMMIGRATION**Detention—Illegal entrant—Illegal entrant not given leave to enter or remain in United Kingdom—Detention pending directions for removal—Persons entering United Kingdom and present there in breach of immigration laws—Commonwealth immigrant—Immigrant entering United Kingdom clandestinely in breach of laws relating to Commonwealth immigrants previously in force—Immigrant no longer liable to prosecution under previous laws—Whether immigrant 'settled' in United Kingdom and deemed to have indefinite leave to remain—Whether immigrant 'illegal entrant' liable to detention and removal—Commonwealth Immigrants Act 1962, ss 4, 4A (as added by the Commonwealth Immigrants Act 1968, s 3)—Immigration Act 1971, ss 1 (2), 4 (2), 33 (1), (2), 34 (1) (a), Sch 2, paras 9, 16 (2). *R v Governor of Pentonville Prison, ex parte Azam* 741Sub nom *Azam v Secretary of State for the Home Department* 765Unlawful detention—Remedy—Habeas corpus—Appeal—Detainee making out a prima facie case that he is not an illegal entrant—Whether entitled as of right to writ of habeas corpus—Whether bound to rely on statutory appeal procedure—Immigration Act 1971, s 16. *R v Governor of Pentonville Prison, ex parte Azam* 741**IMPLIED TERMS**Contract—Building contract—Implication of term to give business efficacy to contract. *See Contract* (Implied term—Implication of term to give business efficacy to contract).**IMPORTATION**Goods—Prohibited goods. *See Customs* (Importation of prohibited goods).**IMPRISONMENT**Sentence to. *See Criminal Law* (Sentence).**INCITEMENT**Race relations—Unlawful discrimination. *See Race Relations* (Incitement).**INCOME**Legal aid. *See Legal Aid* (Entitlement—Income).**INCOME TAX**Close company—Apportionment of income—Apportionment for surtax—Apportionment among participators—Addition to income to be apportioned—Amounts of annual payments deducted in arriving at company's distributable income—Covenanted donations to charity—Trading company—Prohibition on apportionment in absence of shortfall assessment—Whether prohibition applying to amounts of annual payments deducted in arriving at company's distributable income—Whether covenanted donations to charity may be apportioned even though no shortfall assessment—Finance Act 1965, s 78 (2), (4), as amended by the Finance Act 1966, s 27, Sch 5, para 10 (1). *Clark (C & J) Ltd v Inland Revenue Comrs* 513

Deduction in computing profits—Disbursements or expenses wholly and exclusively laid out or expended for purposes of trade—Purpose of expenditure—Payments made under trading contract—Payments made for purpose of making profit—Payment made to acquire an advantage not identifiable as or related to making of profits—Development company acquiring benefit of contract to develop land—Agreement requiring development company to pay premiums to company assigning benefit of contract—Agreement part of overall scheme involving series of transactions relating to sale of benefit of contract—Scheme devised by controlling shareholders of development company—Purpose of scheme to place part of profits arising under contract in hands of trustees of controlling shareholders' family settlement—Effect to reduce profits of development company arising under contract—Payments made to assignee company in order to effect that purpose—Whether payments made wholly and exclusively for purposes of development company's trade—Whether payments deductible by development company in computing profits—Income Tax Act 1952, s 137 (a). **Ransom (Inspector of Taxes) v Higgs** 657

Expenses—Travelling expenses—Deduction from emoluments from office or employment. *See* Income—Emoluments from office or employment—Expenses, *post*.

Income—Emoluments from office or employment—Expenses—Deduction from emoluments—Expenses necessarily incurred in performance of duties of office or employment—Travelling expenses—Taxpayer resident abroad—Taxpayer director of English company—Sole function to expand company by mergers etc—Arrangement with company contemplating duties would be performed mainly outside United Kingdom—Taxpayer flying to United Kingdom periodically in connection with duties—Taxpayer reimbursed by company for money expended on air fares—Sums reimbursed constituting emoluments of office—Whether cost of air fares necessarily incurred by taxpayer in performance of duties of his office of director—Income Tax Act 1952, s 156 (Sch E), Sch 9, para 7. **Taylor v Provan (Inspector of Taxes)** 65

Expenses allowances—Sums paid in respect of expenses by body corporate to director or employee—Director—Expenses in respect of activity outside normal duties—Director given special assignment—Director paid travelling expenses—Expenses relating only to special assignment and not to directorship—Whether expenses chargeable as emoluments from office of director—Income Tax Act 1952, ss 156 (Sch E), 160 (1). **Taylor v Provan (Inspector of Taxes)** 65

Total income—Total income exceeding stated amount—Higher rate of tax—Income received by taxpayer on behalf of third party—Taxpayer assessed to tax at standard rate as person 'receiving' income—Assessment final and conclusive for purposes of tax at standard rate—Assessment also final and conclusive in estimating total income—Whether income to be included in total income of taxpayer although not belonging to taxpayer beneficially—Income Tax Act 1952, ss 148, 524 (4). **Aplin v White (Inspector of Taxes)** 637

Persons chargeable—Profits and interest of money—Person 'receiving' income chargeable—Interest of money—Agent receiving interest belonging to principal—Estate agent collecting rents on behalf of clients—Agent depositing clients' money in bank deposit account in own name—Interest arising on deposit account—Whether interest to be charged on taxpayer as interest of money received by him—Income Tax Act 1952, ss 123 (1) (Sch D, Case III), 148. **Aplin v White (Inspector of Taxes)** 637

Relief—Children—Income of child—Reduction or disallowance of relief—Child entitled in his own right to an income exceeding prescribed amount—Daughter—Marriage during year of assessment—Post-nuptial income of daughter—Income deemed for income tax purposes to be husband's income and not to be her income—Whether daughter entitled to post-nuptial income in her own right—Whether post-nuptial income to be disregarded for purposes of child relief—Income Tax Act 1952, ss 212 (4) (as substituted by the Finance Act 1963, s 13), 354 (1). **Murphy v Ingram (Inspector of Taxes)** 523

Trade—Adventure in the nature of trade—Supervening trade—Asset acquired by taxpayer otherwise than for purpose of trade—Asset subsequently becoming the subject of trade whilst in taxpayer's hands—Purchase of property for possible use as taxpayer's residence—Property subsequently found not to be suitable for residential purposes—Taxpayer obtaining planning permission to develop property—Resale of property at a profit—Whether transaction an adventure or concern in the nature of trade—Whether trading covering whole period from purchase to sale—Income Tax Act 1952, ss 123 (1) (Sch D, Case 1), 526 (1). **Taylor v Good (Inspector of Taxes)** 785

Taxpayer receiving or entitled to profits arising from trade—Profits from dealing in or developing land—Taxpayer not personally engaged in dealing in or developing land—Taxpayer operating through companies controlled by himself and wife—Series of transactions relating to sale and development of land owned by taxpayer's companies—Transactions part of overall scheme devised by taxpayer—Purpose of scheme to place profit from sale of land in hands of trustees of taxpayer's family settlement—Effect of scheme to reduce profits of taxpayer controlled companies from sale and development of land by amount corresponding to sum received by trustees—Whether taxpayer engaged in adventure in nature of trade—Whether transactions to be regarded individually in isolation or as part of overall scheme constituting trade—Whether taxpayer or trustees receiving or entitled to profit accruing in consequence of transactions—Income Tax Act 1952, ss 123 (1) (Sch D, Case I), 148, 526 (1). **Ransom (Inspector of Taxes) v Higgs** 657

INDECENCY

Assault—Indecent assault—Alternative offence—Rape. *See* Criminal Law (Verdict—Alternative offence—Allegations in indictment amounting to or including allegation of another offence).

INDEMNITY

Subrogation—Contract of indemnity—Right of indemnifier to be subrogated to rights of indemnified—Nature of right—Right as an incident to all contracts of indemnity—Exclusion of right—Implied exclusion—Circumstances in which right will be excluded—Contract between firm of cleaners and factory owner to clean factory—Contract containing indemnity by cleaners to indemnify owner against loss or damage caused by negligence of factory owner's servants—Cleaners' servant injured at factory by negligence of factory owner's servant—Indemnity sought by factory owner against cleaners for liability to cleaners' servant—Cleaners seeking to be subrogated to owner's right of action against his own negligent servant. **Morris v Ford Motor Co Ltd** 1084

INDORSEMENT

Writ of summons—Claim for possession—Protected tenancy. *See* **Rent Restriction** (Possession—Protected tenancy).

INDUSTRIAL DISPUTE

See **Industrial Relations** (Industrial dispute).

INDUSTRIAL RELATIONS

Compensation. *See* **Unfair industrial practice**—Compensation, *post*.

Complaint—Unfair industrial practice. *See* **Unfair industrial practice**—Complaint, *post*.

Conciliation officers—Communications made to conciliation officers—Admissibility in evidence—Proceedings before Industrial Court and tribunals—Communications to conciliation officers in connection with performance of their functions—Circumstances in which communications admissible—Industrial Relations Act 1971, s 146 (6). **M & W Grazebrook Ltd v Wallens** 868

Industrial dispute—Act done in contemplation or furtherance of an industrial dispute—Act not actionable in tort—Act not actionable although consisting of inducement or threat of breach of contract—Act also constituting unfair industrial practice—Whether fact that act an unfair industrial practice capable of rendering it actionable in tort—Industrial Relations Act 1971, s 132. **Cory Lighterage Ltd v Transport and General Workers Union** 558

Act not actionable in tort—Dispute between workmen and workmen—Workman allowing membership of trade union to lapse—Fellow workers refusing to work with him—Union threatening employers with strike action if workman not withdrawn—Employers supporting union's membership policy—Employers unable to dismiss workman without consent of statutory board—Consent refused—Worker suspended on full pay—Whether a dispute between employers and union—Whether union's threats made in contemplation or furtherance of industrial dispute—Industrial Relations Act 1971, ss 132 (1), (2), 167 (1). **Cory Lighterage Ltd v Transport and General Workers Union** 558

Intimidation—Act not actionable on ground only that it consists of threats to break or frustrate contracts—Act not actionable on ground only that it is an interference with trade or business of another—Acts consisting of threats to do legalised acts—Threatened acts also constituting an unfair industrial practice—Whether threats thereby constituting unlawful intimidation actionable in the High Court—Industrial Relations Act 1971, ss 33 (3), 132 (1) (a), (2). **Cory Lighterage Ltd v Transport and General Workers Union** 341

Meaning—Dispute between employers and workmen—Dispute relating wholly or mainly to specified matters—Terms and conditions of employment—Suspension of employment—Dispute between workmen and workmen not an industrial dispute—Whether 'terms and conditions of employment' confined to contractual terms and conditions—Whether 'suspension of employment' including suspension on full pay—Industrial Relations Act 1971, s 167 (1). **Cory Lighterage Ltd v Transport and General Workers Union** 558

Industrial tribunal. *See* **Industrial Tribunal**.

National Industrial Relations Court—Jurisdiction—Appeals from industrial tribunals—Court's jurisdiction limited to appeals on questions of law—Possibility of order for costs against appellant if appeal not involving question of law—Industrial Relations Act 1971, s 114—Industrial Court Rules 1971 (SI 1971 No 1777), r 69. **Practice Direction** 1264

Picketing—Peaceful picketing—Obstruction of highway. *See* **Trade Dispute** (Picketing—Obstruction of highway).

Trade union membership and activities—Rights of worker as against employer—Unfair industrial practice by employer—Discrimination by employer against worker by reason of exercise of such rights—Discrimination—Employers recognising four unions for negotiating and other purposes—Agreement for setting up of works committee—Committee consisting of representatives of management and of workers who were members of one of recognised unions—Two workers not being members of a recognised union seeking nomination for membership of works committee—Nomination papers rejected by employers because workers not members of a recognised union—Whether discrimination by employers against workers—Distinction in discriminating against workers and discriminating between workers—Industrial Relations Act 1971, s 5 (2) (b), (4). **Central Electricity Generating Board v Coleman** 709

Unfair dismissal—Complaint—Procedure. *See* **Unfair industrial practice**—Complaint, *post*.

Date of dismissal—Notice by employer terminating contract—Employer and employee subsequently agreeing during period of notice to shorten period of notice—Whether date of dismissal date of expiry of original or of shortened notice—Industrial Relations Act 1971, s 23 (2). **Lees v Arthur Greaves (Lees) Ltd** 21

INDUSTRIAL RELATIONS—continued

Page

Dismissal—Meaning—Notice to employee to terminate contract of employment—Agreement by employer and employee during period of notice to terminate contract forthwith—Contract in fact terminated forthwith—Whether employee dismissed—Industrial Relations Act 1971, ss 22 (1), 23 (2). **Lees v Arthur Greaves (Lees) Ltd**

21

Meaning—Notice to employee to terminate contract of employment—Employee verbally requesting termination of contract on date prior to expiry of notice—Employers agreeing to request—Employee leaving before expiry date—Whether employee 'dismissed' or whether consensual termination of contract—Industrial Relations Act 1971, s 23 (3). **McAlwane v Boughton Estates Ltd**

299

Dismissal in connection with strike or other industrial action—Employee taking part in strike on date of dismissal—Date of dismissal—Time of dismissal—Dismissal on date of termination of strike—Dismissal after termination of strike—Whether employee taking part in strike 'on the date of dismissal'—Industrial Relations Act 1971, s 26 (1). **Heath v J F Longman (Meat Salesmen) Ltd**

1228

Fair and unfair dismissal—Determination whether dismissal fair or unfair—Disobedience—Employee refusing to be party to falsification of employers' records to cover general deficiency despite reassurance by employers' manager—Employee dismissed because of refusal—Whether employee unfairly dismissed. **Morrish v Henlys (Folkestone) Ltd**

137

Hospital staff. *See National Health Service* (Hospital—Staff—Terms and conditions of service—Dismissal).

Redundancy—Compensation for unfair dismissal and redundancy payment—Redundancy a reason justifying dismissal—Presumption of redundancy for purposes of redundancy payment—Onus on employer to show redundancy as a reason justifying dismissal—Circumstances in which tribunal competent to award both compensation for unfair dismissal and redundancy payment—Redundancy Payments Act 1965, s 9 (2) (b)—Industrial Relations Act 1971, s 24 (1), (2), (6). **Midland Foot Comfort Centre Ltd v Richmond**

294

Presumption of redundancy for purposes of redundancy payment—Employer rebutting presumption—Employer failing to show that reason for dismissal justified—Compensation—Award reflecting loss of accrued rights to redundancy payment. **Midland Foot Comfort Centre Ltd v Richmond**

294

Unfair industrial practice—Compensation—Assessment—Matters to which complaint relates caused or contributed to by aggrieved party—Reduction of award when just and equitable—Unfair dismissal—Reduction of award on ground that employee 'caused or contributed to' his dismissal—Employee dismissed for refusing to be a party to the falsification of employers' records—Employee refusing to accept reassurance by employers' manager—Whether just and equitable for tribunal to reduce assessment—Whether dismissal caused or contributed to by employee—Whether words 'caused or contributed' implying blame-worthiness—Industrial Relations Act 1971, s 116 (3). **Morrish v Henlys (Folkestone) Ltd**

137

Complaint—Procedure—Time limit—Complaint made out of time—Whether tribunal having jurisdiction to hear complaint—Industrial Relations Act 1971, Sch 6, para 5 (1). **Westward Circuits Ltd v Read**

1013

Procedure—Time limit—Complaint to be presented before end of period of four weeks—Unfair dismissal—Period of four weeks beginning with the effective date of termination of contract—Meaning of 'presented'—Calculation of four week period—Industrial Tribunals (Industrial Relations, etc) Regulations 1972 (SI 1972 No 38), Sch, para 2 (1). **Hammond v Haigh Castle & Co Ltd**

289

Industrial tribunal having jurisdiction to entertain complaint made out of time—Tribunal having discretion whether or not to entertain complaint—Principles on which discretion to be exercised—Industrial Tribunals (Industrial Relations, etc) Regulations 1972 (SI 1972 No 38), Sch, r 2 (1). **Westward Circuits Ltd v Read**

1013

Not practicable in circumstances for complaint to be presented before end of limitation period—Employee unaware of right to make complaint to industrial tribunal until after expiry of time limit—Whether 'practicable' for employee to have made complaint within limitation period—Industrial Tribunals (Industrial Relations, etc) Regulations 1972 (SI 1972 No 38), Sch, r 2 (1). **Westward Circuits Ltd v Read**

1013

Meaning of 'practicable'—Industrial Tribunals (Industrial Relations, etc) Regulations 1972 (SI 1972 No 38), Sch, r 2 (1). **Hammond v Haigh Castle & Co Ltd**

289

Pressure on employer to infringe rights of workers—Complaint—Who may make complaint—Person against whom action taken—Action deemed to be taken against employer not worker—Threat by union against employers to take industrial action if employee allowed to work—Employee suspended by employers in consequence of threat—Complaint of unfair industrial practice by employee against union—Whether competent for employee to make complaint against union—Industrial Relations Act 1971, ss 33 (3) (a), 101 (1) (c), 105 (1). **Langston v Amalgamated Union of Engineering Workers**

430

INDUSTRIAL TRIBUNAL

Appeal from—Appeal to National Industrial Relations Court. *See Industrial Relations* (National Industrial Relations Court—Jurisdiction—Appeals from industrial tribunals).

Procedure—Originating application—Form of application—Contents of application—Address of person or persons against whom relief is sought—Industrial Tribunals (Industrial Relations, etc) Regulations 1972 (SI 1972 No 38), Sch, r 1 (1). **Smith v Automobile Proprietary Ltd**

1105

INFANTAdoption. *See* **Adoption**.

Custody—Access—Adopted child—Welfare of child—Right of access—Access to be regarded as a right of child rather than parent—Fact that child adopted irrelevant—Custody awarded to father—Circumstances in which mother may be deprived of access. **M v M (child: access)** 81

Divorce proceedings, in. *See* **Divorce (Custody)**.

Guardianship—Custody—Welfare of infant as first and paramount consideration—Relevance of other considerations—Mother's conduct—Weight to be attached to other considerations dependent on how they affect children's welfare—Guardianship of Minors Act 1971, ss 1, 9 (1). **Re D (minors) (wardship: jurisdiction)** 993

Name—Change of surname—Divorce of parents—Mother having custody—Remarriage of mother—Rights of mother as custodian—Rights of father as natural guardian—Interests of child—Whether mother or father having unilateral right to change surname of child. **Y v Y (child: surname)** 574

Removal outside jurisdiction—Application for order prohibiting or allowing removal of child out of England and Wales. *See* **Child (Matrimonial causes—Applications relating to children)**.

Ward of court. *See* **Ward of Court**.

INFORMATION

Amendment—Jurisdiction of Crown Court to allow amendment. *See* **Crown Court (Appeal to—Conviction by magistrates—Appeal)**.

Criminal offence, for—Generally. *See* **Magistrates**.

Detection of evasion of Exchange Control Act 1947. *See* **Currency Control (Exchange control—Evasion of restrictions or requirements imposed by Act)**.

Inland Revenue Commissioners—Power to require a party to a settlement. *See* **Surtax (Settlement—Revocable settlements)**.

INJUNCTION

Husband and wife—Matrimonial home—Exclusion of spouse from matrimonial home—Parties divorced—Parties joint tenants of former matrimonial home—Parties continuing to live in home—Circumstances in which injunction will be granted—Injunction against husband—Conditions making it intolerable for wife and child to continue sharing accommodation with husband—Husband's behaviour endangering mental health of wife and child—No evidence of physical assault or apprehension of violence. **Phillips v Phillips** 423

Restraint against molestation—Jurisdiction of court—Application by party to 'cause or matter'—Ex parte application by wife for leave to present petition for divorce within three years of marriage—Application by wife for injunction restraining husband from molesting her—Whether court having jurisdiction to grant injunction—Whether sufficient nexus between injunction sought and application for leave to present petition—Supreme Court of Judicature (Consolidation) Act 1925, s 225—Matrimonial Causes Act 1965, s 2—Matrimonial Causes Act 1967, s 10 (1)—RSC Ord 29, r 1. **McGibbon v McGibbon** 836

Jurisdiction—Application by party to cause or matter—Husband and wife—Restraint against molestation. *See* Husband and wife—Restraint against molestation—Jurisdiction of court, *ante*.

INQUIRY

Local inquiry—Town planning. *See* **Town and Country Planning (Development—Permission for development)**.

INSURANCE

Indemnity—Loss—Recovery—Right of insurer to sums recovered—Relevance of principle of subrogation—Express terms of policy—Insurers entitled to 90 per cent to sums recovered 'in respect of a loss to which [policy] applies'—Insurance relating to export contract between merchant and foreign buyer—Risks covered including delay in payment by foreign buyer—Insurers undertaking to pay 90 per cent of loss—Amount of loss—Payment under contract in foreign currency—Rate of exchange—Loss to be calculated according to rate of exchange at date of export—Delay in payment caused by exchange control restrictions imposed by buyer's country—Payment by insurers in respect of loss—Subsequent payment by buyers—Sterling proceeds of payment exceeding loss calculated under policy because of devaluation of sterling—Whether insurers entitled to recover sum in excess of amount paid in respect of loss. **L Lucas Ltd v Export Credits Guarantee Department** 984

National insurance. *See* **National Insurance**.

Policy—Construction—Subrogation—Express terms of policy—Right of insurer to sums recovered in respect of loss—Principle of subrogation—Principle to be applied only when doubt or ambiguity as to express terms of policy. **L Lucas Ltd v Export Credits Guarantee Department** 984

Subrogation—Right of insurer to sums recovered—Indemnity. *See* Indemnity—Loss, *ante*.

INTIMIDATION

Industrial dispute—Acts done in contemplation or furtherance of an industrial dispute. *See* **Industrial Relations (Industrial dispute—Acts done in contemplation or furtherance of an industrial dispute)**.

JUDGE

Circuit judge—Circuit judges sitting as judges of High Court—Hearing of 'short' High Court matrimonial causes. *See* **Practice (Hearing—Matrimonial causes)**.

High Court—Hearing of longer applications in county court matrimonial causes. *See* **Practice (Hearing—Matrimonial causes)**.

JUDGMENT

Page

Amendment—Court of Appeal, Criminal Division. *See Criminal Law* (Appeal—Court of Appeal—Judgment or order).

Order—Supplemental order—Jurisdiction to make supplemental order—New facts—Plaintiffs obtaining order for specific performance—Subsequent application by plaintiffs for supplemental order for enquiry into damages—Supplemental order limited to damage arising after date of order for specific performance. *Ford-Hunt v Raghbir Singh*.. . . . 700

JURISDICTION

Commons—Registration—Disputes claim. *See Commons* (Registration—Disputes claim).

Courts—Review of local authority decision—Appropriation of land. *See Local Authority* (Land—Power to appropriate land).

Industrial tribunal—Complaint—Complaint made out of time. *See Industrial Relations* (Unfair industrial practice—Complaint—Procedure—Time limit—Complaint made out of time).

National Industrial Relations Court. *See Industrial Relations* (National Industrial Relations Court).

Removal of child out of—Application for order prohibiting or allowing removal. *See Child* (Matrimonial causes—Applications relating to children).

Visitor—Educational establishment. *See Education* (College—Visitor).

JURY

Direction to jury—Comment by judge on failure of accused to give evidence—Limits of permissible comment. *R v Sparrow* 129

Verdict—Alternative offence. *See Criminal Law* (Verdict—Alternative offence).

JUSTICES

Generally. *See Magistrates*.

LAND

Conveyance—Fraud. *See Fraudulent Conveyance*.

Local authority—Power to sell. *See Local Authority* (Land).

Mortgage. *See Mortgage*.

Planning permission. *See Town and Country Planning*.

Restrictive covenant affecting. *See Restrictive Covenant* (Restrictive covenant affecting land).

Sale. *See Sale of Land*.

Sewerage. *See Public Health* (Sewerage).

LAND REGISTRATION

Rectification of register—Circumstances justifying rectification—Unjust not to rectify register against proprietor in occupation—Circumstances making it unjust not to order rectification—Indemnity—Entitlement of proprietor to indemnity on rectification—Applicants not entitled to indemnity on refusal of rectification—Land Registration Act 1925, s 82 (3) (c). *Epps v Esso Petroleum Co Ltd* 465

Overriding interest—Rectification to give effect to overriding interest—Actual occupation—Use of land to park car—Strip of disputed land between adjoining properties—Strip conveyed to plaintiffs' predecessor with one property—Strip used for purpose of parking car—Strip mistakenly included in conveyance of adjoining property to defendants' predecessor—Defendants' predecessor registering title—Filed plan including strip—Whether plaintiffs' predecessor having overriding interest—Whether use of strip for parking car amounting to actual occupation—Land Registration Act 1925, ss 70 (1) (g), 82 (3). *Epps v Esso Petroleum Co Ltd* 465

LANDLORD AND TENANT

Agricultural holding. *See Agriculture* (Agricultural holding).

Lease—Agreement for lease—Specific performance. *See Specific Performance* (Lease).

Assignment—Consent—Consent not to be unreasonably withheld—Covenant by lessee to use premises only for purposes of printers' business—Proposed assignment by lessee—Intention of proposed assignee to use premises as offices—Refusal of consent—Whether breach of covenant a necessary consequence of assignment—Whether consent unreasonably withheld. *Killick v Second Covent Garden Property Co Ltd* 337

Notice to quit—Agricultural holding. *See Agriculture* (Agricultural holding—Notice to quit).

Validity—Periodic tenancy—Certainty of duration—Weekly tenancy—Written memorandum of agreement—Memorandum expressing tenancy 'to continue until determined by the lessee'—Whether lessor having right to determine—Whether tenancy void for uncertainty—Whether fetter on lessor's right to determine void as being repugnant to nature of periodic tenancy. *Centaploy Ltd v Matlodge Ltd* 720

Protected tenancy—Action for possession. *See Rent Restriction* (Possession—Protected tenancy).

Recovery of possession—Receiver—Appointment—Leave of court to obtain possession—Dissolution of partnership—Lease an asset of partnership—Landlord a partner. *See Partnership* (Relations between partners—Good faith—Partnership property—Leasehold interest—Underlease of premises where partnership business carried on—Acquisition of leasehold reversion by one of partners).

LANDLORD AND TENANT—continued

Repair—Damages for failure to repair—Diminution in value of reversion—Breach of covenant to leave or put premises in state of repair at termination of lease—Damages not recoverable when it is proposed to demolish building—Local authority as lessee—Local authority declaring premises unfit for human habitation—Premises unfit by reason of local authority's breach of covenant to repair—Premises included in slum clearance order—Premises to be demolished under slum clearance order—Whether landlords entitled to damages for breach of covenant to repair—Landlord and Tenant Act 1927, s 18 (1). **Hibernian Property Co Ltd v Liverpool Corporation** 1117

Tenancy—Periodic tenancy. *See* Notice to quit—Validity—Periodic tenancy, *ante*.

LATE NIGHT REFRESHMENT HOUSE

Licence. *See* Licensing (Late night refreshment house).

LEASE

Agreement for—Specific performance. *See* Specific Performance (Lease).

Assignment. *See* Landlord and Tenant (Lease).

Determination of tenancy—Notice to quit. *See* Landlord and Tenant (Notice to quit).

Grant—Intent to defraud creditors. *See* Fraudulent Conveyance.

LEGAL AID

Costs—Unassisted person's costs out of legal aid fund—Costs incurred by unassisted party—Incurred by—Unassisted party member of Automobile Association—Association undertaking proceedings on behalf of unassisted party and paying solicitors—Whether costs 'incurred by' unassisted party—Legal Aid Act 1964, s 1 (1). **Lewis v Averay (No 2)** .. 229

Just and equitable—Refusal of legal aid—Unassisted party alleging legal aid unreasonably refused—Whether relevant in considering whether just and equitable to make order—Legal Aid Act 1964, s 1 (2). **Lewis v Averay (No 2)** 229

Entitlement—Income exceeding prescribed figure—Income—Income including benefits and privileges—Sums received as benefits and privileges rather than by way of legal right—Element of recurrence—Gifts and loans—Whether gifts and loans from friends and relations constituting 'income'—Legal Aid (Assessment of Resources) Regulations 1960 (SI 1960 No 1471), reg 1 (2), Sch 1, para 1. **R v Supplementary Benefits Commission, ex parte Singer** 931

LIBEL AND SLANDER

Pleading—Particulars—Defence—Justification—Relevance of particulars to pleading—Plaintiffs a computer school and directors of school—Allegations by defendants that school a financial racket and guilty of publishing misleading advertisements—Allegation that founder and manager of school unfit to run a school—Whether defendants entitled to give particulars of founder's criminal record. **London Computer Operators Training Ltd v British Broadcasting Corporation** 170

LICENCE

Driving—Disqualification. *See* Road Traffic (Disqualification for holding licence).

LICENSING

Late night refreshment house—Meaning—House, room, shop or building kept open for public refreshment, resort and entertainment—Building inside which public may congregate for refreshment—Stall from which refreshment could only be served to members of public standing outside—Stall a permanent structure—Whether a refreshment house—Late Night Refreshment Houses Act 1969, s 1. **Frank Bucknell & Son Ltd v London Borough of Croydon** 165

LIFE

Imprisonment—Sentence to. *See* Criminal Law (Sentence—Life imprisonment).

LIMITATION OF ACTION

Statute—Retrospective operation—Statute introducing limitation period. *See* Statute (Retrospective operation—Procedural provision—Limitation period).

LIQUIDATOR

See Company (Winding-up).

LOCAL AUTHORITY

Land—Power to appropriate land—Land no longer required for purposes for which acquired—Decision of local authority that land no longer required for those purposes—Jurisdiction of courts to review decision—Local authority acquiring land for purposes of aerodrome—Local authority conveying site adjoining land to plaintiffs to build factory—Plaintiffs aircraft manufacturers—Conveyance containing covenant by local authority to allow plaintiffs to use airfield for defined period for purposes of test, delivery and other flights in connection with their business—Local authority deciding that land no longer required for purposes of aerodrome—Resolution to appropriate land for purposes of housing scheme—Validity of resolution—Whether test flights etc of plaintiffs' aircraft a purpose for which land acquired—Whether court having jurisdiction to review local authority's decision that land no longer required for original purposes—Land Government Act 1933, s 163 (1). **Dowty Boulton Paul Ltd v Wolverhampton Corporation (No 2)** 491

Power to sell land—Land subject to charitable trust—Statutory power—Whether power to dispose of land subject to charitable trust—Local Government Act 1933, s 165. **Hauxwell v Barton-upon-Humber Urban District Council** 1022

Public sewers—Construction of. *See* Public Health (Sewerage—Provision of public sewers).

LOCAL CHARITY

Page

Parties—Local inhabitants—Attorney-General. *See* **Charity** (Proceedings—Parties—Attorney-General—Local charity).

MAGISTRATES

Information—Hearing two or more together—Consent of defendant—Separate informations against two or more defendants—Whether court having power to hear informations together without consent of defendants. **Aldus v Watson** 1018

Jurisdiction—Binding over—Natural justice—Acquitted defendant—Opportunity to make representations—Defendant bound over to keep the peace—Defendant neither warned of proposed binding-over order nor given opportunity to make representations—Whether order should be set aside as being made in breach of rules of natural justice. **R v Woking Justices, ex parte Gossage** 621

Procedure—Adjournment—Summary trial—Adjournment after conviction and before sentence—Disqualification—Conviction of accused in his absence—Restriction on disqualifying accused in his absence—Disqualification for holding driving licence—Justices imposing fine on accused and adjourning consideration of disqualification—Justices purporting to disqualify accused at subsequent hearing in his presence—Whether justices having power to adjourn question of disqualification after imposing fine—Whether purported disqualification valid—Magistrates' Courts Act 1952, s 14 (3)—Criminal Justice Act 1967, s 26 (2). **R v Talgarth Justices, ex parte Bithell** 717

Summary trial—Adjournment. *See* **Procedure—Adjournment, ante**.

MALICIOUS PROSECUTION

Reasonable and probable cause—Prosecution instigated by Director of Public Prosecutions—Whether conclusive that reasonable and probable cause for prosecution. **Riches v Director of Public Prosecutions** 935

MANDAMUS

Crown Court. *See* **Crown Court** (Supervisory jurisdiction of High Court).

MANSLAUGHTER

Generally. *See* **Criminal Law**.

MARKETS AND FAIRS

Market overt—Sale of goods. *See* **Sale of Goods** (Market overt).

MARRIAGE

Dissolution. *See* **Divorce**

Nullity of. *See* **Nullity**.

MASTER AND SERVANT

Contract of service—Written particulars of terms of employment—Delivery to employee—Failure to deliver—Reference to tribunal—Limitation period—Employment having ceased—Reference to be made within three months of employment ceasing—Written particulars of change in terms of employment—Employee ignorant of change until more than three months after termination of employment—Whether tribunal having jurisdiction to entertain reference—Whether power to extend limitation period in cases of equitable fraud or mistake—Contracts of Employment Act 1972, s 8 (8). **Grimes v London Borough of Sutton** 448

Dismissal—Hospital staff. *See* **National Health Service** (Hospital—Staff—Terms and conditions of employment—Dismissal).

Redundancy. *See* **Employment** (Redundancy).

Unfair dismissal. *See* **Industrial Relations** (Unfair dismissal).

Industrial relations. *See* **Industrial Relations**.

Normal working hours—Calculation of redundancy payment. *See* **Employment** (Redundancy—Payment—Amount—Normal working hours).

Redundancy. *See* **Employment** (Redundancy).

Unfair dismissal. *See* **Industrial Relations** (Unfair dismissal).

Wrongful dismissal—Damages—Measure. *See* **Damages** (Measure of damages—Wrongful dismissal).

MATRIMONIAL HOME

Injunction in matrimonial causes. *See* **Injunction** (Husband and wife).

MEDICAL EXAMINATION

Personal injuries claim—Refusal by plaintiff to submit to examination—Refusal unless certain conditions fulfilled—Stay of proceedings. *See* **Practice** (Stay of proceedings—Jurisdiction—Medical examination of plaintiff).

MEMORANDUM

Contract for sale of land. *See* **Sale of Land** (Contract—Memorandum).

MINE

Development by mineral undertakers—Permitted development. *See* **Town and Country Planning** (Development—Permitted development—Development by mineral undertakers).

MINERAL UNDERTAKERS

Permitted development. *See* **Town and Country Planning** (Development—Permitted development—Development by mineral undertakers).

MINORAdoption. *See* **Adoption**.Custody—Divorce proceedings, in. *See* **Divorce** (Custody).Generally. *See* **Infant**.Income tax—Relief. *See* **Income Tax** (Relief—Children).Ward of court. *See* **Ward of Court**.**MITIGATION**Damages, of. *See* **Damages**.**MORTGAGE**

Possession of mortgaged property—Suspension of execution of order for possession—Mortgagor likely to be able within reasonable period to pay any sums due under the mortgage—Power to suspend execution conditional on likelihood of mortgagor paying sums due—Mortgagor failing to pay instalments—Mortgagee entitled to redemption—Mortgagee seeking possession—Mortgagor likely to be able to pay arrears within reasonable period and to pay future instalments—No prospect of mortgagor paying redemption moneys within reasonable period—Mortgagor not entitled to suspension of possession order—Administration of Justice Act 1970, s 36 (1), (2). **Halifax Building Society v Clark** 33

MOTOR VEHICLEDriving offences. *See* **Road Traffic**.Taking without owner's consent. *See* **Road Traffic** (Vehicle—Taking without authority).**NAME**Change—Infant's surname. *See* **Infant**.**NATIONAL HEALTH SERVICE**

Hospital—Staff—Terms and conditions of service—Dismissal—Hospital medical and dental staff—Representations against dismissal—Member of staff considering that employment being unfairly terminated—Terminated—Medical assistant—Appointment for two year period renewable, subject to confirmation, indefinitely—Medical assistant's appointment not confirmed—Whether appointment being 'terminated'—Terms and Conditions of Service of Hospital Medical and Dental Staff (England and Wales) and Administrative Medical Staff of Regional Hospital Boards (England and Wales) (January 1971), para 190. **R v Secretary of State for Social Services, ex parte Khan** 104

NATIONAL INDUSTRIAL RELATIONS COURTGenerally. *See* **Industrial Relations**.**NATIONAL INSURANCE**

Non-contributory benefit—Supplementary allowance—Calculation—Adjustment for exceptional circumstances—Award of amount exceeding basic allowance—Regard to be had to provisions for additional requirements—Additional requirements—Entitlement of recipient of allowance to further sum after two years—Sum awarded for additional requirements exceeding sum awarded for exceptional circumstances—Whether sum awarded for additional requirements to be reduced by amount of sum paid for exceptional circumstances—Ministry of Social Security Act 1966, Sch 2, paras 4, 12. **R v Greater Birmingham Appeal Tribunal, ex parte Simper** 461

NATURAL JUSTICECollege—Dismissal of student. *See* **Education** (College).Magistrates—Binding-over. *See* **Magistrates** (Binding-over).**NEGLIGENCE**

Contributory negligence—Apportionment of liability—Plaintiff's share of responsibility for damage—Road accident—Motor car—Plaintiff front seat passenger—Car belonging to and driven by defendant—Car fitted with seat belts—Plaintiff failing to wear seat belt—Defendant failing to draw attention to seat belt—Accident caused by driver's negligence—Plaintiff suffering injury—Evidence that injury caused or contributed to by failure to wear seat belt—Plaintiff's share of responsibility for injury. **Pasternack v Poulton** 74

Causation—Collision—Road accident—Obstruction of highway—Danger to road users—Danger to road users failing to keep proper look-out—Collision caused by negligent driving of following vehicle—Obstruction contributing to collision—Driver negligently causing lorry to jack-knife and obstruct two lanes of motorway at night—Lorry behind stopping and illuminating scene with headlights—Third party driving lorry too fast and failing to observe obstruction until too late—Collision following belated attempt of third party to avoid obstruction—Collision caused by negligent driving of third party—Whether negligence of driver of jack-knifed lorry contributing to collision. **Rouse v Squires** 903

Defence—Exclusion of liability—Notice—Implied agreement—Freedom to choose whether to submit to terms of notice—Employee acting in course of employment—Plaintiff employed as lighterman on barge—Train of barges being brought into dock by means of capstan rope provided and operated by defendants—Notice excluding liability of defendants to lighterman availing themselves of assistance provided by defendants—Plaintiff injured by reason of defect in rope caused by defendants' negligence—Notice apt to cover accident—Plaintiff not free to refuse to avail himself of assistance provided by defendants—Whether notice protecting defendants from liability. **Burnett v British Waterways Board** 631

Notice—Occupier. *See* **Occupier** (Negligence—Common duty of care—Duty to visitors—Exclusion of duty).

Statutory board—Duty to have regard to safety of operations in provisions of services and facilities—Power to make use of services and facilities subject to such terms and conditions as board think fit—Power to exclude liability for negligence in providing services and facilities—Power to exclude liability in absence of contract—British Waterways Board—Plaintiff employed as lighterman on barge—Barge being brought into dock by means of capstan rope provided by board—Notice excluding liability for board's negligence—Plaintiff injured by reason of board's negligence—Whether board protected by notice—Transport Act 1962, ss 10 (1), 43 (3). *Burnett v British Waterways Board* 631
Volenti non fit injuria—Consent to risk of injury—Free and voluntary consent—Notice by defendants excluding liability for injury—Plaintiff undergoing risk of injury in course of employment—Plaintiff a lighterman employed on barge—Train of barges being brought into dock by means of capstan rope provided and operated by defendants—Notice excluding liability of defendants to lightermen availing themselves of assistance provided by defendants—Plaintiff having no freedom to choose not to submit to terms of notice—Plaintiff injured by reason of defect in rope caused by defendant's negligence—Whether plaintiff having freely and voluntarily consented to risk of injury. *Burnett v British Waterways Board* 631
Duty to take care—Arbitrator—Person acting in arbitral capacity—Exercise of professional skill and judgment—Architect—Interim certificate—Building contract—Architect appointed to supervise works under building contract between employer and contractor—Contract in RIBA form—Interim certificate issued by architect over-certifying amount due to contractor—Whether architect liable to employer for negligent over-certification. *Sutcliffe v Thackrah* 1047
Valuer—Valuation—Auditor appointed to value shares as expert and not as arbitrator—Shareholder selling shares to controlling shareholder in company on basis of valuation—Prospectus subsequently issued by company offering shares to public—Prospectus prepared by auditor—Value placed on shares six times greater than value previously given by auditor to shareholder—Whether shareholder having cause of action in negligence against auditor. *Arenson v Arenson* 235
NOTICE
 Service—Service by post—Option—Notice posted but never delivered. *See Contract* (Offer and acceptance—Acceptance by post—Mode of acceptance prescribed—Notice in writing to offeror—Option).
NOTICE TO QUIT
 Agricultural holding. *See Agriculture* (Agricultural holding).
See Landlord and Tenant (Notice to quit).
NULLITY
 Petition—Title of suit—Inclusion of surname of wife prior to marriage ceremony no longer necessary. *Practice Direction* 880
OBTAINING PECUNIARY ADVANTAGE
See Criminal Law (Obtaining pecuniary advantage by deception).
OFFICIAL REFEREE
 Trial before. *See Practice* (Reference to referee).
OFFICIAL SECRETS
 Act preparatory to the commission of an offence under the Official Secrets Act 1911. *See Criminal Law* (Official secrets).
ONUS OF PROOF
 Proceedings relating to customs or excise. *See Customs* (Forfeiture—Imported goods—Goods on which duty chargeable and unpaid—Onus of proof).
OPTION
 Exercise—Notice—Service of notice in writing—Service by post. *See Contract* (Offer and acceptance—Acceptance by post—Mode of acceptance prescribed—Notice in writing to offeror—Option).
ORDER
 Supplemental order. *See Judgment* (Order—Supplemental order).
PAINTING
 Removal from exhibition in public place. *See Criminal Law* (Removal of articles from places open to the public).
PARTIES
 Charity. *See Charity* (Proceedings—Parties).
 Substitution of. *See Practice* (Parties—Substitution).
PARTNERSHIP
 Dissolution—Appointment of receiver—Leasehold interest—Underlease of premises where partnership business carried on—Acquisition of leasehold reversion by one of partners. *See Relations between partners—Good faith—Partnership property—Leasehold interest, post.*
 Relations between partners—Good faith—Partnership property—Leasehold interest—Underlease of premises where partnership business carried on—Acquisition of leasehold reversion by one of the partners—Dissolution of partnership—Appointment of receiver—Rent in arrears—Landlord's right to claim possession with leave of court—Whether fact that landlord a partner raising any equity which would preclude court from giving leave. *Brenner v Rose* 535

PASSENGER

Car—Failure to wear seat belt—Contributory negligence. *See Negligence* (Contributory negligence—Apportionment of liability).

PATH

Public right of way. *See Highway*.

PATIENT

Hospital—Motorist—Provision of specimen for laboratory test. *See Road Traffic* (Driving with blood-alcohol proportion above prescribed limit—Evidence—Provision of specimen for laboratory test—Hospital patient).

PAYMENT INTO COURT

Generally. *See Practice* (Payment into court).

PERMITTED DEVELOPMENT

See Town and Country Planning (Development).

PERSONAL INJURIES

Action—Discovery—Production of documents before commencement of proceedings. *See Discovery* (Production of documents—Production before commencement of proceedings).

PETITION

Company—Compulsory winding-up. *See Company* (Winding-up—Compulsory winding-up). Nullity. *See Nullity*.

PICKETING

Peaceful picketing—Obstruction of highway. *See Trade Dispute* (Picketing—Obstruction of highway).

PLANNING PERMISSION

Land. *See Town and Country Planning* (Development).

PLEADING.

Libel. *See Libel and Slander*.

POLICE

Arrest without warrant by. *See Arrest* (Arrest without warrant).

POLITICAL OFFENCE

Extradition. *See Extradition* (Political offence).

POSSESSION

Landlord recovering possession. *See Rent Restriction* (Possession).

Mortgaged property, of. *See Mortgage* (Possession of mortgaged property).

Motor vehicle—Taking without authority. *See Road Traffic* (Vehicle—Taking without authority).

POST

Contract—Acceptance by post. *See Contract* (Offer and acceptance).

POWER

Settlement—Intermediate power. *See Settlement* (Power).

POWER OF APPOINTMENT

Intermediate power. *See Settlement* (Power).

PRACTICE

Chancery Division—Lists—Witness list—Setting down—Part 2—Actions estimated to last three days or less—Transfer of such actions from Part 1. *Practice Direction* 422

Complaint—Unfair industrial practice. *See Industrial Relations* (Unfair industrial practice—Complaint).

Costs—Generally. *See Costs*.

Discovery—Production of documents. *See Discovery* (Production of documents).

Dismissal of action—Abuse of process of court. *See Action* (Dismissal—Abuse of process of court).

Hearing—Matrimonial causes—Royal Courts of Justice—Circuit judges sitting as judges of High Court—Circuit judges hearing shorter High Court applications and 'short' High Court matrimonial causes—High Court judges hearing longer applications in county court matrimonial causes—Rules as to right of audience—Costs—Courts Act 1971, ss 20 (3), 23. *Practice Direction* 288

Matrimonial causes—Child—Applications relating to children. *See Child* (Matrimonial causes—Applications relating to children).

Parties—Charity—Attorney-General—Local charity—Action to establish existence of charitable trust. *See Charity* (Proceedings—Parties—Attorney-General—Local charity).

Substitution—Charity—Attorney-General—Local charity—Action by local inhabitants—Action for declaration that park held by local authority subject to charitable trust—Plaintiffs having no locus standi—Whether power to substitute Attorney-General as plaintiff—RSC Ord 15, r 6. *Hauxwell v Barton-upon-Humber Urban District Council* 1022

Payment into court—Transfer of money in court to short-term investment account—Procedure. *Practice Direction* 64

PRACTICE—continued

Page

Place of trial—Adjournment of trial—Adjournment to such place as court thinks fit—Witness—Examination—Witness too infirm to travel to London—Witness fit to be examined at village where she lived—Village not a place authorised for trial of proceedings in Chancery Division—Power of court to adjourn trial to village for purpose of hearing witness's testimony—RSC Ord 33, r 1—RSC Ord 35, r 3. **St Edmundsbury and Ipswich Diocesan Board of Finance v Clark**

1155

Pleading—Libel. *See* **Libel and Slander** (Pleading).

Probate. *See* **Probate**.

Property—Matrimonial property—Related applications. *See* **Husband and Wife** (Property—Practice).

Reference to referee—Power to order trial before official referee—Exercise of power—Absence of appeal from referee on questions of fact—Pleadings raising allegations of importance to party—Trial before judge providing opportunity for Court of Appeal to review findings of fact—Party entitled to trial before judge. **Simplicity Products Co (a firm) v Domestic Installation Co Ltd**

619

Stay of proceedings—Foreign defendant—Action in rem—Action by foreign plaintiff against defendant's vessel whilst vessel visiting English port—Grounds justifying stay—Balance of advantage to plaintiff and disadvantage to defendant of allowing action to proceed—Degree of relative advantage and disadvantage—Substantial advantage—Necessity of showing that disadvantage even more substantial—Collision between plaintiff's and defendant's vessel in foreign waters—Proceedings arising out of collision commenced by other parties against defendant in foreign court—Foreign court appropriate and convenient forum in which action to be tried—Plaintiff offered adequate security for foreign proceedings—Additional expense and delay of separate action in England—Whether sufficient grounds to justify a stay of proceedings. **The Atlantic Star**

175

Jurisdiction—Medical examination of plaintiff—Examination at defendant's request—Exchange of medical reports—Reciprocity—Plaintiff agreeing to submit to examination on condition defendant supplies copy of report—Plaintiff only entitled to insist on condition if willing to supply copies of own medical reports in exchange. **McGinley v Burke**

1010

Striking out—Petition—Petition to wind up company. *See* **Company** (Winding-up—Compulsory winding-up—Petition).

Pleading—Statement of claim—No reasonable cause of action—Limitation of action—Cause of action accruing before limitation period—Power of court to strike out statement of claim—Defendant proposing to rely on Statute of Limitations—Nothing before court to suggest that plaintiff having any escape from statute—RSC Ord 18, r 19. **Riches v Director of Public Prosecutions**

935

Supplemental order. *See* **Judgment** (Order—Supplemental order).

Trial—Place of trial—Chancery Division. *See* **Chancery Division**, *ante*.

Ward of Court. *See* **Ward of Court**.

PREMISES

Business—Display of advertisements on—Restriction. *See* **Town and Country Planning** (Advertisement—Control of advertisements).

PRESERVATION

Trees. *See* **Town and Country Planning** (Trees—Preservation order).

PRIVILEGE

Discovery. *See* **Discovery** (Production of documents).

PRIVY COUNCIL

St Christopher, Nevis and Anguilla—Constitution—Fundamental rights and freedoms—Freedom of expression—Freedom to communicate ideas and information without interference—Law reasonably required in interests of public order not inconsistent with freedom—Public meeting—Use of loudspeaker—Statute making it offence to use 'noisy instrument' during course of public meeting without obtaining written permission of Chief of Police—Whether statute contravening provision in Constitution protecting freedom of expression—St Christopher, Nevis and Anguilla Constitution Order 1967 (SI 1967 No 228), Sch 2, s 10 (1), (2)—Public Meetings and Processions Act 1969 (St Christopher, Nevis and Anguilla), s 5 (1). **Francis v Chief of Police**

251

PROBATE

Practice—Chancery Division—Contentious probate—Accounts of administrators pendente lite—Information as to unconverted assets—Exhibition of inventory—Frequency of accounts. **Practice Direction**

334

Contentious probate—Copies of scripts—Lodgment. **Practice Direction**

334

PROCEDURE

Divorce. *See* **Divorce**.

Industrial tribunal. *See* **Industrial Tribunal** (Procedure).

Payment into court—Transfer of money in court in short-term investment account. *See* **Practice** (Payment into court).

Possession—Protected tenancy. *See* **Rent Restriction** (Possession—Protected tenancy).

PRODUCTION

Documents of. *See* **Discovery** (Production of documents).

PROHIBITION

Crown Court. *See* **Crown Court** (Supervisory jurisdiction of High Court).

PROOF

Adultery—Divorce. *See* **Divorce** (Adultery—Proof).

Burden of—Proceedings relating to customs or excise. *See* **Customs** (Forfeiture—Imported goods—Goods on which duty chargeable and unpaid—Onus of proof).

PROPERTY

Development—Planning permission. *See* **Town and Country Planning** (Development).

Husband and wife—Dispute between. *See* **Husband and Wife**.

Leasehold—Generally. *See* **Landlord and Tenant**.

Matrimonial home. *See* **Husband and Wife** (Property—Matrimonial home).

Mortgage. *See* **Mortgage**.

Restrictive covenant. *See* **Restrictive Covenant**.

PROSECUTION

Malicious. *See* **Malicious Prosecution**.

PROTECTED TENANCY

See **Rent Restriction**.

PUBLIC HEALTH

Sewerage—Provision of public sewers—Local authority—Power to construct sewer 'in, on or over' land on giving reasonable notice—Land—Proposal by local authority to construct sewer through site of plaintiffs' bungalow—Construction of sewer involving demolition of bungalow—Whether 'land' including buildings—Whether authority entitled to demolish building in order to construct sewer—Interpretation Act 1889, s 3—Public Health Act 1936, s 15 (1). **Hutton v Esher Urban District Council** .. 1123

Public sewer—Meaning—Pipe constructed to receive flood water from river—Pipe also constructed to drain surface water from buildings and road surfaces—Whether pipe a public sewer—Public Health Act 1936, s 15 (1). **Hutton v Esher Urban District Council** .. 1123

PUBLIC MEETING

Loudspeaker—Use—St Christopher, Nevis and Anguilla. *See* **Privy Council** (St Christopher, Nevis and Anguilla).

PUBLIC ORDER

Unlawful assembly. *See* **Criminal Law** (Unlawful assembly).

PUBLIC PLACE

Removal of articles from. *See* **Criminal Law** (Removal of articles from places open to the public).

PUBLIC RIGHT OF WAY

See **Highway**.

QUARTER SESSIONS

Highway—Determination whether public right of way. *See* **Highway** (Dedication—Evidence—Provisional map—Dispute).

QUEEN'S BENCH DIVISION

Jurisdiction—Grant of remedy or relief where proceedings for such remedy or relief assigned to another Division. *See* **Court** (Jurisdiction—High Court of Justice).

RACE RELATIONS

Discrimination—Unlawful discrimination—Discrimination against person seeking to obtain or use goods, facilities or services—Discrimination on ground of colour—Discrimination against one person on ground of another person's colour—Foster parents—Local authority fostering children with foster parents in exercise of statutory duty—Foster parents refusing to accept coloured children—Whether children or local authority 'seeking to obtain' facilities provided by foster parents—Whether refusal to accept coloured children discrimination against local authority 'on ground of colour'—Race Relations Act 1968, ss 1 (1), 2 (1). **Race Relations Board v Applin** .. 1190

Provision of goods, facilities and services—Discrimination by person concerned with provision of goods etc to a section of the public—Section of the public—Local authority—Children in care of local authority—Persons registered with local authority as suitable foster parents—Local authority fostering children in their care with foster parents in exercise of statutory duty—Foster parents refusing to accept coloured children—Whether foster parents providing facilities to a section of the public—Whether local authorities or children a 'section of public'—Race Relations Act 1968, s 2 (1). **Race Relations Board v Applin** .. 1190

Incitement—Incitement to unlawful discrimination—Incitement not limited to advice, encouragement of persuasion—Incitement including threats and bringing of pressure—Pressure brought on foster parents of children in local authority care to accept white children only—Race Relations Act 1968, s 12. **Race Relations Board v Applin** .. 1190

RAPE

See **Criminal Law**.

RECEIVER

Appointment—Effect—Partnership—Leasehold interest—Recovery of possession by landlord—Leave of court—Landlord a partner. *See* **Partnership** (Relations between partners—Good faith—Partnership property—Leasehold interest—Underlease of premises where partnership business carried on—Acquisition of leasehold reversion by one of parties).

Debenture. *See* **Company** (Debenture).

RECORDS

Goods vehicle. *See* **Road Traffic** (Goods vehicle—Driver—Records).

RECTIFICATION

Land register. *See* **Land Registration** (Rectification of register).

REDUNDANCY

See **Employment** (Redundancy).

Unfair dismissal—Claim for redundancy payment. *See* **Industrial Relations** (Unfair dismissal—Redundancy).

REDUNDANCY PAYMENT

See **Employment**.

REFRESHMENT HOUSE

Late night refreshment house—Licence. *See* **Licensing** (Late night refreshment house).

REGISTERED LAND

See **Land Registration**.

REGISTRATION

Common land and rights of common. *See* **Commons** (Registration).

REMOVAL OF ARTICLES FROM PUBLIC PLACES

See **Criminal Law** (Removal of articles from places open to the public).

RENT RESTRICTION

Possession—Protected tenancy—Claim for possession—Procedure—Indorsement on writ of summons—Certificate of solicitor or plaintiff's affidavit—Increase in rateable values—New forms of indorsement—Rent Act 1968, s 1, as amended by Counter-Inflation Act 1973, s 14—RSC Ord 6, r 2 (1) (c)—RSC Ord 13, r 4 (2). **Practice Direction** .. 336

REPAIR

Covenant to, in lease—Damages for failure to repair. *See* **Landlord and Tenant** (Repair—Damages for failure to repair).

RESTRICTIVE COVENANT

Restrictive covenant affecting land—Building scheme—Land subject to scheme divided into lots—Lots conveyed subject to restrictions imposed by scheme—Certain lots subsequently coming into common ownership—Common owner subsequently conveying lots to different purchasers—Conveyances expressed to be subject to restrictions imposed by scheme—Whether purchasers of lots previously in common ownership and successors in title entitled to enforce restrictions inter se. **Texaco Antilles Ltd v Kernochan** .. 118

REVENUE

Income tax. *See* **Income Tax**.

Surtax. *See* **Surtax**.

RIGHT OF WAY

Public right of way. *See* **Highway**.

ROAD TRAFFIC

Dangerous driving—Causing death by dangerous driving—Sentence—Disqualification for driving—Principles of sentencing—Categories of offences and offenders—Conviction because of momentary inattention or misjudgment—Relevance of driving record to period of disqualification—Cases in which custodial sentence appropriate. **R v Guilfoyle** .. 844

Disqualification for holding licence—Restriction on disqualifying accused in his absence—Adjournment after conviction. *See* **Magistrates** (Procedure—Adjournment—Summary trial—Adjournment after conviction and before sentence—Disqualification).

Separate periods of disqualification—Periods running concurrently—Whether court having power to impose consecutive periods of disqualification. **R v Meese** .. 1103

Special reasons—Driving with blood-alcohol proportion above prescribed limit—Addition to driver's drink without his knowledge—Proof that addition accounted for excess over prescribed limit—Onus of proof—Onus on driver to prove on balance of probabilities that addition accounted for excess—Circumstances in which necessary for driver to adduce medical evidence—Road Traffic Act 1962, s 5 (1)—Road Safety Act 1967, s 1 (1). **Pugsley v Hunter** .. 10

Driving with blood-alcohol proportion above prescribed limit—Evidence—Failure to supply specimen—Specimen for laboratory test—Reasonable excuse—What amounts to reasonable excuse—Physical or mental inability to provide specimen—Risk to health in providing specimen—Consumption of alcohol by accused after ceasing to drive and before requirement—Whether a reasonable excuse—Road Safety Act 1967, s 3 (3). **R v Lennard** .. 831

Provision of specimen—Breath test—Arrest following test—Right of person arrested to have opportunity of providing a further specimen of breath for a breath test while at police station—Whether person arrested must be taken to police station and given opportunity of providing a further specimen for breath test—Road Safety Act 1967, s 2 (7). **Bourlet v Porter** .. 800

Breath test—Requirement to take test—Person driving or attempting to drive—Issue whether accused driving or attempting to drive at relevant time—Issue of fact for jury—Proper direction to jury in clear cases—Road Safety Act 1967, s 2 (1). **R v Bates** .. 509

	Page
ROAD TRAFFIC —Driving with blood-alcohol proportion above prescribed limit—Provision of specimen—Breath test— <i>continued</i>	
Requirement to take test—Person driving or attempting to drive—Suspicion of alcohol or of commission of moving traffic offence—Suspicion arising after person has ceased driving—Whether necessary that suspicion should arise at time person driving—Considerations to be taken into account in determining whether person driving at relevant time—Road Safety Act 1967, s 2 (1). Edkins v Knowles	503
Specimen for laboratory test—Hospital patient—Requirement to provide specimen at hospital—Requirement made while motorist a patient at hospital—Motorist subsequently discharging himself—Motorist providing specimen at hospital following discharge—Whether necessary that motorist should be a patient at hospital when specimen provided there—Road Safety Act 1967, s 3 (2). Bourlet v Porter	800
Hospital patient—Right of medical practitioner to object—Right a condition precedent to requirement to provide specimen—Right to object to provision of specimen not continuing after requirement made—Road Safety Act 1967, s 3 (2). Bourlet v Porter	800
Goods vehicle—Driver—Limitation of time on duty—Length of working day—Periods of duty, driving and rest—Computation of periods—Journey to destination outside Great Britain—Return journey to Great Britain—Whether account to be taken of driver's activities outside Great Britain in computing periods of duty, driving and rest—Transport Act 1968, ss 96 (1), (3) (a), 103 (1). Fox v Lawson	309
Records—Duty of driver to keep records—Information as to periods of driving, rest etc—Journey to destination outside Great Britain—Return journey to Great Britain—Whether duty to record information as to periods of driving, rest etc whilst outside Great Britain—Drivers' Hours (Goods Vehicles) (Keeping of Records) Regulations 1970 (SI 1970 No 123), reg 3 (1). Fox v Lawson	309
Negligence—Contributory negligence—Apportionment of liability. <i>See Negligence (Contributory negligence—Apportionment of liability).</i>	
Causation. <i>See Negligence (Contributory negligence—Causation).</i>	
Vehicle—Taking without authority—Taking—Unauthorised assumption of possession coupled with some movement of vehicle—Theft Act 1968, s 12 (1). R v Bogacki	864
SALE OF GOODS	
Market overt—Sale in market overt—Buyer acquiring good title—Necessity of showing that sale took place between sunrise and sunset—Sale of Goods Act 1893, s 22 (1). Reid v Commissioner of Police of the Metropolis	97
SALE OF LAND	
Contract—Memorandum—Circumstances in which memorandum must evidence existence of contract—Effect of qualification 'subject to contract'—Waiver of qualification—Waiver by subsequent oral agreement—Solicitors' letters—Oral contract concluded by parties prior to solicitors' correspondence—Vendor's solicitors' letter referring to 'proposed purchase ... subject to contract'—Vendor's solicitors forwarding draft contract—Parties subsequently entering into new oral agreement based on increased purchase price—Vendor's solicitors' letter acknowledging 'increase in purchase price has been mutually agreed'—Letter not expressed to be subject to contract—Whether qualification in earlier letter waived by new oral agreement—Whether subsequent letter read with earlier correspondence and draft contract constituting a note or memorandum of new agreement—Law of Property Act 1925, s 40 (1). Law v Jones	437
Conveyance—Intent to defraud creditors. <i>See Fraudulent Conveyance.</i>	
Option to purchase land or interest therein—Exercise of option—Notice in writing to vendor—Service by post. <i>See Contract (Offer and acceptance—Acceptance by post—Mode of acceptance prescribed—Option).</i>	
SECURITY	
Tax—Counteracting tax advantage from transactions—Surtax. <i>See Surtax (Tax advantage).</i>	
SECURITY FOR COSTS	
Company. <i>See Costs (Security for costs—Company).</i>	
SENTENCE	
Adjournment after conviction and before sentence—Magistrates. <i>See Magistrates (Procedure—Adjournment—Summary trial).</i>	
Causing death by dangerous driving. <i>See Road Traffic (Dangerous driving—Causing death by dangerous driving).</i>	
Crime—Generally. <i>See Criminal Law (Sentence).</i>	
SEPARATION	
Divorce. <i>See Divorce.</i>	
SETTLEMENT	
Power—Intermediate power—Validity—Power conferred on trustees to nominate and add to a class of beneficiaries—Power exercisable in favour of anyone with certain exceptions—Whether valid. Re Manisty's Settlement	1203
Surtax. <i>See Surtax (Settlement).</i>	
SEWER	
Construction of. <i>See Public Health.</i>	

	Page
SHIPPING	
Charterparty—Exception clause—Delay in loading cargo—Excepted cause in existence and ascertainable when charter made—Exception for unavoidable hindrances and causes or hindrances happening without the fault of the charterers—Delay in transporting cargo to port—Lack of transport—Consequent delay in loading frustrating charter—Lack of transport existing at time charter made—Lack of transport unknown to charterers and owners—Fact readily ascertainable by charterers on making enquiry—Whether exception clause giving protection when delay frustrating contract—Whether delay due to unavoidable hindrances in loading. <i>The Angelia</i>	144
Frustration—Arbitration—Special case—Issue whether charterparty frustrated—Whether question of fact or question of law. <i>The Angelia</i>	144
SOCIETY	
Officer—Fiduciary duty. <i>See</i> Fiduciary Duty .	
SOLICITOR	
Audience—Right of audience—Family Division. <i>See</i> Practice (Hearing—Matrimonial causes—Royal Courts of Justice).	
Costs—Taxation—Bill of costs for contentious business. <i>See</i> Costs (Taxation—Solicitor—Bill of costs for contentious business).	
SPECIAL CASE	
<i>See</i> Arbitration .	
SPECIAL REASONS	
Motor vehicle licence. <i>See</i> Road Traffic (Disqualification for holding licence).	
SPECIFIC PERFORMANCE	
Lease—Agreement for lease—Underlease—Execution of underlease breach of covenant in lessor's head lease—Whether lessee entitled to specific performance of agreement to execute underlease. <i>Warrington v Miller</i>	372
STATEMENT OF CLAIM	
Striking out—No reasonable cause of action. <i>See</i> Practice (Striking-out—Pleading).	
STATUTE	
Construction—Conflict between provisions of statute—Provision expressed to be 'subject to' other provision—Whether phrase 'subject to' implying that provisions should be construed so as to conflict. <i>Clark (C & J) Ltd v Inland Revenue Comrs</i>	513
Retrospective operation—Procedural provision—Limitation period—Statute introducing limitation period—Whether provision retrospective in operation—Contracts of Employment Act 1972, s 8 (8). <i>Grimes v London Borough of Sutton</i>	448
STAY OF PROCEEDINGS	
Action, of. <i>See</i> Practice (Stay of proceedings).	
High Court. <i>See</i> Practice .	
STREET	
Traffic. <i>See</i> Road Traffic .	
STRIKING OUT	
Pleading. <i>See</i> Practice (Striking out).	
STUDENT	
College. <i>See</i> Education (College).	
SUBROGATION	
Indemnity. <i>See</i> Indemnity (Subrogation).	
Insurance. <i>See</i> Insurance .	
SURNAME	
Infant—Change. <i>See</i> Infant (Name).	
SURTAX	
Close company—Apportionment of income for surtax. <i>See</i> Income Tax (Close company—Apportionment of income).	
Settlement—Revocable settlements—Information—Power of commissioners by notice to require information—Power to require such information as commissioners think necessary for specified purposes—Burden on taxpayer of proving that commissioners do not think information necessary—Premature requirement of information—Notice requiring information which could not be necessary for specified purposes in light of other information given by taxpayer in response to same notice—Validity of notice—Income and Corporation Taxes Act 1970, s 453. <i>Wilover Nominees Ltd v Inland Revenue Comrs</i>	977
Tax advantage—Counteracting—Transaction in securities—Tax advantage in consequence of transaction in securities—In consequence of—Liquidation of company—Taxpayer principal shareholder of company—Reconstruction of company—Agreement between taxpayer and other members of company providing for liquidation of company and valuation and distribution of company's assets—Sale of business to new company—Taxpayer receiving certain freehold property and securities of old company and substantial cash sum—Taxpayer in effect receiving share of accumulated profits of old company as capital sum in winding-up—Liquidation agreement carried out immediately—Taxpayer obtaining tax advantage—Whether tax advantage obtained 'in consequence of' liquidation agreement—Whether liquidation agreement a 'transaction in securities'—Income and Corporation Taxes Act 1970, ss 460 (1), 467 (1). <i>Inland Revenue Comrs v Joiner</i>	379

SUSPENDED SENTENCE

See Criminal Law (Sentence).

TAX

Income tax. *See Income Tax.*

Surtax. *See Surtax.*

TAXATION

Close company. *See Income Tax (Close company).*

Costs. *See Costs.*

Arbitration. *See Arbitration (Costs—Taxation).*

Generally. *See Costs.*

TAXING MASTER

Costs—Taxation—Arbitration. *See Arbitration (Costs—Taxation).*

TEACHER

Student—Dismissal. *See Education (College).*

TENANCY

Covenant—Repair. *See Landlord and Tenant (Repair).*

Notice to quit. *See Landlord and Tenant (Notice to quit).*

TEST

Breath test. *See Road Traffic (Driving with blood-alcohol proportion above prescribed limit—Evidence).*

THEFT

See Criminal Law.

TIME

Complaint—Unfair industrial practice. *See Industrial Relations (Unfair industrial practice—Complaint).*

TORT

Damages. *See Damages.*

County court—Transfer of action to High Court. *See County Court (Transfer of action).*

Intimidation—Industrial dispute. *See Industrial Relations (Industrial dispute—Acts done in contemplation or furtherance of an industrial dispute).*

TOWN AND COUNTRY PLANNING

Control of advertisements—Display without express consent—Advertisements on business premises—Business premises—Building normally used for specified purposes—'Business premises' not including forecourt or other land forming part of curtilage of building—Petrol service station—Station consisting of sales office, petrol pumps and concrete apron—Advertisements displayed on concrete apron in open air—Whether concrete apron part of building or whether forecourt forming part of curtilage of building—Town and Country Planning (Control of Advertisements) Regulations 1969 (SI 1969 No 1532), reg 14 (1), (3) (a). *Heron Service Stations Ltd v Coupe* .. 110

Development—Material change of use—Planning unit—Dwelling-house—Permitted use of premises—Use since before appointed day—Addition built on to premises—Agricultural smallholding—Permitted use of farmhouse for sale of home-grown and imported produce—Conservatory built on to farmhouse—Conservatory used thereafter for sale of produce—Enforcement notice requiring discontinuance of use of conservatory as retail shop—Whether conservatory to be regarded as separate planning unit—Whether use permitted for farmhouse permitted for conservatory. *Wood v Secretary of State for the Environment* .. 404

Permitted development—Development by mineral undertakers—Erection, alteration or extension of building, plant or machinery—Development on land 'in' quarry or mine—Development on land 'adjacent to and belonging to' quarry or mine—Mine—Site on which mining operations are carried out—Mining operations—Winning and working of minerals—Land adjacent to and belonging to mine—Adjacent—Belonging to—Plaintiffs engaged in production of china clay—Crude slurry extracted from clay pits and partly treated on site—Partly treated slurry conveyed by pipeline to second site two miles distant—Process of refining and drying clay completed on second site—Plaintiffs proposing to erect new buildings on second site—Whether second site part of larger site on which 'mining operations are carried out'—Whether second site 'land in . . . a quarry or mine'—Whether second site 'land . . . adjacent to and belonging to a quarry or mine'—Town and Country Planning General Development Order 1963 (SI 1963 No 709), arts 2, 3, Sch 1, class XVIII. *English Clays Lovering Pochin & Co Ltd v Plymouth Corporation* .. 730

Permission for development—Inquiry—Report of inspector—Minister differing from inspector on a finding of fact—Duty to notify parties and afford them opportunity to make representations where decision at variance with inspector's recommendation—Finding of fact—Distinction between finding of fact and expression of opinion on planning merits—Town and Country Planning (Inquiries Procedure) Rules 1969 (SI 1969 No 1092), r 12 (2). *J Murphy and Sons Ltd v Secretary of State for the Environment* .. 26

Material consideration—Cost of development—Whether cost of developing site a material consideration to be taken into account by planning authority when considering application for permission—Town and Country Planning Act 1971, s 29 (1). *J Murphy and Sons Ltd v Secretary of State for the Environment* .. 26

Trees—Preservation order—Prohibition of wilful destruction of trees—Destruction—Meaning—Damage to root system of tree—Damage reducing life expectancy of tree and rendering it less stable—Whether tree destroyed—Town and Country Planning Act 1962, s 29 (1) (a). *Barnet London Borough Council v Eastern Electricity Board* .. 319

	Page
TRACK Licensed track—Bookmakers. <i>See Gaming (Betting—Licensed track).</i>	
TRADE Adventure in the nature of trade. <i>See Income Tax (Trade).</i> Income tax—Adventure in the nature of trade. <i>See Income Tax (Trade).</i>	
TRADE DESCRIPTION Act or default of another person—Commission of offence due to other person's fault—Liability of other person to be charged with offence—Proof of commission of offence necessary to establish liability of other person—False or misleading statements as to services—Statement made recklessly by manager of business—Proprietor of business charged with offence—Proprietor having no knowledge of statement—Proprietor acquitted because of absence of mens rea—Manager also charged on ground that commission of offence due to his default—Whether manager entitled to acquittal if proprietor acquitted—Trade Descriptions Act 1968, ss 14 (1) (b), 23. <i>Coupe v Guyett</i> 1058 Document—Interpretation—False trade description or statement—Statement in document alleged to be false—Meaning of statement—Whether interpretation of document matter for judge or jury. <i>R v Sunair Holidays Ltd</i> 1233 False or misleading statement—Provision of services—False statement as to provision in the course of trade or business of any services—Qualification to provide services—Statement made by person that he is properly qualified to provide services—Whether 'statement . . . as to . . . provision . . . of services'—Trade Descriptions Act 1968, s 14 (1) (i). <i>R v Breeze</i> .. 1141 Promise in regard to future—Prediction as to future facts—Statements incapable of being true or false at time made—Holiday brochure—Brochure issued in winter for following summer season—Brochure stating hotel had swimming pool—Swimming pool being built for summer season—Swimming pool not in fact completed by summer—Need to prove that statement meant hotel had swimming pool at time brochure issued—Trade Descriptions Act 1968, s 14 (1). <i>R v Sunair Holidays Ltd</i> 1233 Statement in the course of any trade or business—Trade or business—Profession—Statement made by professional man in course of providing professional services—Whether 'trade or business' including profession—Trade Descriptions Act 1968, s 14 (1). <i>R v Breeze</i> 1141	
TRADE DISPUTE Picketing—Obstruction of highway—Right of peaceful picketing—Attendance at specified place for purpose of peaceful picketing—Attendance not of itself constituting an offence—Vehicle prevented from entering building site by picketer during building workers' strike—No angry words or violent action occurring during incident—Incident lasting some nine minutes—Whether picketer entitled to obstruct highway for limited period in exercise of his statutory right to attend near the site for the purpose of peaceful picketing—Highways Act 1959, s 121—Industrial Relations Act 1971, s 134 (1), (2). <i>Hunt v Broome</i> 1035	
TRADE UNION Intimidation—Acts done in contemplation or furtherance of an industrial dispute. <i>See Industrial Relations (Industrial dispute).</i> Membership and activities—Rights of workers. <i>See Industrial Relations (Trade union membership and activities).</i>	
TRAVELLING EXPENSES Deduction for assessment to income tax. <i>See Income Tax (Income—Emoluments from office or employment—Expenses).</i>	
TREASURY Currency control. <i>See Currency Control.</i>	
TREE Preservation order. <i>See Town and Country Planning (Trees).</i>	
TRESPASS Conspiracy—Indictable offence. <i>See Criminal Law (Conspiracy—Indictable offence—Scope of offence—Agreement to do unlawful act—Tort—Trespass).</i>	
TRIAL Official referee, before. <i>See Practice (Reference to referee).</i> Place of trial—Chancery proceedings. <i>See Practice (Chancery Division).</i>	
TRIBUNAL Industrial tribunal. <i>See Industrial Tribunal.</i>	
TRUST AND TRUSTEE Implied trust—Beneficial ownership of matrimonial home. <i>See Husband and Wife (Property—Matrimonial home).</i> Power—Intermediate power. <i>See Settlement (Power).</i>	
UNFAIR DISMISSAL <i>See Industrial Relations (Unfair dismissal)</i>	
UNFAIR INDUSTRIAL PRACTICE <i>See Industrial Relations.</i>	
UNINCORPORATED BODY Officer—Fiduciary duty. <i>See Fiduciary Duty.</i>	

UNLAWFUL ASSEMBLY

See Criminal Law.

UNLAWFUL DISCRIMINATION

Race relations. *See Race Relations* (Discrimination).

USE

Change of. *See Town and Country Planning* (Development—Material change of use).

VALUATION

Negligent. *See Negligence* (Duty to take care—Valuer).

VALUE ADDED TAX

Costs—Taxation. *See Costs* (Taxation—Value added tax).

Valuation—Negligence. *See Negligence* (Duty to take care—Value).

VERDICT

Alternative. *See Criminal Law* (Verdict).

VISITOR

Educational establishment—Visitor's jurisdiction. *See Education* (College—Visitor).

WARD OF COURT

Jurisdiction—Custody—Previous order of magistrates—Previous order made under jurisdiction conferred by guardianship of minors legislation—Circumstances in which High Court will make different order under wardship jurisdiction—Exceptional circumstances—Magistrates' court unable to give relief sought—Difficulty of enforcing order where parent having custody living outside jurisdiction of magistrates' court—Refusal of legal aid to parent to prosecute appeal against magistrates' order—Doubts as to validity of order made by magistrates' court.

Re D (minors) (wardship: jurisdiction) 993

Leave—Leave for ward to go out of jurisdiction—Leave for temporary visits abroad—Power to give general leave for such visits—Order giving general leave—Conditions attached to it—Certificate of compliance with conditions. **Practice Direction**.. .. . 512

WATER AND WATERCOURSES

British Waterways Board—Negligence—Exclusion of liability—Statutory duty to have regard to safety of operations in provision of services and facilities. *See Negligence* (Defence—Exclusion of liability—Statutory board).

WIDOW

Damages—Fatal accident. *See Fatal Accident* (Damages—Assessment).

WIFE

Financial provision—Divorce. *See Divorce* (Financial provision).

Matrimonial home—Beneficial interest in. *See Husband and Wife* (Property—Matrimonial home).

WILL

Gift—Personal chattels—Articles of personal use—Collection of clocks—Collection inherited by testator—Collection maintained by testator but not added to—Clocks kept in locked rooms and not in working order—Whether clocks articles of personal use—Administration of Estates Act 1925, s 55 (1) (x). **Re Crispin's Will Trusts**.. .. . 141

WINDING-UP

Company, of. *See Company*.

WITNESS

Infirmary—Inability to attend trial—Adjournment of trial to place where witness lives—Chancery proceedings. *See Practice* (Chancery Division—Place of trial—Adjournment of trial—Adjournment to such place as court thinks fit—Witness—Examination).

List—Chancery Division. *See Practice* (Chancery Division—Lists—Witness list).

WORK AND LABOUR

Industrial relations. *See Industrial Relations*.

WRONGFUL DISMISSAL

Damages—Measure. *See Damages* (Measure of damages—Wrongful dismissal).

Cases noted

	Page
A B (an infant), Re ([1954] 2 All ER 287, [1954] 2 QB 385, [1954] 3 WLR 1). Applied in Race Relations Board v Applin	1190
Abrahams' Will Trusts, Re, Caplan v Abrahams ([1967] 2 All ER 1175, [1969] 1 Ch 463, [1967] 3 WLR 1198). Applied in Re Manisty's Settlement	1203
Allan (J M) (Merchandising) Ltd v Cloke ([1963] 2 All ER 261, [1963] 2 QB 348, [1963] 2 WLR 903). Dictum of Lord Denning MR applied in Ashmore, Benson, Pease & Co Ltd v A V Dawson Ltd	856
Anderson Ltd v Daniel ([1924] 1 KB 149, 93 LJKB 105, 130 LT 427). Dictum of Atkin LJ applied in Ashmore, Benson, Pease & Co Ltd v A V Dawson Ltd	856
Arenson v Arenson ([1972] 2 All ER 939, [1972] 1 WLR 1196). Affirmed CA	235
Armstrong Whitworth Rolls Ltd v Mustard ([1971] 1 All ER 598). Distinguished in Tarmac Roadstone Holdings Ltd v Peacock	485
Atlantic Star, The ([1972] 3 All ER 705, [1972] 3 WLR 746). Reversed HL	175
Attorney-General v Manchester Corpn ([1930] All ER Rep 653, [1931] 1 Ch 254, 100 LJCh 33, 144 LT 112). Applied in Dowty Boulton Paul Ltd v Wolverhampton Corporation (No 2)	491
Attorney-General v Teddington Urban District Council ([1998] 1 Ch 66, 67 LJCh 23, 77 LT 426). Considered in Dowty Boulton Paul Ltd v Wolverhampton Corporation (No 2)	491
B v B ([1971] 3 All ER 682, [1971] 1 WLR 1486). Applied in M v M	81
B (M F) (an infant), Re ([1972] 1 All ER 900, [1972] 1 WLR 104). Dictum of Salmon LJ followed in Re J (a minor) (adoption order: conditions)	410
B and B Viennese Fashions v Losane ([1952] 1 All ER 913). Dictum of Jenkins LJ applied in Ashmore, Benson, Pease & Co Ltd v A V Dawson Ltd	856
Baden's Deed Trusts (No 2), Re, Baden v Smith ([1971] 3 All ER 985, [1972] Ch 607, [1971] 3 WLR 475). Applied in Re Manisty's Settlement	1203
Beckett v Cohen ([1973] 1 All ER 120, [1972] 1 WLR 1593). Applied in R v Sunair Holidays Ltd	1233
Belling (deceased), Re, London Borough of Enfield v Public Trustee ([1967] 1 All ER 105, [1967] Ch 425, [1967] 2 WLR 382). Applied in Hauxwell v Barton-upon-Humber Urban District Council	1022
Bennett v Tugwell (an infant) ([1971] 2 All ER 248, [1971] 2 QB 267, [1971] 2 WLR 847). Distinguished in Burnett v British Waterways Board	631
Bevan v Webb ([1905] 1 Ch 620, 74 LJCh 300, 93 LT 298). Applied in Brenner v Rose	535
Birch v Thomas ([1972] 1 All ER 905, [1972] 1 WLR 294). Distinguished in Burnett v British Waterways Board	631
Birmingham Citizens Permanent Building Society v Caunt ([1962] 1 All ER 163, [1962] Ch 883, [1962] 2 WLR 323). Applied in Halifax Building Society v Clark	33
Bosley v Long ([1970] 3 All ER 288, [1970] 1 WLR 1413). Dictum of Cooke J applied in Bourlet v Porter	800
Bostels Ltd, Re ([1967] 3 All ER 425, [1968] Ch 346, [1967] 3 WLR 1359). Applied in Re Castle, Coulson & MacDonald Ltd	814
Braddock v Tillotsons Newspapers Ltd ([1949] 2 All ER 311, [1950] 1 KB 53). Dictum of Tucker LJ considered in McCann v Sheppard	881
Brangwynne v Evans ([1962] 1 All ER 446, [1962] 1 WLR 267). Applied in Aldus v Watson	1018
Brindle v H W Smith (Cabinets) Ltd ([1973] 1 All ER 230, [1972] 1 WLR 1653). Distinguished in Lees v Arthur Greaves (Lees) Ltd	21
Brunner v Moore ([1904] 1 Ch 305, 73 LJCh 377, 89 LT 738). Distinguished in Holwell Securities Ltd v Hughes	476
Brunner v Greenslade ([1970] 3 All ER 833, [1971] 1 Ch 993, [1970] 3 WLR 891). Approved in Texaco Antilles Ltd v Kernochan	118
Buckpiitt v Oates ([1968] 1 All ER 1145). Distinguished in Burnett v British Waterways Board	631
Burnand v Rodocanachi ((1882) 7 App Cas 339, 51 LJQB 552, 47 LT 279). Dictum of Lord Blackburn applied in Morris v Ford Motor Co Ltd	1084
Burnett v British Waterways Board ([1972] 2 All ER 1353, [1972] 1 WLR 1329). Affirmed CA	631
Button v Director of Public Prosecutions ([1965] 3 All ER 587, [1966] AC 591, [1965] 3 WLR 1131). Applied in Kamara v Director of Public Prosecutions	1242
Cameron (decd), Re, Kingsley v Inland Revenue Comrs ([1965] 3 All ER 474, [1967] Ch 1, [1966] 2 WLR 243). Distinguished in Murphy v Ingram (Inspector of Taxes)	523
Castellain v Preston ([1881-85] All ER Rep 493, (1883) 11 QBD 380, 52 LJQB 366, 49 LT 29). Considered in L Lucas Ltd v Export Credits Guarantee Department	984
— ([1881-85] All ER Rep 498, (1883) 11 QBD 393, 403, 404, 52 LJQB 373, 378, 49 LT 32, 34). Dicta of Cotton and Bowen LJ applied in Morris v Ford Motor Co Ltd	1084
Chambers v Goldthorpe, Restell v Nye ([1900-3] All ER Rep 969, [1901] 1 KB 624, 70 LJKB 482, 84 LT 444). Applied in Arenson v Arenson	235
— ([1900-3] All ER Rep 969, [1901] 1 KB 624, 70 LJKB 482, 84 LT 444). Applied in Sutcliffe v Thackrah	1047
Chapman v Goonvean & Rostowrack China Clay Co Ltd ([1973] 1 All ER 218, [1972] 1 WLR 1634). Affirmed CA	1063
Charter v Race Relations Board ([1973] 1 All ER 512, [1973] 2 WLR 299). Applied in Race Relations Board v Applin	1190
Clarke v Martlew ([1972] 3 All ER 764, [1973] 1 QB 58, [1972] 3 WLR 653). Applied in McGinley v Burke	1010
Clay (Charles) & Sons Ltd v British Railways Board ([1971] 1 All ER 1007, [1971] Ch 725, [1971] 2 WLR 625). Applied and distinguished in Centaploy Ltd v Matlodge Ltd	720
Clinch v Inland Revenue Comrs ([1973] 1 All ER 977, [1973] STC 155, [1973] 2 WLR 862). Applied in Wilover Nominees Ltd v Inland Revenue Comrs	977

	Page
Collins's Settlement Trusts, Re ([1971] 1 All ER 283, [1971] 1 WLR 37). Distinguished in Re Crispin's Will Trusts	141
Compagnie d'Armement Maritime SA v Compagnie Tunisienne de Navigation SA ([1970] 3 All ER 89, [1971] AC 600, [1970] 3 WLR 408). Dictum of Lord Wilberforce considered in Halfdan Grieg & Co A/S v Sterling Coal & Navigation Corp	1073
Corstar (Owners) v Eurymedon (Owners), The Eurymedon ([1938] 1 All ER 122, [1938] P 41, 107 LJP 81, 158 LT 445). Applied in Rouse v Squires.	903
Cory Lighterage Ltd v Transport and General Workers Union (p 341, post). Affirmed on other grounds CA	558
Craythorne v Swinburne ([1803-13] All ER Rep 183). Dictum of Lord Eldon LC explained in Morris v Ford Motor Co Ltd	1084
Crompton (Alfred) Amusement Machines Ltd v Comrs of Customs and Excise (No 2) ([1972] 2 All ER 353, [1972] 2 QB 102, [1972] 2 WLR 835). Affirmed on different grounds HL.	1169
Cummings v Birkenhead Corp ([1971] 2 All ER 881, [1972] Ch 12, [1971] 2 WLR 1458). Applied in Herring v Templeman	581
Davy v Garrett ((1878) 7 Ch D 483, 47 LJCh 224, 38 LT 81). Dictum of James LJ applied in Re W R Willcocks & Co Ltd.	93
Des Salles d'Epinoix v Des Salles d'Epinoix ([1967] 2 All ER 539, [1967] 1 WLR 553). Distinguished in McGibbon v McGibbon	836
Dismore v Milton ([1938] 3 All ER 762, 159 LT 381). Not followed in Riches v Director of Public Prosecutions	935
Dowty Boulton Paul Ltd v Wolverhampton Corp (No 2) ([1972] 2 All ER 1073, [1973] Ch 94). Affirmed CA	491
Dredger Liesbosch (Owners) v Steamship Edison (Owners) ([1933] All ER Rep 144, [1933] AC 449, 102 LJP 73, 149 LT 49). Distinguished in Martindale v Duncan	355
Dymond v Pearce ([1972] 1 All ER 1142, [1972] 1 QB 496, [1972] 2 WLR 633). Distinguished in Rouse v Squires	903
Eaglehill Ltd v J Needham Builders Ltd ([1972] 3 All ER 905, [1972] 3 WLR 800). Dictum of Lord Cross of Chelsea applied in Cripps (Pharmaceuticals) Ltd v Wickenden	606
Edkins v Knowles (p 503, post). Applied in R v Bates.	509
Elliston v Reacher ([1908-10] All ER Rep 615, [1908] 2 Ch 673, 78 LJCh 93, 99 LT 703). Dictum of Cozens-Hardy MR applied in Texaco Antilles Ltd v Kernochan.	118
Finnegan v Allen ([1943] 1 All ER 493, [1943] KB 425, 112 LJKB 323, 168 LT 316). Applied in Arenson v Arenson	235
G (D M) (an infant), Re ([1962] 2 All ER 550, [1962] 1 WLR 736). Dictum of Pennycuik J followed in Re J (a minor) (adoption order: conditions).	410
G (T J) (an infant), Re ([1963] 1 All ER 23, 31, [1963] 2 QB 88, 89, 102, [1963] 2 WLR 74, 86). Dicta of Ormerod and Pearson LJ considered in Re J (a minor) (adoption order: conditions).	410
Gestetner (decd), Re, Barnett v Blumka ([1953] 1 All ER 1150, [1953] Ch 672, [1953] 2 WLR 1033). Applied in Re Manisty's Settlement.	1203
Glasier v Rolls ((1889) 59 LJCh 63, 62 LT 305). Distinguished in Ford-Hunt v Raghbir Singh.	700
Griffiths v Young ([1970] 3 All ER 601, [1970] Ch 675, [1970] 3 WLR 246). Applied in Law v Jones	437
Gulbenkian's Settlement Trusts, Re, Whishaw v Stephens ([1968] 3 All ER 785, [1970] AC 508, [1968] 3 WLR 1127). Applied in Re Manisty's Settlement	1203
H (G J) (an infant), Re ([1966] 1 All ER 952, [1966] 1 WLR 706). Applied in Re D (minors).	993
Halfdan Grieg & Co A/S v Sterling Coal & Navigation Corp ([1973] 1 All ER 545, [1973] 2 WLR 237). Reversed CA	1073
Hall v Hall ([1971] 1 All ER 762, [1971] 1 WLR 404). Applied in Phillips v Phillips	423
Hand v Blow ([1901] 2 Ch 737, 70 LJCh 693, 85 LT 157). Dictum of Romer LJ applied in Brenner v Rose	535
Harvey v Road Haulage Executive ([1952] 1 KB 120). Applied in Rouse v Squires	903
Hedley Byrne & Co Ltd v Heller & Partners Ltd ([1963] 2 All ER 575, [1964] AC 465, [1963] 3 WLR 101). Considered in Arenson v Arenson	235
Henthorn v Fraser ([1891-94] All ER Rep 908, [1892] 2 Ch 27, 61 LJCh 373, 66 LT 439). Distinguished in Holwell Securities Ltd v Hughes	476
Household Fire and Carriage Accident Insurance Co Ltd v Grant ((1879) 4 ExD 216, 48 LJQB 577, 41 LT 298). Distinguished in Holwell Securities Ltd v Hughes	476
Hughes v Pump House Hotel Co Ltd (No 2) ([1902] KB 485, 71 LJKB 803, 87 LT 359). Applied in Hauxwell v Barton-upon-Humber Urban District Council	1022
Hutton v Esher Urban District Council ([1972] 3 All ER 504, [1972] Ch 515, [1972] 3 WLR 62). Reversed CA	1123
Imperial Land Co of Marseilles, Re ((1872) 7 Ch App 587, 41 LJCh 621, 26 LT 781). Distinguished in Holwell Securities Ltd v Hughes	476
Inland Revenue Comr v Europa Oil (NZ) Ltd ([1971] AC 760, [1971] 2 WLR 55). Applied in Ransom (Inspector of Taxes) v Higgs	657
Jenkins v Betham ((1855) 24 LJCP 94, 24 LTOS 272). Distinguished in Arenson v Arenson.	235
Jones v Great Central Railway Co ([1910] AC 4, 79 LJKB 191, 100 LT 710). Applied in Alfred Crompton Amusement Machines Ltd v Comrs of Customs and Excise (No 2).	1169
K (K J S) (an infant), Re ([1966] 3 All ER 154, [1966] 1 WLR 1241). Applied in Re D (minors)	993
Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd ([1970] 2 All ER 893, [1971] AC 882, [1970] 3 WLR 311, 312). Dictum of Lord Diplock applied in Grimes v London Borough of Sutton	448
L (infants), Re ([1962] 3 All ER 1, [1962] 1 WLR 886). Explained in Re D (minors)	993
Lace v Chandler ([1944] 1 All ER 305, [1944] KB 368, 113 LJKB 282, 170 LT 185). Distinguished in Centaploy Ltd v Matlodge Ltd	720
Lawrence v South County Freeholds Ltd ([1939] 2 All ER 524, [1939] Ch 683, 108 LJCh 248, 161 LT 20). Dictum of Simonds J applied in Texaco Antilles Ltd v Kernochan	118
Leitch v Emmott ([1929] All ER Rep 638, [1929] 2 KB 236, 98 LJKB 673, 141 LT 311). Distinguished in Murphy v Ingram (Inspector of Taxes)	523

Logan v Bank of Scotland (No 2) ([1904-7] All ER Rep 443, [1906] 1 KB 150, 75 LJKB 223, 94 LT 156). Dictum of Sir Gorell Barnes P explained and applied in <i>The Atlantic Star</i>	Page 175
McHenry v Lewis ((1882) 22 Ch D 407, 408, 52 LJCh 330, 47 LT 555). Dictum of Bowen LJ explained and applied in <i>The Atlantic Star</i>	175
McPhail v Doulton ([1970] 2 All ER 228, [1971] AC 424, [1970] 2 WLR 1110). Applied in <i>Re Manisty's Settlement</i>	1203
Marriott v Oxford and District Co-operative Society Ltd ([1969] 3 All ER 1128, [1970] 1 QB 191, 192, [1969] 3 WLR 988). Dicta of Lord Denning MR considered in <i>Shields Furniture Ltd v Goff</i>	653
Mayor, Aldermen and Citizens of the City of Wakefield v Cooke ([1900-3] All ER Rep 791, [1904] AC 31, 73 LJKB 88, 89 LT 707). Applied in <i>Armstrong v Whitfield</i>	546
Meek v Powell ([1952] 1 All ER 347, [1952] 1 KB 164). Applied in <i>Garfield v Maddocks</i>	329
Miller (James) & Partners Ltd v Whitworth Street Estates (Manchester) Ltd ([1970] 1 All ER 796, [1970] AC 583, [1970] 2 WLR 728). Applied in <i>L Schuler A G v Wickman Machine Tool Sales Ltd</i>	39
Moore v Shelley ((1883) 8 App Cas 293, 52 LJPC 39, 48 LT 920, 921). Dictum of Sir Barnes Peacock applied in <i>Cripps (Pharmaceuticals) Ltd v Wickenden</i>	606
Mouncer v Mouncer ([1972] 1 All ER 289, [1972] 1 WLR 321). Distinguished in <i>Fuller (otherwise Penfold) v Fuller</i>	650
Mulcahy v R ((1868) LR 3 HL 317). Dictum of Willes J explained in <i>Kamara v Director of Public Prosecutions</i>	1242
Mulholland v Mitchell ([1971] 1 All ER 313, [1971] AC 679, 680, [1971] 2 WLR 101, 102). Dictum of Lord Wilberforce applied in <i>McCann v Sheppard</i>	881
Nettleship v Weston ([1971] 3 All ER 587, [1971] 2 QB 701, [1971] 3 WLR 377). Dictum of Lord Denning MR applied in <i>Burnett v British Waterways Board</i>	631
Northampton Coal, Iron and Waggon Co v Midland Waggon Co ((1878) 7 Ch D 503, 504, 38 LT 83). Dictum of James LJ not followed in <i>Sir Lindsay Parkinson & Co Ltd v Triplan Ltd</i>	273
Norton Tool Co Ltd v Tewson ([1973] 1 All ER 183, [1973] 1 WLR 45). Applied in <i>Morrish v Henlys (Folkestone) Ltd</i>	137
Norwich Pharmacal Co v Comrs of Customs and Excise (p 943, post). Distinguished in <i>Alfred Crompton Amusement Machines Ltd v Comrs of Customs and Excise (No 2)</i>	1169
— [1972] 3 All ER 813, [1972] 3 WLR 870). Reversed HL	943
Nuttall and Lynton and Barnstaple Railway Co, Re ((1899) 82 LT 17). Considered in <i>Halfdan Grieg & Co A/S v Sterling Coal & Navigation Corp.</i>	1073
O'Connell v Jackson ([1971] 3 All ER 129, [1972] 1 QB 270, [1971] 3 WLR 463). Applied in <i>Paster-nack v Poulton</i>	74
Ogden v London Electric Railway Co ([1933] All ER Rep 896, 149 LT 476). Distinguished in <i>Alfred Crompton Amusement Machines Ltd v Comrs of Customs and Excise (No 2)</i>	1169
Orr v Diaper ((1876) 4 Ch D 92, 46 LJCh 41, 35 LT 468). Applied in <i>Norwich Pharmacal Co v Comrs of Customs and Excise</i>	943
Osborne v London and North Western Railway Co ((1888) 21 QBD 223, 224, 57 LJQB 619, 59 LT 227). Dictum of Wills J applied in <i>Burnett v British Waterways Board</i>	631
Osenton (Charles) & Co v Johnston ([1941] 2 All ER 245, [1942] AC 130, 110 LJKB 420, 165 LT 235). Applied in <i>Simplicity Products Co (a firm) v Domestic Installations Co Ltd</i>	619
P (infants), Re ([1967] 2 All ER 229, [1967] 1 WLR 818). Applied in <i>Re D (minors)</i>	993
P (A J) (An Infant), Re ([1968] 1 WLR 1976). Applied in <i>Re D (minors)</i>	993
P (L M) (otherwise E) v P (G E) ([1970] 3 All ER 662, [1970] 1 WLR 1473). Dictum of Sachs LJ applied in <i>Nash v Nash</i>	704
Pappa v Rose ((1871) LR 7 CP 32, 41 LJCP 11, 25 LT 466). Applied in <i>Arenson v Arenson</i>	235
Park, Re, Public Trustee v Armstrong ([1931] All ER Rep 633, [1932] 1 Ch 580, 101 LJCh 295, 147 LT 118). Applied in <i>Re Manisty's Settlement</i>	1203
Parry v Cleaver ([1969] 1 All ER 555, [1970] AC 1, [1969] 2 WLR 821). Applied in <i>Stocks v Magna Merchants Ltd</i>	329
Parsons v BNM Laboratories Ltd ([1963] 2 All ER 658, [1964] 1 QB 95, [1963] 2 WLR 1273). Applied in <i>Stocks v Magna Merchants Ltd</i>	329
Pegler v Railway Executive ([1948] 1 All ER 562, [1948] AC 338, [1948] LJLR 942). Dictum of Lord Uthwatt applied in <i>Grimes v London Borough of Sutton</i>	448
Peruvian Guano Co v Bockwoldt ((1883) 23 Ch D 233, 52 LJCh 716, 717, 48 LT 11). Dictum of Bowen LJ explained and applied in <i>The Atlantic Star</i>	175
Pinner v Everett ([1969] 3 All ER 257, [1969] 1 WLR 1266). Applied in <i>Edkins v Knowles</i>	503
Povey v Povey ([1970] 3 All ER 617, 624, 625, [1972] Fam 48, 56, 57, [1971] 2 WLR 386, 393, 394). Dicta of Sir Jocelyn Simon P, and of Ormrod J doubted in <i>Lewis v Averay (No 2)</i>	229
Price v Romilly ([1960] 3 All ER 432, [1960] 1 WLR 1363). Dictum of Diplock J approved in <i>Stoneman v Brown</i>	225
Pure Spirit Co v Fowler ((1890) 25 QBD 237, 59 LJQB 538, 63 LT 560). Dictum of Denman J not followed in <i>Sir Lindsay Parkinson & Co Ltd v Triplan Ltd</i>	273
R v Bathurst ([1968] 1 All ER 1178, 1179, [1968] 2 QB 107, 108, [1968] 2 WLR 1097, 1098). Dictum of Lord Parker CJ applied in <i>R v Sparrow</i>	129
R v Dunsheath, ex parte Meredith ([1950] 2 All ER 741, [1951] 1 KB 127). Applied in <i>Herring v Templeman</i>	581
R v Fazackerley (p 819, post, [1973] 1 WLR 632). Not followed in <i>R v Turner</i>	828
R v Fisher ([1969] 1 All ER 265, [1969] 2 QB 114, [1969] 2 WLR 453). Distinguished in <i>R v Hodgson</i>	552
R v Governor of Pentonville Prison, ex parte Azam (p 741, post, [1973] 2 WLR 949). Affirmed HL	765
R v Governor of Pentonville Prison, ex parte Tzu-Tsai Cheng ([1973] 1 All ER 935). Affirmed HL	204
R v Jones (E J M) ([1970] 1 All ER 212, [1970] 1 WLR 215). Dictum of Sachs LJ applied in <i>R v Bates</i>	509
R v Kamara ([1972] 3 All ER 999, [1973] 2 WLR 126). Affirmed on different grounds HL	1242
R v Kelly ([1970] 2 All ER 198, [1970] 1 WLR 1050). Disapproved in <i>R v Bates</i>	509

	Page
R v Locker ([1971] 2 All ER 875, [1971] 2 QB 321, [1971] 2 WLR 1302). Distinguished in R v Fazackerley	819
— Followed in R v Turner	828
R v Mochan ([1969] 1 WLR 1332). Dictum of Cusack J disapproved in R v Hodgson	552
R v Page ([1971] 2 All ER 870, [1971] 2 QB 330, [1971] 2 WLR 1308). Applied in R v Fazackerley	819
— Distinguished in R v Turner	828
R v Percy Dalton (London) Ltd ([1949] LJLR 1626). Applied in R v Smith (Roger Daniel)	896
R v Rhodes ([1899] 1 QB 83, 84, 68 LJQB 86, 79 LT 361, 362). Dictum of Lord Russell of Killowen CJ applied in R v Sparrow	129
R v Sharp ([1957] 1 All ER 580 [1957] 1 QB 561, [1957] 2 WLR 476). Dictum of Lord Goddard CJ disapproved in Taylor v Director of Public Prosecutions	1108
R v Taylor (Vincent) ([1973] 1 All ER 78, [1972] 3 WLR 961). Affirmed HL	1108
Ransom (Inspector of Taxes) v Higgs ([1972] 2 All ER 817). Varied in part, affirmed in part CA	657
Reardon Smith Line Ltd v Ministry of Agriculture, Fisheries and Food ([1961] 2 All ER 577, [1962] 1 QB 42, [1961] 3 WLR 110). Distinguished in The Angelia	144
Reynolds' Will Trusts, Re ([1965] 3 All ER 686, [1966] 1 WLR 19). Distinguished in Re Crispin's Will Trusts	141
Rica Gold Washing Co, Re ([1879] 11 Ch D 36, 40 LT 531). Distinguished in Re W R Willcocks & Co Ltd	93
Ricketts v Colquhoun (Inspector of Taxes) ([1926] AC 1, 95 LJB 82, 134 LT 106). Applied in Taylor v Provan (Inspector of Taxes).	65
Rogers v Dodd ([1968] 2 All ER 22, [1968] 1 WLR 548). Applied in Frank Bucknell & Son Ltd v London Borough of Croydon	165
Rookes v Barnard ([1964] 1 All ER 367, [1964] AC 1129, [1964] 2 WLR 269). Considered in Cory Lighterage Ltd v Transport and General Workers Union	341
S v S and P ([1962] 2 All ER 3, 4, [1962] 1 WLR 448, 449). Dictum of Willmer LJ explained in M v M St Pierre v South American Stores (Gath & Chaves) Ltd ([1935] All ER Rep 414, [1936] 1 KB 398, 105 LJKB 443, 154 LT 549, 550). Dictum of Scott LJ explained and applied in The Atlantic Star	175
Sakhija v Allen ([1972] 2 All ER 311, [1973] AC 152, [1972] 2 WLR 1116). Considered in Edkins v Knowles	503
Schtraks v Government of Israel ([1962] 3 All ER 540, [1964] AC 591, [1962] 3 WLR 1032, 1033). Dictum of Viscount Radcliffe applied in Tzu-Tsai Cheng v Governor of Pentonville Prison	204
Scowby, Re, Scowby v Scowby ([1897] 1 Ch 741, 66 LJCh 327, 76 LT 363). Applied in Ford-Hunt v Raghbir Singh	700
Seabrook v British Transport Commission ([1959] 2 All ER 15, [1959] 1 WLR 509). Distinguished in Alfred Crompton Amusement Machines Ltd v Comrs of Customs and Excise (No 2)	1169
Sheldon v Bromfield Justices ([1964] 2 All ER 131, [1964] 2 QB 573, [1964] 2 WLR 1066). Distinguished in R v Woking Justices, ex parte Gossage	621
Simpson v Thomson ([1877] 3 App Cas 284, 38 LT 2). Dictum of Lord Cairns LC applied in Morris v Ford Motor Co Ltd	1084
Steamship 'Induna' Co Ltd v British Phosphate Comrs, The Loch Dee ([1949] 1 All ER 522, [1949] 2 KB 430, [1949] LJLR 1058). Distinguished in The Angelia	144
Stevenson v Watson ([1879] 4 CPD 148, 48 LJQB 318, 40 LT 485). Applied in Arenson v Arenson T (otherwise H) (an infant), Re ([1962] 3 All ER 972, [1963] Ch 241, 242, [1962] 3 WLR 1480). Dictum of Buckley J explained in Y v Y (child: surname)	574
Taylor v Provan (Inspector of Taxes) ([1972] 2 All ER 930, [1972] 1 WLR 1459). Reversed CA	65
Tharsis Sulphur and Copper Co v Loftus ([1872] LR 8 CP 1, 42 LJCP 6, 27 LT 549). Applied in Arenson v Arenson	235
Thorne v University of London ([1966] 2 All ER 338, [1966] 2 QB 237, [1966] 2 WLR 1080). Applied in Herring v Templeman	581
Trippas v Trippas (p 1, post, [1973] 2 WLR 585). Applied in Harnett v Harnett	593
Trow v Ind Coope (West Midlands) Ltd ([1967] 2 All ER 900, [1967] 1 QB 899, [1967] 3 WLR 633). Applied in Hammond v Haigh Castle & Co Ltd	289
— ([1967] 2 All ER 908, 909, [1967] 2 QB 921, 923, [1967] 3 WLR 643, 645). Dicta of Harman and Salmon LJ applied in Heath v J F Longman (Meat Salesmen) Ltd	1228
Tumahole Bereng v R ([1949] AC 270, [1949] LJLR 1609). Dictum of Lord MacDermott followed in R v Chapman	624
Tynan v Balmer ([1966] 2 All ER 137, [1967] 1 QB 107, [1966] 2 WLR 1194). Dictum of Lord Parker CJ applied in Hunt v Broome	1035
Universal Cargo Carriers Corp v Citati ([1957] 2 All ER 83, [1957] 2 QB 435, [1957] 2 WLR 729). Dictum of Devlin J disapproved in The Angelia	144
Upmann v Elkan ([1871] LR 12 Eq 145). Dictum of Lord Romilly MR applied in Norwich Pharmacal Co v Comrs of Customs and Excise	943
— ([1871] 7 Ch App 133, 41 LJCh 247, 25 LT 813). Dictum of Lord Hatherley LC applied in Norwich Pharmacal Co v Comrs of Customs and Excise	943
Wachtel v Wachtel ([1973] 1 All ER 829, [1973] 2 WLR 366). Applied in Harnett v Harnett	593
Walsh v Lonsdale ([1882] 21 Ch D 9, 52 LJCh 2, 46 LT 858). Distinguished in Warmington v Miller	372
Watcham v Attorney-General of East Africa Protectorate ([1918-19] All ER Rep 455, [1919] AC 533, 87 LJPC 150, 120 LT 258). Distinguished and doubted in L Schuler A G v Wickman Machine Tool Sales Ltd	39
Waugh v R ([1950] AC 211). Dictum of Lord Oaksey explained in R v Sparrow	129
Wellington Corp v Lower Hutt Corp ([1904] AC 775, 776, 73 LJPC 81, 91 LT 540). Dictum of Sir Arthur Wilson applied in English Clays Lovering Pochin & Co Ltd v Plymouth Corp	730
Wickman Machine Tool Sales Ltd v L Schuler A G ([1972] 2 All ER 1173, [1972] 1 WLR 840). Affirmed HL	39
Wilkes v Gee ([1973] 1 All ER 226, [1973] 1 WLR 111). Affirmed CA	1214
Willmott v Barber ([1880] 15 Ch D 96, 49 LJCh 792, 43 LT 95). Applied in Warmington v Miller	372

	Page
Windsor Refrigerator Co Ltd v Branch Nominees Ltd ([1961] 1 All ER 277, [1961] Ch 375, [1961] 2 WLR 196). Applied in Cripps (Pharmaceuticals) Ltd v Wickenden	606
Winstone v Winstone ([1959] 3 All ER 580, [1960] P 28, [1959] 3 WLR 660). Distinguished and doubted in McGibbon v McGibbon	836
Wright v Nicholson ([1970] 1 All ER 14, [1970] 1 WLR 146). Dicta of Lord Parker CJ explained in Garfield v Maddocks	303
Yorkshire Insurance Co Ltd v Nisbet Shipping Co Ltd ([1961] 2 All ER 487, [1962] 2 QB 330, [1961] 2 WLR 1043). Considered in L Lucas Ltd v Export Credits Guarantee Department	984

Statutes, etc, noted

	Page
Public General Statutes	
Administration of Estates Act 1925, s 55 (1) (x)	141
Administration of Justice Act 1970—	
s 31	454
s 36 (1), (2)	33
Adoption Act 1958, s 7 (3)	410
Agricultural Holdings Act 1948, s 24 (2) (d)	225
Arbitration Act 1950, s 21 (1)	1073
Betting, Gaming and Lotteries Act 1963, s 18 (1), (2)	324
Charities Act 1960—	
s 18 (11), (12)	108
s 28	1022
Commonwealth Immigrants Act 1962, ss 4, 4A, as added by the Commonwealth Immigrants Act 1968, s 3	741, 765
Companies Act 1948, s 447	273
Contracts of Employment Act 1963, Sch 2, para 1 (1), (2)	485
Contracts of Employment Act 1972, s 8 (8)	448
County Courts Act 1959, s 43	1131
Courts Act 1971—	
s 10 (5)	234
ss 20 (3), 23	288
Criminal Appeal Act 1968—	
ss 2 (1) proviso, 3 (1)	1145
s 24 (1), (3), as amended by the Criminal Justice Act 1972, s 39, Sch 3	1221
Criminal Justice Act 1967—	
s 9	893
s 26 (2)	717
s 40 (1) (c)	1200
Criminal Law Act 1967, s 6 (3)	552
Customs and Excise Act 1952—	
s 44	1149, 1161
ss 45, 56, 79	1161
ss 275, 290 (2) (b), Sch 7	1149
s 304	1161
Divorce Reform Act 1969—	
s 2 (1) (e), (5)	650
s 6 (2)	17
Education Act 1944, s 68	581
Exchange Control Act 1947, Sch 5, Part I, para 1 (1), Part II, para 1 (1)	540
Extradition Act 1870, s 3 (1)	204
Finance Act 1965, s 78 (2), (4), as amended by the Finance Act 1966, s 27, Sch 5, para 10 (1)	513
Finance Act 1972, s 19 (2)	464
Guardianship of Minors Act 1971, ss 1, 9 (1)	993
Highways Act 1959, s 121	1035
Immigration Act 1971, ss 1 (2), 4 (2), 16, 33 (1), (2), 34 (1) (a), Sch 2, paras 9, 16 (2)	741, 765
Income and Corporation Taxes Act 1970—	
s 453	977
ss 460 (1), 467 (1)	379
Income Tax Act 1952—	
s 123 (1) (Sch D, Case I)	657, 785
(Case III)	637
s 137 (a)	657
s 148	637, 657
ss 156 (Sch E), 160 (1)	65
ss 212 (4) (as substituted by the Finance Act 1963, s 13), 354 (1)	523
s 524 (1)	637
s 526 (1)	657, 785
Sch 9, para 7	65
Industrial Relations Act 1971—	
s 5 (2), (b), (4)	709
s 22 (1)	21
s 23 (2), (3)	21, 299
s 24 (1), (2), (6)	294
s 26 (1)	1228
s 33 (3)	341
(a), 101 (1) (c)	430
s 105 (1)	430
s 116 (3)	137
s 132 (1), (2)	558
(a)	341
s 134 (1), (2)	1035
s 146 (6)	868
s 167 (1)	558
Sch 6, para 5 (1)	1013

Interpretation Act 1889, s 3	Page
Intestates Estates Act 1884, s 5	1123
Land Registration Act 1925, ss 70 (1) (g), 82 (3) (c)	1136
Landlord and Tenant Act 1927, s 18 (1)	465
Late Night Refreshment Houses Act 1969, s 1	1117
Law of Property Act 1925—	165
s 40 (1)	437
s 172 (1), (3)	359
s 196	476
Law Reform (Miscellaneous Provisions) Act 1971, s 4 (1)	846
Legal Aid Act 1965, s 1 (1), (2)	229
Local Government Act 1933—	
s 163 (1)	491
s 165	1022
Magistrates' Courts Act 1952, s 14 (3)	717
Married Women's Property Act 1882, s 17	1042, 1187
Matrimonial Causes Act 1965, s 2	836
Matrimonial Causes Act 1967, s 10 (1)	836
Matrimonial Proceedings and Property Act 1970—	
s 2	1187
(1) (c)	1
s 4	1187
s 5 (1)	593
(g)	1
s 7 (4)	395
s 37	593, 1042
Ministry of Social Security Act 1966, Sch 2, paras 4, 12	461
Murder (Abolition of Death Penalty) Act 1965, s 1 (2)	401
National Parks and Access to the Countryside Act 1949, s 31 (1)	546
Official Secrets Act 1920, s 7	89
Public Health Act 1936, s 15 (1)	1123
Public Order Act 1936, s 5, as substituted by the Race Relations Act 1965, s 7	303
Race Relations Act 1968, ss 1 (1), 2 (1), 12	1190
Redundancy Payments Act 1965—	
s 1 (2) (b)	1063
s 4 (1), (2)	299
s 9 (2) (b)	294
Rent Act 1968, s 1, as amended by Counter-Inflation Act 1973, s 14	336
Road Safety Act 1967—	
s 1 (1)	10
s 2 (1)	503, 509
(7)	800
s 3 (2)	800
(3)	831
Road Traffic Act 1962, s 5 (1)	10
Sale of Goods Act 1893, s 22 (1)	97
Sexual Offences Act 1956, s 14 (1), (2)	552
Solicitors Act 1957, s 64, proviso (a)	877
Supreme Court of Judicature (Consolidation) Act 1925—	
s 57	233
s 225	836
Theft Act 1968—	
ss 1 (1), 3 (1)	782
ss 11 (1), (2)	872
s 12 (1)	864
s 16 (1)	819
(2) (a)	819, 828
s 22 (1)	782
Town and Country Planning Act 1962, s 29 (1) (a)	319
Town and Country Planning Act 1971, s 29 (1)	26
Trade Descriptions Act 1968—	
s 14 (1)	1233
(i)	1141
(b)	1058
s 23	1058
Transport Act 1962, ss 10 (1), 43 (3)	632
Transport Act 1968, ss 96 (1), (3) (a), 103 (1)	309

Commonwealth and Other Territories

Public Meetings and Processions Act 1969 (St Christopher, Nevis and Anguilla), s 5 (1)	251
St Christopher, Nevis and Anguilla Constitution Order 1967 (SI 1967 No 228), Sch 2, s 10 (1), (2)	251

Rules

Indictment Rules 1971 (SI 1971 No 1253), r 5 (1)	1242
Matrimonial Causes Rules 1971 (SI 1971 No 953)—	
r 68 (1), (2)	851
rr 94 (1), (3), 97, 114 (1) (a), as amended by the Matrimonial Causes (Amendment) Rules 1973 (SI 1973 No 177), r 4	400

RSC—		
Ord 6, r 2 (1) (c)	336
Ord 13, r 4 (2)	336
Ord 15, r 6	1022
Ord 18, r 19	914, 935
Ord 29, r 1	836
Ord 33, r 1	1155
Ord 35, r 3	1155
Ord 62, App 2, Part X, para 2	1135
Town and Country Planning (Inquiries Procedure) Rules 1969 (SI 1969 No 1092), r 12 (2)	26

Regulations

Drivers' Hours (Goods Vehicles) (Keeping of Records) Regulations 1970 (SI 1970 No 123), reg 3 (1)	309
Industrial Tribunals (Industrial Relations, etc) Regulations 1972 (SI 1972 No 38)—	
Sch, r 1 (1)	1105
r 2 (1)	289, 1013
Legal Aid (Assessment of Resources) Regulations 1960 (SI 1960 No 1471), reg 1 (2), Sch 1, para 1	931
Town and Country Planning (Control of Advertisements) Regulations 1969 (SI 1969 No 1532), reg 14 (1), (3) (a)	110

Order

Town and Country Planning General Development Order 1963 (SI 1963 No 709), arts 2, 3, Sch 1, class XVIII	730
--	-----

Miscellaneous

Terms and Conditions of Service of Hospital Medical and Dental Staff (England and Wales) and Administrative Medical Staff of Regional Hospital Boards (England and Wales) (January 1971), para 190	104
--	-----

Words and phrases

	Page
Act preparatory to the commission of an offence [Official Secrets Act 1920 s 7]	89
Actual occupation [Land Registration Act 1925, s 70 (1) (g)]	465
Adjacent to [Town and Country Planning General Development Order 1963, Sch 1, class XVIII, para 2]	730
Affray	1108
Any sums sue under the mortgage [Administration of Justice Act 1970, s 36 (1)]	53
Apply [Matrimonial Proceedings and Property Act 1970, s 7 (4)]	395
Arrest	645
Articles of personal use [Administration of Estates Act 1925, s 55 (1) (x)]	141
Belonging to [Town and Country Planning General Development Order 1963, Sch 1, class XVIII, para 2]	730
Building [Town and Country Planning (Control of Advertisements) Regulations 1969 (SI 1969 No 1532), reg 14 (3)]	110
Business premises [Town and Country Planning (Control of Advertisements) Regulations 1969 (SI 1969 No 1532), reg 14]	110
Cause or matter [RSC Ord 29, r 1 (1)]	836
Charity proceedings [Charities Act 1960, s 28]	1022
Child [Income Tax Act 1952, s 212 (4) (as substituted by the Finance Act 1963, s 13)]	523
Collection intended for permanent exhibition to the public [Theft Act 1968, s 11 (2)]	872
Conduct [Matrimonial Proceedings and Property Act 1970, s 5 (1)]	593
Corroboration	624
Costs incurred by [Legal Aid Act 1964, s 1 (1)]	229
Description [Customs and Excise Act 1952, s 290 (2) (b)]	1149
Destruction [Town and Country Planning Act 1962, s 29 (1) (a)]	319
Discriminate against [Industrial Relations Act 1971, s 5 (2) (b), (4)]	709
Dismissal [Industrial Relations Act 1971, ss 22 (1), 23 (2)]	21
Dismissed [Redundancy Payments Act 1965, s 4, Industrial Relations Act 1971, s 23 (3)]	299
Driving or attempting to drive [Road Safety Act 1967, s 2 (1)]	503, 509
Evaded [Theft Act 1968, s 16 (2) (a)]	819, 828
Exercisable by notice in writing to	476
Facilities [Betting, Gaming and Lotteries Act 1963, s 18 (2)]	304
Fight	1108
Forecourt [Town and Country Planning (Control of Advertisements) Regulations 1969 (SI 1969 No 1532), reg 14 (3)]	110
Illegal entrant [Immigration Act 1971, s 33 (1)]	741, 765
Imported [Customs and Excise Act 1952, ss 44, 45]	1161
In consequence of [Income and Corporation Taxes Act 1970, s 460 (1)]	379
Income [Legal Aid (Assessment of Resources) Regulations 1960 (SI 1960 No 1471), reg 1 (2)]	931
Industrial dispute [Industrial Relations Act 1971, s 167 (1)]	341
Intent to defraud [Law of Property Act 1925, s 172 (1)]	359
Land [Public Health Act 1936, s 15 (1)]	1123
Late night refreshment house [Late Night Refreshment Houses Act 1969, s 1]	165
Market overt	97
Likely to be made [Administration of Justice Act 1970, s 31]	454
Living apart [Divorce Reform Act 1969, s 2 (1) (e), (5)]	650
Mine [Town and Country Planning General Development Order 1963, art 2 (1), Sch 1, class XVIII, para 2]	730
Mineral undertakers [Town and Country Planning General Development Order 1963, art 2 (1), Sch 1, class XVIII]	730
Mining operations [Town and Country Planning General Development Order 1963, art 2 (1)]	730
Normal working hours [Contracts of Employment Act 1963, Sch 2, para 1]	485
Not required [Local Government Act 1933, s 163 (1)]	491
Office of a political character [Extradition Act 1870, s 3]	204
Personal chattels [Administration of Estates Act 1925, s 55 (1) (x)]	141
Persons seeking to obtain or use goods facilities or services [Race Relations Act 1968, s 2 (1)]	1190
Practicable [Industrial Tribunals (Industrial Relations, etc) Regulations 1972 (SI 1972 No 38), Sch, para 2 (1)]	289, 1013
Presented [Industrial Tribunals (Industrial Relations, etc) Regulations 1972, Sch, para 2 (1)]	289
Proceedings [Intestates Estates Act 1884, s 51]	1136
Public sewer [Public Health Act 1936, s 15 (1)]	1123
Reasonable excuse [Road Safety Act 1967, s 3]	831
Receiving [Income Tax Act 1952, s 148]	637
Regard shall be had [Ministry of Social Security Act 1966, Sch 2, para 4 (2) (a)]	461
Require [Solicitors Act 1957, s 64, proviso (a)]	877
Requirements of [employer's] business for employees to carry out work of a particular kind ... have diminished [Redundancy Payments Act 1965, s 1 (2) (b)]	1063
Section of the public [Race Relations Act 1968, s 2 (1)]	1190
Settled [Immigration Act 1971, ss 2 (3) (d), 33 (1)]	741, 765
Site [Town and Country Planning General Development Order 1963, art 2 (1)]	730
Subject to [Finance Act 1965, s 78 (4)]	513
Sums recovered ... in respect of a loss to which this guarantee applies	984
Suspension of employment [Industrial Relations Act 1971, s 167 (1) (b)]	558
Taking [Theft Act 1968, s 12 (1)]	864
Tenancy to continue until determined by lessee	709

Terminated	Page
Terms and conditions of [Industrial Relations Act 1971, s 167 (1) (a)]	104
Think [Income and Corporation Taxes Act 1970, s 453]	558
Trade or business [Trade Descriptions Act 1968, s 14 (1)]	977
Transaction in securities [Income and Corporation Taxes Act 1970, s 467 (1)]	1141
Unavoidable hindrances	379
Winning and working of minerals [Town and Country Planning Development Order 1963, art 2]	144
	730

Corrigenda

[1973] 1 All ER

- p 187. **Norton Tool Co Ltd v Tewson.** Delete lines b 5 and 6.
p 546. **Halfdan Grieg v Stirling Coal Corpn.** Line e 5: for 'compare' substitute 'compel'.

[1973] 2 All ER

- p 116. **Heron Service Stations Ltd v Coupe.** Line c 2: for 'deprivation' read 'derivation'.
p 400. **Practice Direction.** Line e 2 and footnote 2: for 'SI 1973 No 177' read 'SI 1973 No 777'.
p 846. **Thompson v Price.** Line h 6: for 'Administration of Justice Act 1971' substitute 'Law Reform (Miscellaneous Provisions) Act 1971'.
p 974. **Norwich Pharmacal Co v Commissioners of Customs and Excise.** Line b 2: for 'appellants or to their property' substitute 'goods'. Line b 4: for 'goods' substitute 'them'. Line d 1: for 'the appellants which entitles the latter to demand' substitute 'the importers which entitles the appellants to demand'. Page 975, lines f 4 and 5: for 'to the appellants and their rights of property' substitute 'to the goods imported'. Line h 4: for 'plaintiff or his property' substitute 'goods'.

Trippas v Trippas

COURT OF APPEAL, CIVIL DIVISION

LORD DENNING MR, PHILLIMORE AND SCARMAN LJJ

14th, 15th FEBRUARY 1973

Divorce – Financial provision – Matters to be considered by court when making order – Loss of chance of acquiring benefit – Lump sum payment – Compensation to wife for loss of benefit which she might have received if marriage had not been dissolved – Husband having share in family business – Husband and wife separating after 27 years of marriage – Wife going to live with another man – Husband going to live with another woman – Sale of family business after separation and before divorce – Husband receiving substantial capital sum – Reasonable prospect that he would have settled share of proceeds of sale of business on wife – Matrimonial Proceedings and Property Act 1970, ss 2 (1) (c), 5 (1) (g).

The husband and wife married in 1941 and had two sons who had since grown up. The husband worked in a family business. The wife also went out to work. The family business prospered but the marriage went badly. The parties formed other associations. At that time a sale of the family business, in which the husband had a half share, was under discussion. The husband said to the wife that if the business was taken over 'I will settle a lump sum on each of us and have my freedom'. In 1968 they separated; the husband went to live with another woman and the wife with another man. The matrimonial home, which was jointly owned by the parties, was valued at £10,000 and the husband bought out the wife's interest for £5,000; they also divided the furniture. In 1969 the family business was sold for £350,000, the husband receiving £80,000 in cash and £95,000 in shares. The husband paid £5,000 to each of the two sons but nothing to the wife. In January 1972 the husband obtained a decree nisi of divorce on the basis of two years' separation, the wife consenting to the decree. The wife applied under s 6 of the Divorce Reform Act 1969 for financial provision to be made for her before the decree was made absolute. The husband was ordered to file an affidavit of means in May 1972 but did not do so until the first day of the hearing in October 1972. He put his house and various chattels at £21,000 and shareholdings at £85,000, producing £2,500 a year, while his liabilities totalled £50,000. He said in evidence that he was building a house at a cost of £27,000. The judge awarded the wife a lump sum of £8,000 under s 2 (1) (c)^a of the Matrimonial Proceedings and Property Act 1970. The husband appealed and the wife cross-appealed, the husband contending that since the case was not an appropriate one for periodical payments neither was it a case for a lump sum order, the wife having thrown in her lot with the man with whom she was living and whom she might marry.

Held – The wife's cross-appeal would be allowed and the lump sum increased to £10,000. Orders made under s 2 of the 1970 Act were not solely concerned with

^a Section 2 (1), so far as material, provides: 'On granting a decree of divorce . . . the court may . . . make . . . (c) an order that either party to the marriage shall pay to the other such lump sum or sums as may be [specified in the order].'

support but were to be made in accordance with the policy laid down in s 5 (1)^b. Under s 5 (1) the court, in considering whether to order payment of a lump sum, was required to exercise its powers so as to place the parties in the position in which they would have been had the marriage not broken down and they had discharged their financial responsibilities to each other; in particular the court was directed by s 5 (1) (f) to take into consideration the contribution the wife had made by caring for the home and family and by s 5 (1) (g) to have regard to the value to the wife of any benefit which, in consequence of the divorce, she would lose the chance of acquiring. If the marriage had continued it was likely that the husband would have settled on her a substantial sum out of the proceeds of sale of the family business. It was immaterial that the wife was living with another man; she was entitled, by virtue of s 5 (1) (g), to be compensated for the loss of the chance of receiving a financial benefit from the sale of the business; accordingly the husband should provide a lump sum for her. On the facts the £8,000 awarded by the judge was too low; £10,000 would be the appropriate figure (see p 4 d and e, p 5 d f and g, p 6 b and f, p 7 a b and j, p 8 d and j and p 9 g, post).

Notes

For financial provision on granting a decree of divorce and the matters to be considered by the court in exercising its powers, see Supplement to 12 Halsbury's Laws (3rd Edn) para 987A, 1-4.

For the Matrimonial Proceedings and Property Act 1970, ss 2, 5, see 40 Halsbury's Statutes (3rd Edn) 800, 803.

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Iverson v Iverson [1966] 1 All ER 258, [1967] P 134, [1966] 2 WLR 1168, 27 (2) Digest (Reissue) 823, 6593.

Wachtel v Wachtel [1973] 1 All ER 829, [1973] 2 WLR 366, CA.

Appeal

On 13th January 1972 the husband, Ronald Geoffrey Trippas, was awarded a decree nisi of divorce under s 2 (1) (d) of the Divorce Reform Act 1969, the husband and the wife, Emily Kathleen Trippas, having lived apart for a period of two years immediately preceding the presentation of the petition and the wife consenting to the decree. On 30th October 1972, on an application by the wife under s 6 of the 1969 Act, his Honour Judge Bush, sitting as a deputy High Court judge in chambers at Birmingham, ordered the husband to pay to the wife a lump sum of £8,000 under s 2 (1) (c) of the Matrimonial Proceedings and Property Act 1970. The husband appealed against that order seeking an order that it be set aside or discharged or, alternatively, that it be varied by a reduction of the amount of the sum awarded. The grounds of appeal were, *inter alia*, that the judge was wrong in law in that (i) he proceeded on the erroneous view of the law that the wife's adultery should not be taken into account under the heading of 'conduct' because it was not a cause of the breakdown of the marriage; (ii) he adopted an erroneous view of the law in holding that a wife who had not merely committed adultery but had also been cohabiting as man and wife with another man for a period of about four years was entitled to maintenance in any form; (iii) he regarded as irrelevant the likelihood of the wife marrying the other man; (iv) he proceeded on the basis that he could see no fault in a wife who so ordered her affairs by not marrying that she continued to receive maintenance; (v) he failed to have due regard for the provisions of s 7 (3) of the Matrimonial Proceedings and Property Act 1970 and the policy embodied in those provisions; and/or the fact that the court had no power to order repayment of a lump sum in the event of remarriage by the wife. The wife gave notice that at the hearing of the appeal

^b Section 5 (1), so far as material, is set out at p 5 b and c, post

a she intended to contend that the order should be affirmed on the grounds relied on by the judge and further or alternatively that the order should be affirmed on the ground that it effected a redistribution of assets that reflected the real contribution of the wife to the welfare of the family in accordance with ss 2 and 5 (1) of the 1970 Act. At the hearing of the appeal the wife's cross-notice was amended to ask for an increase in the sum awarded. The facts are set out in the judgment of Lord Denning MR.

b *A B Hollis QC* and *H C Tayler* for the husband.

John K Wood QC and *Euan Sutherland* (who did not appear in the court below) for the wife.

c **LORD DENNING MR.** The husband and wife were married as long ago as 1941. He was 24. She was 18. There are two sons now grown up. In 1957 they separated for over a year; but they came together again. The final separation took place on 15th September 1968. So they were 27 years together, apart from that one year or so. The husband worked hard. He was in the family business which made press tools. He was on the sales side. Unfortunately, when he was young, no doubt entertaining customers, he drank a good deal too much. That gave rise to trouble at home. The wife looked after the home and cared for the family exceedingly well. She went out to work too, so as to help with the expenses. They had none too much money in the early days. But in later years the husband did very well. The family business prospered. But the marriage went badly. The husband's drinking was a serious handicap; but he has now given it up. Eventually each formed other associations. When they separated in 1968 the wife was the one who left the home. She was employed by the Gas Board. She went to live with a married man who was also employed by the Gas Board. She has been with him ever since. In 1968 the husband too had formed an association with one woman. Now he is living with another woman. He means to marry her. The wife has not made up her mind whether to marry the man with whom she is living.

f Now I turn to the divorce. In July 1970 the husband launched a petition for divorce on the ground of his wife's adultery. In answer, the wife cross-petitioned on the ground of the husband's adultery. When the new Acts came into force on 1st January 1971, those proceedings were dropped. The husband got leave to issue a second petition on the ground given by s 2 (1) (d) of the Divorce Reform Act 1969, that they had been living apart continuously for two years; and both sides consented to a divorce. On 13th January 1972 a decree nisi was pronounced; but before it was made absolute the wife desired to have provision made for her under s 6 of the 1969 Act. On 30th October 1972 the judge awarded the wife a lump sum of £8,000, and the husband now appeals to this court.

g Counsel for the husband says that that sum should be set aside or reduced. He relied before the judge, and before us, on the wife's conduct. He says that the wife went to live with the other man 4½ years ago. She has lived with him ever since. h That man is earning. So is she. Counsel relied on the words of *Latey J* in *Iverson v Iverson*¹:

'At one end of the scale her adultery may indeed disqualify her altogether. It may do so, for example, where her adultery has broken up the marriage, where it is continuing and where she is being supported by her paramour.'

i Those words cannot survive the recent decision of this court in *Wachtel v Wachtel*². This is a good instance where the conduct of the parties can be put on one side altogether. Since 1968 each has been living with another partner. There is nothing to

¹ [1966] 1 All ER 258 at 260, [1967] P 134 at 138, 139

² [1973] 1 All ER 829, [1973] 2 WLR 366

choose between them. The financial dispositions must be made without regard to their conduct. a

Counsel for the husband also said that a lump sum was not appropriate in this case. He said that a lump sum was only to be used as a substitute for periodical payments—so to speak as a capitalisation of them—and that if, as here, it was not a case for periodical payments, it was not a case for a lump sum. He relied for this purpose on the words of Willmer LJ in *Brett v Brett*¹: b

‘... in assessing the quantum of the lump sum payment, where such an award is appropriate, it is proper to proceed on the same principles as would apply in assessing the quantum of annual payments under the law as it stood before the [Matrimonial Causes] Acts of 1963 and 1965 were passed.’

I cannot accept that contention. The Divorce Reform Act 1969 and the Matrimonial Proceedings and Property Act 1970 have revolutionised the law on all these matters. There is no point in going back to the cases on the earlier Acts. They are now out of date. The proper approach now is to take the new Acts and the guidelines stated in *Wachtel v Wachtel*²; and build on those. c

So I reject counsel's suggestion that a lump sum is simply another way of quantifying maintenance. Under the new Acts, it is a separate provision on its own. In awarding it, the judge may take into account all the various matters laid down in the Act. He may, for instance, have regard, by reason of s 5 (1) (f), to the contribution which the wife made by looking after the home and caring for the family. He may also have regard, under s 5 (1) (g) to the chances of the wife, if the marriage had continued, acquiring some special benefit from it. So I turn to the various items. It is obviously not a case for periodical payments. Nor does the wife seek them. d

Next, the matrimonial home. It was in their joint names. It may fairly be assumed to have belonged to them both in equal shares. But it has already been divided by the parties themselves. When they separated in September 1968 they made arrangements for the division of it. Its value was assessed at £10,000. The husband bought out the wife's interest for £5,000. He paid it to her. That was the end of that item. Next, the furniture. That was divided up at the same time. The sons took some. The wife took some too. That was the end of that. e

Now comes the point of importance and difficulty. It is the subsequent acquisition of capital by the husband. The husband's company, A W Trippas & Co, was a family business which had come down from his father. It belonged to the husband and his brother. In 1969, after the parties had been separated for a year, there was a ‘take-over’. The business was sold by the husband and his brother for £350,000. That is £175,000 each. The husband received £80,000 in cash on the sale. He received the remaining £95,000 in shares in the new business. He was also appointed sales director in the new business at £4,000 a year plus expenses, and allowed the use of a car. I am afraid that sales directorship did not last very long. He surrendered it and received £4,000 as compensation for loss of office. f

Although the sale did not take place until 1969, it had been under discussion for some time before they separated. The wife gave evidence about what her husband said to her. The judge accepted her evidence. The husband said: ‘If and when the company is taken over, I will settle a lump sum on each of us and have my freedom.’ The wife said: ‘That is not nice; it is rather like paying off an old retainer.’ g

When the company was taken over, the husband did in fact give £5,000 to each of the sons. The wife says that she too should have some part of the money. The wife cannot claim a share in the business as such. She did not give any active help in it. She did not work in it herself. All she did was what a good wife does do. She gave h

1 [1969] 1 All ER 1007 at 1012, [1969] 1 WLR 487 at 493

2 [1973] 1 All ER 829, [1973] 2 WLR 366 i

a moral support to her husband by looking after the home. If he was depressed or in difficulty, she would encourage him to keep going. That does not give her a share.

But counsel on her behalf relies on a special provision in the 1970 Act. Section 5 (1) says that in exercising its powers the court is—

b 'to have regard to all the circumstances of the case including the following matters . . . (g) in the case of proceedings for divorce or nullity of marriage, the value to either of the parties to the marriage of any benefit (for example, a pension) which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring; and so to exercise those powers as to place the parties, so far as it is practicable and, having regard to their conduct, just to do so, in the financial position in which they would have been if the marriage had not broken down and each had properly discharged his or her financial obligations and responsibilities towards the other.'

c We did not have to consider that provision in *Wachtel v Wachtel*¹, but it is very relevant in the present case. Parliament gives the example of a pension. It gives a case where, if there had been no divorce, the wife might have received a pension after her husband's death. If there is a divorce, this subsection says that the court can take it into account. It can award her compensation for the loss of the pension. So here. If this marriage had continued, it is plain that the wife had a good chance of receiving a financial benefit on the sale of the business. Just as the two sons received £5,000 each, she might have received something. The husband might well have felt it proper to settle on his wife a substantial sum out of the very large sum which he was receiving. Now that there has been a divorce, she should be compensated for the loss of that chance.

e Counsel for the husband submits that she should have no compensation for the loss of that chance. She is living with another man and may marry him. She has thrown in her lot with him. She has severed her connection with her husband. So she should not have any share in this sum which only came into being after they had separated. That argument would have been acceptable before the Act of 1970, but f it is not acceptable now. Section 5 (1) (g) covers the position exactly. As I said during the argument, supposing the man with whom she is living dies. Suppose he is killed in a road accident. She would need all the help she can get. The subsection tells the court to do what it can to put them both in the same position as if the marriage had not broken down. It is also to do what is just considering that she looked after the home and brought up the family over those 27 years. It seems to g me only just that, having regard to the capital sum received by the husband, he should provide a lump sum for her.

The question then is, how much? The court has been put in some difficulty. In May 1972 the husband was ordered to file an affidavit as to his means. He did not file it. He did not give a list of documents which he was told to do. Then at the last moment, on the very first day of the hearing before the judge, he produced h an affidavit of means. He put the house, furniture and a porcelain collection at £21,000. He put his shareholdings in various companies at £85,000, which he estimated produced £2,500 a year. He said he had liabilities for tax and bank overdraft which totalled £50,000. No doubt the wife's counsel would have wished to cross-examine him on that affidavit, but that would mean an adjournment. No one was anxious for an adjournment. So counsel agreed and the judge made this note:

i 'Counsel agree that in absence of full financial discovery and cross-examination to proceed on the basis that the husband of substantial means and in a position to make a lump sum payment.'

The husband in evidence said that he was building a house at a cost of £27,000; and that, although he was only aged 55, he was not able to earn now. He said that he had tried to get a job with no result at all. a

On that scanty material, the court has to fix a lump sum. Seeing that the husband gave the two sons £5,000 each, it seems to me that, if the marriage had continued, he might well have provided £10,000 for the wife. The judge put it at £8,000. That seems to me to be too low. Rather than go for further discovery and so forth, the wife has instructed her counsel to say that she would be content with £10,000 without further enquiry. That seems to me fair. I would therefore increase the judge's award from £8,000 to £10,000. I would dismiss the appeal and allow the cross-appeal to that extent. b

PHILLIMORE LJ. I entirely agree. Counsel for the husband was really reduced in the end to saying that £8,000 or even £10,000 would be too much on the figures. But the figures were based on a wholly inadequate affidavit, delivered on the first day of the hearing, 17th October 1972, and which he had been ordered to deliver as long ago as 1st May 1972. On the evidence, he had been paid £175,000 for his share in the business, and he had taken that as to £80,000 in cash and as to the balance in shares. When he sets out in his affidavit shareholdings in various companies £85,000, there is nothing to indicate how much of his shareholding is in this new company which took over; and, of course, we all know that shares of private companies are very often quoted at a very low price which does not represent their true value. I strongly suspect that this affidavit by no means discloses the whole of the husband's means. Secondly, he did say, and his counsel relies on it, that he had been unable to obtain employment. He said, 'I am now 55 years of age. I have tried to get a job, with no result at all'. He produced no details whatever. Now, of course, it is possible that he had made genuine efforts to obtain employment; but I venture to think that it is equally possible that he has made very little effort at all; and the burden was on him to show that he is now unemployable. It seems to me that these considerations make counsel's argument impossible to sustain. I agree with Lord Denning MR, that even on the figures which the husband has produced, if one applies the one-third rule, then a figure of £10,000 as a lump sum is amply justified. c

I would agree, therefore, that the appeal be dismissed and the cross-appeal allowed to the extent of substituting £10,000 for the £8,000 awarded by the learned judge. d

SCARMAN LJ. I agree. This case takes the law a little further along the road signposted by the Divorce Reform Act 1969 and the Matrimonial Proceedings and Property Act 1970. It is a different case on its facts from *Wachtel v Wachtel*¹. In *Wachtel v Wachtel*¹ the problem was how to deal under the new legislation with the matrimonial home. In this case the problem is how to deal with the capital (at least £80,000) arising from the sale in 1969 of the husband's interest in his business. There had been in this case a matrimonial home which had been owned jointly; but in 1968 the husband and wife, when they parted, had agreed that the wife should receive £5,000 representing her interest in the house. e

Counsel for the husband really took three points. First, he was prepared to argue that there was a case for consideration of the wife's conduct. But that point could not get very far in view of the ruling of this court in *Wachtel v Wachtel*¹ and the findings of the trial judge. His second point was that, on a proper construction of s 2 of the Matrimonial Proceedings and Property Act 1970, the orders, which that section enables the court to make, are orders designed to provide for the maintenance or f

a support of a spouse. He drew a distinction between s 2, which lists a number of financial orders, and which he says is a section concerned with support, and s 4, which enables the court to distribute property. I think this view of the law is wholly fallacious, as can be demonstrated from the statute itself. It is true that s 2 deals with the financial orders that the court can make, and that s 4 deals with the orders which it can make for the distribution of property; but the powers given to the court under both those sections have to be exercised in accordance with one policy—the policy set out in s 5. Section 5 (1) begins with these words:

b 'It shall be the duty of the court in deciding whether to exercise its powers under section 2 or 4 of this Act in relation to a party to the marriage and, if so, in what manner, to have regard to all the circumstances of the case including [a number of matters which are then set out].'

c Thus the statute itself negatives the distinction counsel for the husband sought to draw between ss 2 and 4. But counsel relied on a comparison of s 2 with the earlier law to show that the section is concerned with maintenance and support. This court in *Wachtel v Wachtel*¹ declared that the 1969 Act and the 1970 Act are reforming statutes; and Lord Denning MR, in giving the judgment of the court, said²:

d 'We regard the provisions of ss 2, 3, 4 and 5 of the 1970 Act as designed to accord to the courts the widest possible powers in readjusting the financial position of the parties and to afford the courts the necessary machinery to that end, as for example is provided in s 4.'

e In construing a reforming statute it is wrong, in my view, to pay regard to cases that were decided before the Act was enacted. In construing ss 2, 4 and 5 one must look to what those sections say, bearing in mind that they represent a reform of the law. One finds in s 2 an enumeration of the financial orders (periodical payments, lump sum and so forth) that are within the power of the court to make. One does not, of course, go to a marginal note or cross-heading to interpret a section; but I observe that in both the marginal note and the cross-heading there is a description of the section as dealing with financial provision. Those are neutral words with no echoes of the previous law, and they seem to me to be aptly chosen to describe what one actually finds in s 2. If, therefore, one can derive no sure guidance from the earlier law, but is confined to the Act, s 5 declares how the court is to go about the business of deciding whether or not to make a financial order under s 2. The first thing one sees in s 5 is that the court is to have regard to all the circumstances of the case. I believe it essential that the court should retain the complete flexibility of approach that the Act there emphasises—all the circumstances of the case, past, present, and, insofar as one can make a reliable estimate, future. When one turns to the detailed matters which, amongst all the circumstances of the case, the court is to consider, one finds amongst them:

h '... the contributions made by each of the parties to the welfare of the family, including any contribution made by looking after the home or caring for the family.'

i In the present case the wife made no specific contribution to the business life or business earnings of her husband; but for over 25 years of marriage she maintained his home; she brought up his children, and she provided, as on the evidence is quite clear, the general and moral support to a man sometimes hard pressed by business worries that a good wife does. That is a matter which the Act tells us we are to take into consideration when faced with the problem whether or not to make an order either under s 2 or s 4.

1 [1973] 1 All ER 829, [1973] 2 WLR 366

2 [1973] 1 All ER at 836, [1973] 2 WLR at 373

Then there is a further matter amongst those mentioned in s 5 which is directly relevant to the present case, s 5 (1) (g): a

‘... in the case of proceedings for divorce or nullity of marriage, the value of either of the parties to the marriage of any benefit (for example, a pension) which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring.’ b

When this husband and wife parted they did come to an agreement about the matrimonial home. They knew at that time that the husband might in the reasonably near future find his family business the subject of a take-over bid. They discussed the possible implications of such an event on the family finances; and it is clear from the evidence that at that time the husband, acting, I should have thought very properly and very reasonably, said that there would be something for the wife. The event (in the shape of £89,000 plus shares) did occur some nine months or so after their parting. When it occurred he made a gift of £5,000 to each of his sons. I think it reasonable to infer that, had they been living together at that time, the wife could have expected in cash or in kind some sort of benefit accruing to her from the sale of the business. One must bear in mind that this man, with a proper sense of his marital obligations, had, much earlier in the family life, put the matrimonial home in joint names. I think it would be reasonable to infer that, had the married life continued, he would have thought it the decent thing to do to see that some part of this capital sum should be distributed to his wife as well as between himself and his sons. Of course, even if at that time nothing in the form of cash had come to the wife, had they gone on living together, it is clear that she would have benefited generally from the availability of the capital to her husband. Moreover, since this man was not in pensionable employment, this sum could properly be regarded as his substitute for a pension; and I would have thought that, had they lived together until he died, some provision would have been made for the wife by gift or will or settlement from the capital sum he received on the sale of the business. c
d
e

On that view of the facts, one turns back again to the language of s 5 (1) (g); and one sees that the court has to have regard, on an application for an order, to ‘the value to either of the parties to the marriage of any benefit (for example, a pension) ...’ Those words are apt in the circumstances of this man and his business to cover the availability of this money which, by reason of the dissolution of the marriage, the wife has lost the chance of acquiring. Like Lord Denning MR I think the words of the statute cover exactly the situation that arose and place on the court the necessity of considering whether or not a lump sum should be ordered under s 2. f
g

Counsel for the husband’s third point was that a lump sum award is unjust; and he emphasised that the wife now has the support of the man with whom she is living. The court must have regard to all the circumstances of the case. Not only must the court have regard to the past, it must also have regard to the present and to the future. If one studies the present and the future of these parties, the situation is that if a capital sum is made available to the wife, something very near equality can be achieved. I take first the figures which counsel gave to the court at the conclusion of his very powerful address on behalf of the husband. He said the court, on the findings of the judge, should treat the husband as having a free capital of something like £32,000 and an income of £2,240 less tax. In addition, of course, the husband has either the house in which he is now living or its capital value. These figures are on the basis on the judge’s order of a lump sum of £8,000 to the wife. The husband is not in employment. One would have thought that at his age of 55, recovered as he is from an unhappy illness, he would be able to work, if need be; and if one looks at the finding of the judge, there is nothing in that finding which disentitles this court from drawing that inference; for the judge said of him: ‘He is now 55 years of age, and it is unlikely that he will get a job in any line of business’ h
j

a similar to that which he formerly pursued'. That, of course, does not rule out the possibility of getting a different sort of job. Look now to the wife's position as counsel for the husband gave it to the court, that is, assuming that she receives a lump sum of £8,000. He put the wife's capital at a little over £10,000, yielding an income per year of £840 less tax. To which he added her own earnings in her employment of £1,629. The husband, therefore, will be getting an annual income of £2,240, and the wife will be getting £2,329, on the basis of the judge's order. The husband, of course, does not have to work for that income. If he works, he can no doubt supplement it; and he has a home which is additional to his free capital of £32,000. The wife, of course, also has a home provided by the man with whom she is living. But she is working, unlike the husband, and her work is represented in her cash income. So one gets this situation on the judge's order: the husband will have free capital, that is capital in addition to the value of his house, of £32,000; the wife will have a capital of just over £10,000, while the two cash incomes are not very dissimilar. Both the man and the woman have certain benefits additional to their cash income, on which it is unnecessary to put any exact price. If the judge's award of £8,000 should be increased to £10,000, then the husband's free capital would be £30,000, and his cash income less tax £2,100. The wife's free capital would be £12,000 and her cash income about £2,460 (including in her income her earnings). His income is exclusive of any earnings, because he is not in employment; and he has the value of owning and living in a house, the value of which has not been brought into calculation. Thus, if a lump sum of £10,000 be awarded, the wife's capital position is still much weaker than the husband's, but her income position, as long as she remains in work, is slightly better. Notwithstanding these differences, a lump sum of £10,000 awarded to the wife would create a situation as near equality as it is practical to get. There is nothing either in the so-called one-third rule or in the language of the 1970 Act which precludes this court from doing rough justice on the basis of approximate equality, provided it is, on the whole, just to both parties, as in my opinion it is in this case. If one looks at the very last words of s 5 (1), the court is required to exercise its powers—

'so as to place the parties, so far as it is practicable and, having regard to their conduct, just to do so, in the financial position in which they would have been if the marriage had not broken down and each had properly discharged his or her financial obligations and responsibilities towards the other.'

I think a lump sum of £10,000 goes as far as is practicable towards doing just that. Since, for the reasons I have indicated, there is no need in this case to attach any weight to conduct, a lump sum award of this amount provides a just solution, and for that reason I agree that the appeal should be dismissed and the cross-appeal allowed.

One further matter. I cannot help thinking that the trial of the issues in this case would have taken a very different form had the trial taken place after the decision of this court in *Wachtel v Wachtel*¹. Where it is clear that conduct cannot play a significant part, it seems to me wrong to load the court with affidavits about ancient or modern discontents. A better use of the court's time, and of counsel and solicitors' time, would be to concentrate on what really matters, namely the financial position of the family. Had this been done, I think it inconceivable that the wife's advisers would have allowed the husband to get away without discovery of documents, or would have gone into the trial on 17th October faced for the first time that day with the affidavit of means. I can understand that under the old law, with its emphasis on conduct, these matters might not have seemed so important as they have now

become; but I express the hope that in the light of the decision of this court in *Wachtel v Wachtel*¹ a new order of priorities will be accepted by those advising spouses in this sort of case. a

Appeal dismissed; cross-appeal allowed. A lump sum of £10,000 to be paid by the husband to the wife within 28 days. Leave to appeal to the House of Lords refused.

Solicitors: Batchelor, Fry, Coulson & Burder, agents for E G Seagroatt & Co, Birmingham (for the husband); Higgs & Sons, Staffordshire (for the wife). b

L J Kovats Esq Barrister.

Pugsley v Hunter c

QUEEN'S BENCH DIVISION

LORD WIDGERY CJ, CUSACK AND CROOM-JOHNSON JJ

20th FEBRUARY 1973

Road traffic – Disqualification for holding licence – Special reasons – Driving with blood-alcohol proportion above prescribed limit – Addition to driver's drink without his knowledge – Proof that addition accounted for excess over prescribed limit – Onus of proof – Onus on driver to prove on balance of probabilities that addition accounted for excess – Circumstances in which necessary for driver to adduce medical evidence – Road Traffic Act 1962, s 5 (1) – Road Safety Act 1967, s 1 (1). d

The defendant pleaded guilty before a magistrate to a charge of driving a vehicle on a road having consumed alcohol in excess of the prescribed limit, contrary to s 1 (1) of the Road Safety Act 1967. A sample of blood taken from him had on analysis been found to contain not less than 161 milligrammes of alcohol in 100 millilitres of blood. The defendant, his wife and a friend gave evidence that on the night in question they had all three been in a public house. The defendant had consumed two light ales and a shandy but, while he was visiting the lavatory, the friend had, without the defendant's knowledge, added two double vodkas to the defendant's drink. Although satisfied that the defendant's alcohol had been increased without his knowledge, the magistrate felt that he could not be certain, in the absence of scientific evidence, that the increase accounted for the whole of the excess over the prescribed limit. He held, however, that the fact that the drink had been tampered with quite substantially could amount to 'special reasons', within s 5 (1) of the Road Traffic Act 1962, and accordingly he had a discretion whether the facts justified him finding that there were special reasons for not disqualifying the defendant from driving. He exercised that discretion in the defendant's favour and the prosecutor appealed. e

The defendant's appeal was allowed. f

The magistrate's finding that the defendant's alcohol had been increased without his knowledge, the magistrate felt that he could not be certain, in the absence of scientific evidence, that the increase accounted for the whole of the excess over the prescribed limit. He held, however, that the fact that the drink had been tampered with quite substantially could amount to 'special reasons', within s 5 (1) of the Road Traffic Act 1962, and accordingly he had a discretion whether the facts justified him finding that there were special reasons for not disqualifying the defendant from driving. He exercised that discretion in the defendant's favour and the prosecutor appealed. g

Held – The onus of proving the facts on which the plea of special reasons was based lay on the defendant; the onus was on him to show on a balance of probabilities that the quantity of alcohol in his blood in excess of the prescribed limit was attributable to the additional drink which had been put into his glass without his knowledge. Unless the case was an obvious one where a layman could reliably and confidently say that the added liquor must explain the excess of alcohol, it would not be possible for a defendant to discharge the onus of proof which rested on him without the support of medical evidence. It followed that the case should be remitted to the magistrate to reconsider whether the defendant had on the evidence discharged that onus (see p 14 a c to e and g, p 15 f and p 16 d g and j, post). h

- a* Per Lord Widgery CJ. It may well be desirable to adopt a practice whereby, in cases where the defence intend to call evidence to prove facts or medical opinion in support of a plea of special reasons, notice of the nature of the evidence to be called is given to the prosecution at a sufficient interval before the hearing to enable the prosecution to be prepared to deal with it (see p 16 e, post).

Notes

- b* For the consideration of special reasons for not ordering an obligatory disqualification, see 33 Halsbury's Laws (3rd Edn) 639, 640, para 1081, and for cases on the subject, see 45 Digest (Repl) 122-126, 431-454.
For the Road Traffic Act 1962, s 5, see 28 Halsbury's Statutes (3rd Edn) 411, and for the Road Safety Act 1967, s 1, see *ibid* 459.
- c* As from 1st July 1972, s 1 of the 1967 Act and s 5 of the 1962 Act have been replaced respectively by ss 6 and 93 of the Road Traffic Act 1972.

Cases referred to in judgment

- Alexander v Latta* [1972] RTR 441, DC.
Flewitt v Horvath [1972] RTR 123, DC.
- d* *Jones v English* [1951] 2 All ER 853, 115 JP 609, 50 LGR 111, DC, 45 Digest (Repl) 122, 432.

Cases also cited

- R v Durrant* [1969] 3 All ER 1357, [1970] 1 WLR 29, CA.
R v Hamilton [1970] 3 All ER 284, CA.
R v Shippam [1971] RTR 209, CA.

Case stated

- This was an appeal by way of case stated by Albert William Clark Esq, one of the magistrates of the Magistrates' Court of the Metropolis, sitting at Woolwich Magistrates' Court on 18th July 1972.

- f* The appellant, Robin Pugsley, a police sergeant, preferred an information against the respondent, William Hunter, that he on 28th April 1972 at Blithdale Road, Abbey Wood in the county of London, drove a motor vehicle on a road having consumed alcohol in excess of the prescribed limit, contrary to s 1 (1) of the Road Safety Act 1967.

- The respondent pleaded guilty and the solicitor instructed on behalf of the prosecution then outlined the following sequence of events which led to the respondent's appearance before the magistrate. (a) On 28th April 1972 at 11.20 p m the respondent was seen to be driving his motor car in Plumstead High Street in the centre of the road at an estimated speed of between 40 and 45 m p h and, during the time in which he was followed by the appellant, the respondent failed to accord precedence to a number of pedestrians who were in process of crossing the road by use of two pedestrian crossings and further failed to give any required traffic signal when turning left and right into other adjacent streets. (b) The appellant unsuccessfully endeavoured to stop the respondent by sounding the police car horn and by flashing its lights and the respondent's car was eventually stopped with assistance from a second police vehicle. (c) The respondent was asked to take a breath test and after further conversation agreed so to do whereupon the Alcotest bag was partially inflated with a positive result. The appellant told the respondent that he was arresting him for driving a motor vehicle when he had had too much to drink. The respondent replied, 'This is ridiculous; what about my children? they are all alone'. (d) The respondent was subsequently subjected to the required procedure under the Road Safety Act 1967. At 12.25 a m a sample of blood was taken from him which on analysis was found to contain not less than 161 milligrammes of alcohol in 100 millilitres of blood.

The respondent, his wife and a Mr Bliss then gave evidence on oath to the following effect. (a) Shortly after 10.00 p m during the evening of 28th April 1972 the respondent visited a public house together with his wife and there met a friend, Mr Bliss. (b) During the course of their stay at the public house the respondent consumed two light ales and a shandy. (c) When the respondent visited the lavatory Mr Bliss added two double vodkas to the respondent's drink, which addition was unknown to the respondent.

Paragraphs 4-6 of the case stated were as follows:

'4. No evidence was led to establish the significance of two double vodkas to the said finding of 161 milligrammes of alcohol in 100 millilitres of blood and when Counsel appearing on behalf of the Respondent commenced to address me upon the relevant law I stopped him as in my opinion the decision to be made was one of fact, namely whether or not I believed what the Respondent and his witnesses had said in evidence and that if what the Respondent had said was true then he was a man to be pitied in as much as he would not know how much alcohol he had consumed.

'5. Whilst satisfied that the respondent's blood alcohol level had been increased without his knowledge by Mr Bliss's enhancing the alcoholic quality of the drink, I could not feel so certain that this could account for all the excess over and above 80 milligrammes per 100 millilitres level. It is a well established fact that the rate of consumption of alcohol has a marked effect on the maximum concentration reached in the blood and the rate of conversion and reduction of the level with the passage of time. I felt that it would be dangerous to attempt to draw what would amount to scientific conclusions on this without precise scientific evidence which in any event would tend at best to be rather nebulous in view of the number of imprecise factors involved.

'6. The fact that the drink had been tampered with quite substantially could amount to "special reasons" [within s 5 (1) of the Road Traffic Act 1962] and I had to exercise my discretion as to whether they did justify my so finding. Having seen the Respondent in the witness box I was satisfied that the whole of the proceedings had been a salutary lesson to him and the disruptive effect on his life would be great if he were disqualified. I therefore found it unnecessary to call upon the Solicitors for the Prosecution to reply on either the facts or the law. I exercised my discretion in the Respondent's favour by finding that there were special reasons for not disqualifying him, and I imposed a fine of £40, ordered him to pay £15 towards the costs of the prosecution and his Driving Licence to be endorsed.'

D H Farquharson QC and K Dow for the appellant.

Douglas Hogg for the respondent.

LORD WIDGERY CJ. This is an appeal by case stated by Mr Albert William Clark, one of Her Majesty's magistrates sitting in the magistrates' court at Woolwich, in respect of his adjudication as a magistrates' court on 18th July 1972. On that occasion he had before him an information in familiar form preferred by the appellant, a police officer, against the respondent alleging that the respondent on 28th April 1972 at Abbey Wood in the county of London drove a motor vehicle on a road having consumed alcohol in excess of the prescribed limit, contrary to s 1 (1) of the Road Safety Act 1967. The respondent pleaded guilty to the charge, so it is unnecessary to go into the circumstances in which the offence was committed. The only issue before the magistrate was whether there were special reasons justifying him in not disqualifying the respondent, and if so, whether he should exercise his discretion and refuse to order disqualification. The blood-alcohol content proved on analysis to be 161 milligrammes of alcohol per 100 millilitres of blood. The

a respondent called evidence in support of his contention that there were special reasons justifying a failure to disqualify, and the evidence was that he himself had drunk only a very modest quantity of alcohol, namely two light ales and a shandy; by that I mean that he was conscious of and accepted that he had knowingly drunk that quantity, two light ales and a shandy. However, he was in the company of his wife and a friend, so described in the case, one Bliss, and the wife and Mr Bliss gave evidence that whilst the respondent was in the lavatory, Mr Bliss had added two double vodkas to the respondent's otherwise comparatively innocuous drink.

b It is perhaps not irrelevant to observe that this is a defence not uncommon at the present time in charges of this kind, and it is one no doubt which magistrates charged with the duty of trying these cases will examine with some care. However, in this case the magistrate accepted the evidence of the wife and Mr Bliss that the drink had had this addition of vodka made to it.

c Having satisfied himself that that was right, he then proceeded to reach a conclusion as to what the consequences should be. I think I should read the next two paragraphs of the case, because his reasoning is all contained in it. He said:

d 'Whilst satisfied that the Respondent's blood alcohol level had been increased without his knowledge by Mr Bliss's enhancing the alcoholic quality of the drink, I could not feel so certain that this could account for all the excess over and above 80 milligrammes per 100 millilitres level. It is a well established fact that the rate of consumption of alcohol has a marked effect upon the maximum concentration reached in the blood and the rate of conversion and reduction of the level with the passage of time. I felt that it would be dangerous to attempt to draw what would amount to scientific conclusions on this without precise scientific evidence which in any event would tend at best to be rather nebulous in view of the number of imprecise factors involved. The fact that the drink had been tampered with quite substantially could amount to "special reasons" and I had to exercise my discretion as to whether they did justify my so finding.'

f He then goes on to say that having seen the respondent in the box and having regard to the highly damaging effect which disqualification would have on him, he decided to exercise the discretion, as he called it, in the respondent's favour.

g As I read those reasons I think they amount to this. He correctly applies his mind to the question whether the added drink was responsible for the excess alcohol in the respondent's blood, and he decides that he cannot really reach a conclusion on that point without the assistance of scientific evidence. Then in my opinion he falls into error, because having reached the conclusion that he could not really decide whether the added drink was responsible for the whole of the excess, he seems to have decided the case on the basis that it is good enough if the respondent shows that the drink had been tampered with quite substantially. I say that because his own words are 'The fact that the drink had been tampered with quite substantially could amount to "special reasons"'

h Counsel for the appellant challenges these conclusions on a number of grounds, but in particular he says that the mere fact that the drink had been tampered with quite substantially could not itself amount to a special reason, and he also contends that the magistrate having been unable to decide unaided whether the added drink was responsible for the excess alcohol discovered in the respondent's blood should have found that the respondent's plea of special reasons was not made out.

j The case is of rather more than ordinary importance because it is probably the first time that this court has really made a serious attempt or been given an opportunity to make a serious attempt at deciding a number of important points which arise out of the plea of special reasons based on the so-called 'laced' drink. The first question which counsel for the appellant invites us to decide is on whom is the onus of proof in regard to the facts on which the plea of special reasons is based?

For my part I have no hesitation in saying that the onus of proof of the relevant and material facts rests on the defendant, the motorist in question. There is authority a for this in a decision of this court on the earlier legislation, *Jones v English*¹. This was a case in which the defendant had been charged with driving whilst under the influence of drink under the earlier statute, and the question of special reasons arose. Lord Goddard CJ said this²:

‘... where, on a plea of Guilty or after evidence has been heard, a defendant has been convicted of an offence for which the penalty of disqualification is laid down by Act of Parliament and he seeks to rely on special reasons for the non-imposition of disqualification, he ought to give evidence, and the justices ought to hear evidence on the point and not merely to accept statements. This is highly desirable because the onus is on the defendant to show special reasons why he should not be disqualified.’ b
c

Not only is there the authority of this court for that conclusion, but it seems to me to be entirely consistent with the principle that the defendant, who is the only person who knows what the special reasons are, should face the onus of proving the facts on which he relies for this plea.

The second question which counsel for the appellant says is requiring a reasoned answer at the present time is: what has to be established under this onus of proof in regard to the so-called laced drink cases? The first point to be made in answer to that question, which is not really in dispute, is that it is for the defendant to show that the quantity of alcohol in his blood in excess of the statutory authorised maximum is attributable to the additional drink which was put into his glass unknown to him, in other words the matter for enquiry is whether it was the additional drink which caused him to commit the offence under s 1 of the 1967 Act. So one can state the task of the defence in these terms, that it is for the defendant to show the offence is due to the additional alcohol inserted. d
e

To what standard has the defence to satisfy the court on that point? Counsel for the appellant submits: on a balance of probabilities, adopting the well-known principle in criminal law that where an onus falls on the defence, the onus must be discharged according to a balance of probabilities. Counsel for the respondent differs; he contends that it is sufficient if the evidence shows a reasonable possibility that it was the added drink which was the cause of an offence being committed. For myself, I cannot accept that test. It is one unknown to the criminal law as far as I am aware and it seems to me entirely right and proper that the standard of proof required is proof on a balance of probabilities that the offence was caused by the added drink, and nothing else. f
g

Then one comes to the next question, which is: how in practice is the onus to be discharged? It is easy enough perhaps to state what the onus is and the standard to which it must be discharged, but how in fact is it to be discharged? It must be discharged in practice by the calling of admissible and relevant evidence; like any other issue in litigation it depends on the calling of admissible and relevant evidence, and there are a number of different circumstances which may face the court when a defendant seeks to prove such special reasons. For example, one may have a situation, and I think that I myself referred to it in one of the earlier cases, *Flewitt v Horvath*³, where I referred to the possibility that a defendant might be quite unaware of how his drink had been doctored or by whom, and that all he could say to the magistrate in pleading special reasons was to tell the magistrate what he had in fact drunk to his knowledge, and then demonstrate by reference to the alcoholic content of h
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1 [1951] 2 All ER 853

2 [1951] 2 All ER at 854

3 [1972] RTR 123

a his blood that he must have had additional alcohol from some source, and that that additional alcohol was sufficient to cause him to commit the offence. I do not for a moment rule out the possibility in cases where the defendant appears to the court as being a man of truth that he can provide his own answer by saying what drink consciously he took and demonstrating that that drink could not possibly have been responsible for the excess alcohol in his blood. Furthermore, I would recognise that there are some cases where it can be said to be obvious to a layman that the added drink, once its nature and quality have been discovered, was the cause of the commission of the offence. An example is where the alcoholic content in the blood is only marginally above the statutory limit, and the added drink taken to the satisfaction of the court without the knowledge of the defendant is substantial. For example, if this man's alcoholic content had been only 82 milligrammes of alcohol per 100 millilitres of blood and the magistrate was satisfied that he had received two double vodkas unknown to himself, any magistrate would at once conclude and could at once conclude that those two double vodkas were responsible for the excess of alcohol in the blood over the statutory limit. But there may be occasions in which such a conclusion is not obvious, and counsel for the defendant has pressed the court to say that in cases where the conclusion is not as obvious as that, it is not open to courts, being laymen in the medical sense, to draw their own conclusions, or speculate whether the added liquor was sufficient to explain the excess, and he says in cases where a conclusion is not obvious, then the defendant cannot discharge the onus of proof except by calling expert evidence in support of his theory.

I am most reluctant to establish a rule which will be oppressive on defendants by requiring them to call, provide and pay for expert evidence in all cases of this kind, but I am eventually persuaded at the end of the argument that unless the case really is an obvious one, unless the case is one where a layman can reliably and confidently say that the added liquor must explain the excess of alcohol, then the only way in which a defendant can discharge the onus is by calling medical evidence. One will assume and hope that these cases will not be very frequent, but I reach the conclusion at the end of the case that where the facts are not obvious to a layman in the medical sense, it will be necessary for the defendant to call medical evidence in order to discharge the onus of proof which rests on him.

I ought to have said in dealing with the onus of proof that the view which I express today is not consistent with the view which I am reported as having expressed in *Alexander v Latta*¹. That was a case of a man who had been misled into drinking lager of a considerably greater strength than he was accustomed to. The issue arose whether that justified a conclusion of special reasons, and according to the headnote, which is justified by a reference to my judgment, I said that the extra strength of the lager might have had the effect of pushing the alcohol content of the defendant's blood above the statutory limit. Reflecting on the matter with the advantage of today's argument, I think that that was expressing the test wrongly, and that what the court should have been looking for in *Alexander v Latta*¹ was whether the defendant had proved on a balance of probabilities that the additional strength of the lager was the cause of his blood-alcohol content exceeding the statutory limit.

With those principles behind us, we come back to the present case. I would not seek to fault the learned magistrate's reasoning down to the point where he explains his difficulty about assessing the effect of the vodka on this particular man. The test I have already said he ought in my opinion to have applied was to ask himself whether it was obvious to a layman that the vodka was responsible for the excess; if it was obvious to a layman, then in my judgment he was entitled to reach a conclusion on it. If he decided favourably to the defendant, then there would have been a special reason and he would have had a discretion to decline to disqualify him if he thought fit.

But is it obvious? In my judgment it may in this particular case appeal to a magistrate as obvious for this reason. If the respondent's own evidence is accepted, as I think it was, that all he had consciously had to drink was two light ales and a shandy, the magistrate had to balance the effect of two light ales and a shandy against two double vodkas, and it seems to me obvious as a mere layman that the two double vodkas must have had an influence on that man's blood-alcohol content of more than 50 per cent or more than 80 milligrammes out of the total of 161 milligrammes. I cannot doubt that if one balances on one side two light ales and a shandy, and on the other side two double vodkas, that the effect in terms of blood-alcohol content of the latter must exceed the 81 milligrammes of excess, and if that is how it appealed to a magistrate trying a case of this kind I would not feel disposed to say that he had reached an unacceptable conclusion. But whether the magistrate in this case took that view or would take that view is difficult to say, because as I have already explained he did not really decide the case on that consideration, but drifted off to another, and in my judgment, irrelevant consideration. I think that the magistrate should be given an opportunity to reconsider this question, and that when he reconsiders it the parties should be entitled to call evidence if they think fit on the issues arising out of the special reasons contention, and I would allow the appeal to the extent of sending this case back to the magistrate with a direction for him to reconsider his conclusion in the light of the opinion of this court.

I would add, at counsel for the appellant's suggestion, which I appreciate, that it may well be desirable to accept as the practice in these cases that where the defence intend to call evidence to prove facts or medical opinion in support of a plea of special reasons, notice of the nature of the evidence to be called ought to be given to the prosecution at a sufficient interval before the hearing to enable the prosecution to be prepared to deal with it. It is not possible to require under sanctions that such notice be given, but the desirability of it being given speaks for itself, because if it is not given and the prosecution find themselves faced with issues of fact arising out of special reasons which they are not prepared for, the result inevitably will be an adjournment, possibly at the expense of the defendant who fails to notify. Accordingly I endorse counsel's suggestion that as a matter of practice in cases of this kind where evidence is to be called by the defence on this issue, notice of the nature of the evidence ought to be given in good time before the hearing.

CUSACK J. I agree with Lord Widgery CJ's judgment and with the order proposed. I would simply seek to add one matter with a view to stressing it. It is not in my view to be thought that scientific evidence must be called in every case in which it is desired to establish that there are special reasons on the ground that drink had been laced. In some cases it will be clear that alcohol had been added to what I may call an innocent drink, and that the quantity must have been, on a balance of probabilities, such as to carry the alcoholic content of the defendant's bloodstream above the permitted level. In others the excess may be such that the defendant will fail to establish special reasons unless he calls scientific evidence. It is for the defendant and his advisers to decide what evidence he calls, but there may certainly be cases in which he may fail in his contention that special reasons should apply to him unless scientific evidence is brought forward to support his own evidence.

CROOM-JOHNSON J. I agree with both the judgments which have been delivered.

Appeal allowed. Case remitted to the magistrate with a direction to reconsider his conclusion in the light of the court's opinion.

Solicitors: Solicitor, Metropolitan Police (for the appellant); Sotheby & Co (for the respondent).

Jacqueline Charles Barrister.

Wilson v Wilson

COURT OF APPEAL, CIVIL DIVISION

DAVIES, STEPHENSON LJ AND GOFF J

19th JANUARY 1973

Divorce – Separation – Financial protection for respondent – Decree nisi granted – Refusal to make decree absolute – Refusal unless court satisfied that financial provision made by petitioner fair and reasonable or best that can be made in the circumstances – Proposals for financial provision in petition – Proposals fair and reasonable – Proposals not constituting making of provision – Necessity of securing that proposals will be carried out before making decree absolute – Divorce Reform Act 1969, s 6 (2).

A husband and wife married in 1944 and had five children. The matrimonial home was a three-bedroomed house bought by the husband on mortgage in 1957. In January 1961 the husband left the wife and went to live with another woman. He continued to pay the mortgage instalments of £31.34 a month and he paid the wife £60 a month for the maintenance of the whole family until October 1970. He had been earning £2,500 as a car salesman but he left that job in June 1970 and set up business on his own, a year's accounts showing a profit of £372, and his earnings being some £50 to £72 a month. The wife was receiving social security payments of £13.35 a week plus 95p a week for the youngest child. The value of the house was put at £15,000 or £17,000. In October 1971 the husband presented a petition for divorce under s 2 (1) (e) of the Divorce Reform Act 1969 on the basis of five years' separation. The petition stated that 'the [husband] proposes, if a Decree Nisi is granted, to make the following financial provisions for the [wife], namely (i) That half the net proceeds of sale of the matrimonial home be paid to the [wife]; (ii) That until such sale the [husband] will continue to pay the monthly sum of £31.34 being the mortgage instalment on the said house'. He was granted a decree nisi of divorce. The wife applied for a declaration as to the fairness and reasonableness of the proposed financial arrangements under s 6^a of the 1969 Act, for periodical payments to herself and the two youngest children, who were still under age, and for a transfer of the property or a settlement or a lump sum payment. The judge made a nominal order of one penny a year for the wife and £1.50 weekly for each of the two children but otherwise he dismissed the wife's applications; his order stated '... the Court was satisfied that the financial provision made by the [husband] for the [wife] is reasonable and fair'. The wife appealed.

Held – (i) The making of proposals for financial provision for the wife did not amount to making provision for her, within s 6 (2) of the 1969 Act; if the decree were made absolute on the basis of mere proposals it would be open to a husband subsequently to resile from those proposals leaving the wife without protection. Accordingly s 6 required reasonable and fair financial provision for the wife actually to have been made before the decree was made absolute. It followed that the order should provide for the sale of the house to be in the hands of the wife's solicitor and that he should distribute the balance of the proceeds between the husband and the wife in accordance with the terms of the order (see p 18 j, p 20 d e and g, and p 21 c and d, post).

(ii) Subject to the consequential amendment to the judge's order, the appeal would be dismissed since, in all the circumstances, the financial provision proposed was fair and reasonable (see p 20 b c and h and p 21 d, post).

^a Section 6, so far as material, is set out at p 20 j, post

Notes

For restrictions on making decree absolute when based on period of separation, see *a*
 Supplement to 12 Halsbury's Laws (3rd Edn) para 900A.

For the Divorce Reform Act 1969, ss 2, 6, see 40 Halsbury's Statutes (3rd Edn) 770,
 774.

Appeal

The wife, Irene Rose Wilson, appealed against an order of his Honour Deputy Judge *b*
 Magnus, sitting at the Divorce Registry as a deputy circuit judge, made on 24th
 November 1972, whereby he declared himself satisfied that the financial provision
 made by the husband, Walter William Wilson, for the wife was reasonable and fair
 for the purposes of s 6 of the Divorce Reform Act 1969, and dismissed the wife's ap-
 plication for an order under s 4 of the Matrimonial Proceedings and Property Act 1970
 for transfer of property or variation of settlement. The facts are set out in the *c*
 judgment of Davies LJ.

N R Hannah for the wife.

Fiona Stoll for the husband.

DAVIES LJ. This is an appeal against an order of his Honour Deputy Judge Magnus *d*
 made on 24th November 1972 in which he adopted a report by the registrar, the full
 report of which we have got, dated 1st August, as to various applications for ancillary
 relief that the wife had made. The husband had obtained a decree nisi of divorce
 under s 2 (1) (e) of the Divorce Reform Act 1969, i.e. that they had been living apart
 for five years. As is well known, by s 6 of the 1969 Act it is provided that, when a
 decree is made on that ground, the decree absolute should not be made unless the *e*
 court is satisfied that the financial provision made by the petitioner for the respondent
 is reasonable and fair or the best that can be made in the circumstances. That appli-
 cation for a declaration as to the fairness and reasonableness of the proposed financial
 arrangements came before the registrar and, of course, subsequently before the judge
 and was combined with applications for periodical payments to the wife and the two
 youngest children of the marriage, an application for a transfer of property or a *f*
 settlement or a lump sum payment. All these applications by the wife, other than
 an almost nominal order for periodical payments, were rejected by the judge, on the
 registrar's recommendation.

With regard to the question of the husband's proposals, one finds them in the
 husband's petition for divorce dated 24th October 1971, in which he said, in para 8:

'... the [husband] proposes, if a Decree Nisi is granted, to make the following *g*
 financial provisions for the [wife], namely (i) That half the net proceeds of sale
 of the matrimonial home be paid to the [wife]; (ii) That until such sale the [hus-
 band] will continue to pay the monthly sum of ... £31.34 being the mortgage
 instalment on the said house.'

With regard to periodical payments, which I can mention now, there was a nominal *h*
 order of one penny per year for the wife and an order for £1.50 weekly for each of the
 two children. Apart from that, all the applications made by the wife were dismissed.
 The order made by the judge included these words: '... the Court was satisfied that the
 financial provision made by the [husband] for the [wife] is reasonable and fair.' In
 point of fact the husband had made no financial provision for the wife at all. All he had
 done was to make the proposal in his petition which I have just read. This court was *j*
 somewhat worried at that state of affairs. Both the registrar and the learned judge
 seemed to think that a proposal was equivalent to a provision. For myself, I do not
 think that is right at all because, if a decree is allowed to be made absolute on a
 mere proposal, it could very well happen that once the decree was made absolute
 a husband (I do not mean this one) would renege from his proposals and not carry
 them out and that the wife or ex-wife would be left completely unsecured and

a possibly destitute. But after discussion with learned counsel on both sides I think we have found a way to safeguard the wife's position in that regard, and I will come to that at the end of what I hope will be a short judgment.

The facts of the case are these. The parties were married in December 1944, being then aged 24 and 20; they are now consequently 52 and 48. They have had five children, of whom only two are under age, a girl of 15 and a boy of 12. This case concerns what was the matrimonial residence, a house at 62 Athenaeum Road, b Whetstone, in North London. It is a three-bedroomed house and was bought by the husband in 1957. Apparently previous to that the wife had found out that the husband was associating with a woman. She tackled him about it and he promised to mend his ways in that regard. But in 1960 the wife found out that it had been going on, I do not know whether for all the time or not, and they had a row about it. In c January 1961 the husband left and has been away ever since and, as far as we know, has been living with this other lady ever since. He has been paying the mortgage instalments on the house which I have mentioned—£31.34 per month. For a time he paid the wife £60 a month for the maintenance of the whole family; but that came to an end in October 1970, because he had left his job in June 1970. Apparently that was a car salesman's job. His leaving it was due partly, it would appear, to ill-health and also partly, as the registrar finds, to his desire to set up business on his d own. He was getting a salary of some £2,500 when he was employed. But there is no doubt at all that on his own he has not been doing anything like so well. Apparently, according to counsel for the wife, his accounts for the year ending July 1971 show a profit of £372; and in evidence he estimated that he was making £50 a month or possibly £72 a month. The registrar thought his earnings very small in e comparison with his previous salary and doubted whether his prospects were at all bright. The wife's financial position since the stopping of the allowance has been very parlous. She gets social security payments amounting to £13.35 a week, plus 90p a week for the youngest child, i.e. the second of the younger ones, the fifth, of course, in all.

There is the position. The husband's only asset is this house. It was estimated to f be worth at the time of the hearing before the registrar either £15,000 or £17,000. The main contention of counsel for the wife is that, in the light of all the history and the conduct of the parties, the husband having deserted the wife ten years ago and committed adultery, the proper order, whether it be done by varying the settlement or whether it be done by a transfer of property order, would be that the wife should g get the entire beneficial ownership of this house. We have not heard counsel for the husband on the other side on that because I think it occurred to all of us that in all the circumstances of this case it would be quite wrong to take away from the husband, despite his conduct, the only capital asset that he is ever likely to have. The wife sought to assert that she had some equity in the house, that she had put up a small sum of money for the purchase of the residence that they had before they went to Athenaeum Road. But the registrar did not think very much of that. He said: h 'Though she probably has some equitable interest in 62 Athenaeum Road, it is, in my opinion, a small one.' It is argued by counsel for the wife that, if she gets the half of £15,000 or £17,000 after the mortgage has been paid off, it would be very difficult for her to have anywhere suitable to live and that if she had to go to a smaller house this hitherto united family would probably in the foreseeable future come to be broken up instead of being all together as now. On the other hand, having regard to the fact that the elder ones may soon be leaving the family nest and getting married, i I do not know that one ought really to contemplate that the husband should provide housing for the whole family in any such future time as we can foresee.

The next submission by counsel for the wife was that the judge did not give proper weight to all the considerations that are set forth in s 5 of the Matrimonial Proceedings and Property Act 1970. I cannot see, for myself, that he failed to consider any of those matters.

Then it is said that, in view of the fact that the husband's income is insufficient to justify the making of an order for effective periodical payments to the wife, that difficulty should be counterbalanced and compensated for by the making of the order that is sought; in other words, giving the wife the whole house.

Well, we have had all the matters fully put before us by counsel for the wife; we have had this very full and complete report from the registrar read to us; and I have come to the conclusion that his order (subject to a formal matter to which I will turn in a moment) was completely right. I think that it would be wrong to deprive the husband of the whole of his interest in the house and I think that the fairest division of it would be (as he proposed in his petition) that the house should be sold, and each of them then should have, for what it is worth, a decent little piece of capital. The husband apparently wants to use it in his business—counsel for the wife suggests he may lose it; I do not know—and the wife would be able, no doubt, to buy a smaller house in a less expensive neighbourhood than this house in Whetstone. On the merits of the matter, I see no reason whatsoever for interfering with the order which the judge made.

I now come back to the point which I mentioned earlier on, as to the question of providing some security to the wife. I do not think it is right that a decree absolute should be made unless the wife is in a position to be guaranteed the financial provision which is offered and which the court approves. That is coming back again to the words of s 6 (2) of the Divorce Reform Act 1969, and pointing out that in my judgment the words 'financial provision made by the petitioner for the respondent' are not by any means the same as 'the financial proposals made by the petitioner'. If the decree were allowed to be made absolute when the matter was still in the air in the state of a mere proposal, the husband might quite happily go back on his word and go off to New Zealand or somewhere, leaving his wife in the lurch. In those circumstances (and we have had a talk with counsel on each side about this), I would propose that the order should be amended by ordering that the house be sold, that the sale be in the hands of the wife's solicitor, and that he, when the sale is completed and after paying off the mortgage and any necessary charges, distribute the balance as to one moiety to the wife and one moiety to the husband: in the event of the husband not carrying out this order, the sale to be completed on his behalf by the senior registrar of the Family Division. The decree is not to be made absolute until that is done.

Counsel for the husband raised a quite proper point of difficulty just now when she said: what is to happen if the wife refuses to implement the order? The answer to that I think was provided by Goff J when he said that the proper thing is to put in the order 'liberty to apply', so that if there were obstruction—on either side, and particularly by the wife, dealing with counsel's point—the husband can go to a judge of the Family Division and ask for an order to deal with that situation. Subject to that addition to the order, I would dismiss the appeal.

STEPHENSON LJ. I agree, and would add only a word or two on one matter of general importance which has emerged in the course of this appeal. Section 6 of the Divorce Reform Act 1969 gives financial protection to a respondent to a petition under s 2 (1) (d) or (e). A respondent to a petition under s 2 (1) (e) has protection at two stages. First of all, before even a decree nisi can be pronounced, she has the protection given by s 4, which provides that the court shall dismiss the petition if certain conditions are satisfied. Then she has the protection given after decree nisi by s 6 (2) providing that the court shall not make absolute the decree of divorce unless it is satisfied of one of two conditions, the second being—

'(b) that the financial provision made by the petitioner for the respondent is reasonable and fair or the best that can be made in the circumstances.'

- a* In this case the registrar (as Davies LJ has pointed out) treated the husband's proposals set out in his petition to sell the matrimonial home and to pay the wife half the net proceeds of the sale as the making of such a financial provision. He recommended the dismissal of the wife's applications under the Matrimonial Proceedings and Property Act 1970, 'subject to the implementation by the petitioner of the proposal set out in the petition'; but he did not recommend that the making of the decree absolute be subject to the same condition. The judge's order did not in terms dismiss the applications under the 1970 Act but it did recite that 'the Court was satisfied that the financial provision made by the [husband] for the [wife] is reasonable and fair'. In other words, the learned judge treated the financial provision as made and as reasonable and fair when in fact it had merely been proposed or offered.

- b*
- c* I regard it as important that the protection given by s 6 of the 1969 Act should not be whittled away by allowing a decree to be made absolute before reasonable and fair financial provision for the respondent has actually been made, which in this case means that the finance has actually been provided by payment. I entirely agree with the order proposed by Davies LJ.

GOFF J. I agree, and I have nothing to add.

- d* *Appeal dismissed, subject to variation of order below by ordering the sale of the house; the sale to be in the hands of the wife's solicitor, who, after payment of mortgage and necessary charges, would distribute balance of proceeds of sale as to one moiety to wife and one to husband. In default of husband carrying out the order, the sale to be completed by senior registrar of Family Division. Decree of divorce not to be made absolute meanwhile. Liberty to apply to judge of the Family Division.*

- e* Solicitors: P A S Mulready & Co (for the wife); Kleinman, Klarfeld & Co (for the husband).

F A Amies Esq Barrister.

f **Lees v Arthur Greaves (Lees) Ltd**

NATIONAL INDUSTRIAL RELATIONS COURT

SIR SAMUEL COOKE, MR R BOYFIELD AND PROFESSOR T L JOHNSTON

15th NOVEMBER, 14th DECEMBER 1972

- g* *Industrial relations – Unfair dismissal – Dismissal – Meaning – Notice to employee to terminate contract of employment – Agreement by employer and employee during period of notice to terminate contract forthwith – Contract in fact terminated forthwith – Whether employee dismissed – Industrial Relations Act 1971, ss 22 (1), 23 (2).*
- h* *Industrial relations – Unfair dismissal – Date of dismissal – Notice by employer terminating contract – Employer and employee subsequently agreeing during period of notice to shorten period of notice – Whether date of dismissal date of expiry of original or of shortened notice – Industrial Relations Act 1971, s 23 (2).*

- i* On 1st October 1971 an employee was orally given six months' notice by his employer to terminate his contract of employment. By letter dated 7th October the employer informed the employee that his employment would be terminated on 31st March 1972 'unless otherwise agreed in the meantime'. On 28th January 1972 the employee was prevailed on by the employer to finish his employment, accepting two months' full gross pay in lieu of working for the months of February and March 1972. The employee did in fact finish on 28th January receiving his insurance cards, holiday

pay entitlement and P45 tax form. Subsequently the employee claimed compensation for unfair dismissal under ss 22 and 106 of the Industrial Relations Act 1971, which came into force on 28th February 1972^a.

Held – The employee was not entitled to compensation for unfair dismissal. An employee was not ‘dismissed’ within the meaning of s 23^b of the 1971 Act where, during the period between the giving of notice and its expiry, the employer and the employee agreed that the contract of employment should be terminated forthwith, and it was so terminated. Since the employer and the employee had agreed on 28th January that the contract of employment be terminated on that date, it followed that, despite the notice given by the employer in October 1971, the contract had not been terminated by dismissal and the provisions of s 22 had no application. In any event, even if the employee had been dismissed, the contract was terminated, and the dismissal took effect, on 28th January, i.e. before s 22 came into force, with the result that the employee did not have the rights conferred by ss 22 and 106 (see p 24 g and p 25 a to c, post).

Per Curiam. There is a ‘dismissal’ within the meaning of ss 22 and 23 of the 1971 Act where, during the period of notice and its expiry, (a) the employer and employee agree that the period of notice shall be abridged by substituting a new and earlier date for its expiry, or (b) the employer and employee agree that during the balance of the notice period the employer shall not require any services from the employee (see p 24 h and j, post).

Brindle v H W Smith (Cabinets) Ltd [1973] 1 All ER 230 distinguished.

Notes

For the meaning of dismissal under the Industrial Relations Act 1971, see Supplement to 38 Halsbury’s Laws (3rd Edn) para 677B, 19.

For the Industrial Relations Act 1971, ss 22, 23, 106, see 41 Halsbury’s Statutes (3rd Edn) 2088, 2137.

Case referred to in judgment

Brindle v H W Smith (Cabinets) Ltd [1973] 1 All ER 230, [1972] 1 WLR 1653, [1973] ICR 12, CA.

Case also cited

Ryan v Liverpool Warehousing Co (1966) 1 ITR 69, IT.

Appeal

This was an appeal by John R Lees against a decision of an industrial tribunal (chairman Henry Gore Esq) sitting at Manchester, dated 19th July 1972, that the appellant’s application for compensation for unfair dismissal against the respondents, Arthur Greaves (Lees) Ltd, under ss 22 and 106 of the Industrial Relations Act 1971 was null and void, dismissal having taken place before the relevant provisions of the 1971 Act had come into effect. The facts are set out in the judgment of the court.

Laurence Oates for the appellant.

Mr Jack Purvis, industrial relations officer, Engineering Employers’ Association of South Lancashire, Cheshire and North Wales, appeared on behalf of the respondents.

SIR SAMUEL COOKE delivered the following judgment of the court. This is an appeal from a decision of an industrial tribunal held at Manchester dismissing the appellant’s claim for compensation for unfair dismissal. The respondents are sheet

^a See the Industrial Relations Act 1971 (Commencement No 4) Order 1972 (SI 1972 No 36)

^b Section 23, so far as material, is set out at p 24 b, post

a metal workers and engineers. The appellant entered their service in 1952 and served them in the various capacities of traveller, chargehand and foreman, until with effect from 1st September 1970 he was appointed their works manager. The terms of that appointment are set out in a letter dated 21st August 1970, signed by the respondents' chairman, and the terms provided, *inter alia*, that either party might terminate the employment by giving six months' notice.

b A year or so later the board of directors of the respondents formed the opinion that the appointment was not a success, and on 1st October 1971 the appellant was orally given six months' notice of the termination of his employment. That oral notice was confirmed by a letter from Mr Dawson, the chairman, to the appellant, dated 7th October 1971. The letter makes it clear that a new works manager was to be appointed at once, that the appellant was to be responsible to him, and that the appellant's sphere of responsibility was to be confined to the sale and production of general sheet metal work. The appellant apparently acquiesced in that change in the terms and conditions of his employment, and the letter makes it clear that in other respects the terms and conditions of his employment were to remain unchanged during the period of the notice. The letter concludes:

d 'At the expiration of notice, March 31st 1972, your employment will be terminated unless otherwise agreed in the meantime.'

Among their findings of fact, the tribunal find that on 28th January 1972 the appellant was prevailed on to finish, and did in fact finish on that date, accepting two months' full gross pay in lieu of working for the months of February and March 1972. The tribunal find that on 28th January the appellant received his insurance cards, holiday pay entitlement, and P45 tax form. They find that he signed on at the employment exchange some time after 31st March 1972 and obtained new employment in May 1972.

e Now the appellant's claim for compensation for unfair dismissal was based on the Industrial Relations Act 1971. The right of an employee not to be unfairly dismissed, which is a new statutory right separate from and additional to his common law right not to be dismissed wrongfully, is conferred by s 22 of the 1971 Act. That section came into operation on 28th February 1972.

f It was in those circumstances that the tribunal considered, as a preliminary point, whether having regard to the events of January 1972 the appellant had any cause of action (if we may be permitted to use that term by analogy in this context) against his employers under s 22 of the 1971 Act and the related provisions dealing with compensation. The normal rule, of course, is that when an Act of Parliament creates a new cause of action, as opposed to providing a new procedure for enforcing an existing cause of action, the new cause of action is not conferred in respect of matters which occurred before the commencement of the Act, unless the Act expressly or by implication so provides. The tribunal dealt with that question in this way:

g 'The Tribunal concluded . . . that the effective date of the termination of the [appellant's] contract of service had been 28th January 1972 when he received all his monetary entitlements, his insurance cards and P.45 Tax Form, after which date there was no longer in existence any contract between him and the Respondents and thenceforward the [appellant] was entitled to offer his services to any other employer. The contract had been legally if prematurely terminated on 28th January 1972; "prematurely" consisted of 2 months earlier than the original date of termination specified in the notice of 7th October 1971, but the Respondents had made some reparation or recompense in respect of such prematureness. The [appellant] could have stipulated with the Respondents that he was to be regarded as their employee without working for the remaining 2 months in which case his insurance cards would have been stamped and PAYE tax deduction made; but this was not done and the [appellant]

was content to accept 2 months gross pay without working; he was not employed by anyone after 28th January 1972 until he got new employment in May 1972. Application dismissed as null and void, the dismissal being before the date of the commencement of the Industrial Relations Act 1971.' a

The meaning of 'dismiss' and 'dismissal' is dealt with in s 23 of the 1971 Act. Section 23 (2) provides that, subject to an exception not here material— b

'for the purposes of this Act an employee shall be taken to be dismissed by his employer if, but only if,—(a) the contract under which he is employed by the employer is terminated by the employer, whether it is so terminated by notice or without notice, or (b) where under that contract he is employed for a fixed term, that term expires without being renewed under the same contract.'

Subsection (5) of s 23 defines the expression 'effective date of termination', an expression which is not used in s 23 itself but elsewhere in the 1971 Act. In particular, sub-s (5) provides that in relation to an employee whose contract of employment is terminated by notice, whether given by the employer or the employee, the expression 'the effective date of termination' means the date on which the notice expires. c

In the recent case of *Brindle v H W Smith (Cabinets) Ltd*¹, the Court of Appeal had to consider what date was, for the purposes of s 22 of the 1971 Act, to be taken as the date of an employee's dismissal when she was dismissed on notice given by her employer. The Court of Appeal in effect held that in such a case the date of dismissal is the date on which the notice expires and on which, in consequence of the expiry of the notice, the contractual nexus between the parties is terminated. It is further clear from the decision of the Court of Appeal in that case that the date which is to be taken as the date of dismissal is not affected by the mere fact that the employer waives his right to the employee's services during the period of the notice. d

While those principles are, we think, clear from the Court of Appeal's decision, the decision does not deal with the question whether, and if so in what way, the application of those principles may be modified by an agreement arrived at between employer and employee during the period of the notice. The Court of Appeal did not have to consider that question, because it was abundantly clear that in the case before them no such agreement had been arrived at. e

It appears to this court that at least three types of agreement may be relevant: (1) the employer and employee may agree, during the period of the notice and before its expiry, that the contract of employment between them shall be terminated forthwith. In such a case it appears to us that there never is a dismissal within the meaning of s 23 of the 1971 Act. The contract between them is not terminated by the employer's notice, because the notice has never taken effect; it has been terminated by the supervening agreement between the parties and not by the notice at all. (2) The employer and employee may agree, during the period of the notice and before its expiry, that the period of the notice shall be abridged by substituting a new and earlier date for its expiry. The difference between such an agreement and an agreement of the first type may well be a fine one and may, indeed, seem artificial. However, it is a difference which may have important consequences, because, where such an agreement is made, the position is that there is still a dismissal within the meaning of the 1971 Act, but the date of the dismissal is advanced in accordance with the agreement. (3) The employer and employee may agree, during the period of the notice and before its expiry, that the employer shall not exercise his right to require services from the employee during the balance of the notice; that the employee shall, in effect, be entitled to a vacation during that period. If such an agreement is made and observed, there is a dismissal within the meaning of the 1971 Act, and the date of dismissal is the date of the expiry of the notice. f

a In the present case it appears to us to be plain that the tribunal have found that on 28th January 1972 the appellant and the respondents made an agreement of the first of the three types we have mentioned, and that by virtue of that agreement the contract of employment between them terminated on that date. Subject to one matter to which we shall refer in a moment, there was in our view ample evidence to support that finding. If the finding stands, we think it follows that although a notice to terminate the contract of employment was given by the respondents, the effect of the events which followed was that the contract was not terminated by dismissal and that the provisions of the Act relating to unfair dismissal do not apply. Alternatively, *b* if contrary to our view there was a dismissal, the dismissal took effect on 28th January 1972, before s 22 of the Industrial Relations Act 1971 came into force, and therefore the appellant did not at the material time have the rights conferred by that section and the related sections providing for compensation.

c However, in considering whether the evidence, as summarised in the chairman's notes, is sufficient to support the finding of a consensual discharge of the contract on 28th January 1972 there is one matter of importance to which we must refer. It is entirely clear that there could be no question of there having been a valid agreement to discharge the contract of employment if the agreement was achieved by trickery or by improper pressure exercised by the employer on the employee. We refer *d* to the following passages in the chairman's summary of the appellant's evidence:

e 'I finished on 28th January 1972. I was pressurised into leaving. 25th January 1972 I was asked if I had got another job. I said I had notice to work. After further meeting it was said I should leave on Friday 28th January 1972. I said I should get compensation. He said he would go into it. I left on Friday 28th January 1972. I was given for next two months—full wages for two months. [And in cross-examination:] I left on 28th January as being entitled to do so. I received 2 months pay and cards and P45 on that day.'

f In interpreting that evidence we think that the tribunal were entitled to take into account the human relationships and practical administrative features of the situation. The appellant had, in effect, been replaced by a new works manager during the period while he was working out his notice. Such a situation can obviously give rise to friction which an employer may well desire to eliminate. In those circumstances, an employer may perfectly properly seek to persuade the employee who is under notice to agree to terminate the contract of employment before the notice expires. Lawful persuasion is one thing; improper pressure brought on the employee by unlawful action or threats of unlawful action is quite another. The expression *g* 'I was pressurised into leaving' may have been no more than the appellant's way of describing perfectly lawful persuasion. It was for the tribunal to interpret the evidence before them. The tribunal's view of the matter is, we think, expressed in the passage in para 2 of their reasons where they say:

h 'The [appellant] could have stipulated with the Respondents that he was to be regarded as their employee without working for the remaining 2 months in which case his insurance cards would have been stamped and PAYE tax deduction made; but this was not done and the [appellant] was content to accept 2 months gross pay without working.'

j We do not think that the tribunal would have found that the appellant was content with what occurred if there had been any real indication in the evidence of improper pressure on him. Nor is there any suggestion in the notes of evidence that the respondents had deceived the appellant as to the rights which he would have had under the Industrial Relations Act 1971 if the notice had been allowed to run its course. There is indeed nothing in the notes of evidence to suggest that such knowledge as they may have had of the 1971 Act was superior to the appellant's own. After all, the appellant had been a works manager. Courts and tribunals will always

carefully scrutinise any case in which there is ground for suggesting that an agreement has been obtained by deception or improper pressure. There is nothing in our decision today which should encourage employers to attempt to obtain agreements by such means. a

The appeal is dismissed.

Appeal dismissed.

Solicitors: *Casson & Co*, Salford (for the appellant). b

Gordon H Scott Esq Barrister.

J Murphy and Sons Ltd v Secretary of State c for the Environment and another

QUEEN'S BENCH DIVISION

ACKNER J

5th, 6th, 16th FEBRUARY 1973 d

Town and country planning – Development – Permission for development – Material consideration – Cost of development – Whether cost of developing site a material consideration to be taken into account by planning authority when considering application for permission – Town and Country Planning Act 1971, s 29 (1).

Town and country planning – Development – Permission for development – Inquiry – Report of inspector – Minister differing from inspector on a finding of fact – Duty to notify parties and afford them opportunity to make representations where decision at variance with inspector's recommendation – Finding of fact – Distinction between finding of fact and expression of opinion on planning merits – Town and Country Planning (Inquiries Procedure) Rules 1969 (S I 1969 No 1092), r 12 (2). e

Because of the urgent housing problem in their area a local council submitted an outline application for permission to develop a site for housing purposes. In the development plan the site had been allocated for industrial purposes and the council accepted that it was not ideal for residential purposes. Certain contractors carried on business at a depot adjoining the site. They and others objected to the council's application. An inspector was appointed to hold a public local inquiry. In his report the inspector stated in his conclusion: '... despite the undoubted urgent need for more housing... I do not consider the site is suitable for residential development. Evidence given at the inquiry indicates that noise [from the contractors' depot] would be a considerable nuisance and would have a severe environmental effect on the occupants of the dwellings proposed by the council.' There was also evidence that, because of the physical character of the site and the excessive noise, the cost of the development would be above average. The Minister did not accept the inspector's recommendation, however, and decided that the permission should be granted. His decision letter set out the inspector's conclusion and stated, inter alia, that the cost of developing a site for a particular purpose was not a relevant consideration in determining whether planning permission should be granted. In para 12 of the letter he further stated that in areas where there was 'an exceptional and urgent need for more housing land, planning disadvantages in the use of particular sites for residential purposes, which would be unacceptable elsewhere, must sometimes be accepted for reasons of wider policy where the sites are capable with careful treatment of providing reasonable housing accommodation'. The contractors moved for an order to quash f

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- a the decision on the grounds (i) that the Minister had failed, contrary to s 29 (1)^a of the Town and Country Planning Act 1971, to have regard to a material consideration, i.e. the cost of developing the site, and (ii) that he had failed to comply with r 12 (2)^b of the Town and Country Planning (Inquiries Procedure) Rules 1969 in that, having differed, in the concluding words of para 12 of his letter, from his inspector on a finding of fact he had failed to notify the contractors of his disagreement and to afford them an opportunity to make representations in writing.

Held – The motion would be dismissed because—

- (i) on a planning application under the Town and Country Planning Acts, the planning authority was concerned with the question how the land was to be used, not whether the proposed development would be a wise commercial venture, and so the Minister was not entitled to have regard to the cost of developing a site in determining whether planning permission should be granted (see p 31 c and d and p 32 c, post);
- c (ii) the final words of para 12 of the Minister's decision were not a statement of fact but an expression of his opinion that, by taking the appropriate measures, reasonable housing accommodation could be provided even though the degree of noise would be unacceptable in areas where there was no exceptional and urgent need for more housing land (see p 33 c and d, post).

Notes

For the exercise of powers to grant planning permission, see 37 Halsbury's Laws (3rd Edn) 301-304, para 413.

- e For the Town and Country Planning Act 1971, s 29, see 41 Halsbury's Statutes (3rd Edn) 1619.

Case referred to in judgment

Lord Luke of Pavenham v Minister of Housing and Local Government [1967] 2 All ER 1066, [1968] 1 QB 172, [1967] 3 WLR 801, 131 JP 425, 111 Sol Jo 398, 18 P & CR 333, 65 LGR 393, CA; *rvsg* [1967] 1 All ER 351, [1967] 2 WLR 623, 131 JP 258, 111 Sol Jo 16, 18 P & CR 280, Digest (Cont Vol C) 968, 55ba.

Motions

- The applicants, J Murphy and Sons Ltd, moved the court for (1) an order quashing the decision of the first respondent, the Secretary of State for the Environment ('the Minister'), dated 17th December 1971 to grant planning permission to the second respondent, the London Borough of Camden ('the council'), for the development for

- a Section 29 (1), so far as material, provides: "... where an application is made to a local planning authority for planning permission, that authority, in dealing with the application, shall have regard to the provisions of the development plan, so far as material to the application, and to any other material considerations, and—(a) . . . may grant planning permission, either unconditionally or subject to such conditions as they think fit; or
- h (b) may refuse planning permission."

- b Rule 12, so far as material, provides: '(1) The appointed person shall after the close of the inquiry make a report in writing to the Minister which shall include the appointed person's findings of fact and his recommendations, if any, or his reason for not making any recommendations.

- j '(2) Where the Minister—(a) differs from the appointed person on a finding of fact . . . and by reason thereof is disposed to disagree with a recommendation made by the appointed person, he shall not come to a decision which is at variance with any such recommendation without first notifying the applicant, the local planning authority and any section 17 party who appeared at the inquiry of his disagreement and the reasons for it and affording them an opportunity of making representations in writing within 21 days or (if the Minister has taken into consideration any new evidence or any new issue of fact, not being a matter of government policy) of asking within 21 days for the re-opening of the inquiry . . .'

residential purposes of certain land on the west side of Highgate Road, London NW5, and (2) orders (i) suspending until the final determination of the proceedings the operation of the London Borough of Camden (West Kentish Town Sidings) Compulsory Purchase Order 1969, and (ii) quashing that order either generally or insofar as it affected the property of the applicants. The facts are set out in the judgment. a

The Hon S C Silkin QC and M Howard for the applicants. b

Douglas Frank QC and Gordon Slynn for the respondents.

Cur adv vult

16th February. **ACKNER J** read the following judgment. These are two motions by the applicants, J Murphy & Sons Ltd, public works building and civil engineering contractors. The first is to quash the decision of the Secretary of State for the Environment dated 17th December 1971 granting planning permission for the development for residential purposes of certain land on the west side of Highgate Road, London NW5. The second is for an order suspending the London Borough of Camden (West Kentish Town Sidings) Compulsory Purchase Order 1969, which related approximately to the same area of land covered by the planning permission, with the exception of a small portion of which the second respondent, the London Borough of Camden, referred to hereafter as 'the council', already owned. This order he confirmed on the same day as he granted the planning permission. c

There are two grounds, which are quite distinct, on which the motion to quash the Minister's decision to grant planning permission is based. These, in the order in which they are set out in the amended notice of motion, are: (1) the Minister's decision was not within his powers since, contrary to s 29 (1) of the Town and Country Planning Act 1971, he failed to have regard to a material consideration, viz the costs of developing the site; the Minister stated in terms that the cost of developing a site for a particular purpose is not a relevant consideration in determining whether or not planning permission should be granted and (2) he failed to comply with r 12 (2) of the Town and Country Planning (Inquiries Procedure) Rules 1969¹ in that having differed from his inspector whom he had appointed to hold a public inquiry on a *finding of fact* he failed to notify the applicants of his disagreement and the reasons for it and to afford them an opportunity of making representations in writing and that as a result the interests of the applicants have been substantially prejudiced. If either of these two grounds are established they entitle me to quash the Minister's decision; see s 245 (4) (b) of the Town and Country Planning Act 1971. If the Minister's decision granting planning permission were to be quashed, it is agreed that his decision confirming the compulsory purchase order should be suspended. d

In July 1971 the Minister's inspector, Mr K M Sargeant, held a public local inquiry into: (a) an application deemed to have been referred to the Secretary of State under s 22 of the Town and Country Planning Act 1962 (s 35 of the 1971 Act) for outline planning permission for development by the council for residential purposes of land on the west side of Highgate Road, adjoining the Kentish Town-Barking railway; (b) an application made by the council under Part V of the Housing Act 1957 and the Acquisition of Land (Authorisation Procedure) Act 1946 for the confirmation of the London Borough of Camden (West Kentish Town Sidings) Compulsory Purchase Order 1969 authorising them to acquire compulsorily land on the west side of Highgate Road for the purpose of providing housing accommodation. e

The land the subject-matter of the planning application comprised four acres bounded on the north-east by Highgate Road and on the north-west by the Kentish Town-Barking railway. The frontage land, about one-third of the site, is at about road level, the rest of the site being about 20 ft lower at railway level. It was formerly a railway maintenance depot. In the initial development plan, the frontage land was f

a allocated for general industry, and the low-level back land as a railway goods station. Because of the urgent housing problem—there were approximately 50,000 households in Camden in sub-standard houses and they would have to be rehoused within the next few years—the council submitted the outline application as a departure from the development plan in advance of a proposed amendment for a larger area of about 94 acres—the Grafton area. The council accepted that the site was not ideal for residential use, but was satisfied that it could be developed satisfactorily if special measures were taken. It was proposed to construct a deck over the low-level part of the site so that all the housing units would be at or above the level of Highgate Road. It was also proposed to use double glazing.

b The applicants, who were the main objectors, had their Kentish Town depot adjoining the southern side of the application site. The council did not seek the compulsory purchase of any part of their site, but the applicants wished to expand into the land which the council wished to use for housing. Their premises comprised approximately ten acres of former sidings and locomotive sheds originally used by British Railways. The applicants are a very large undertaking and are responsible for a wide variety of works in the public sector in the Greater London area. A total of 484 vans, trucks and mobile compressors were based on this depot and used for operations north of the Thames and in the London area. Plant, machinery and vehicles were serviced, maintained and repaired at the depot in the workshops, or in the open if the equipment was too large to go under cover. Some maintenance took place at night, usually once or twice a week. Steel gas pipes were fabricated by the cutting and joining of sections in the workshops nearest the application site. The applicants maintained that the site was quite unsuitable for residential development by reason essentially of the noise from the railways and from their own depot, which would be excessive despite the proposed action by the council to minimise it. They moreover contended that the special steps proposed by the council, such as the ‘decked’ residential development and the double glazing, would be so expensive as not to be economically permissible.

e The inspector in his report has purported, at para 93, to make some 38 findings of fact. Unfortunately these are not findings, they are recitals of facts which were agreed, and contentions and assertions made by the council and the applicants. All findings of fact, which are material, are set out in paras 94-98, which he has headed ‘CONCLUSIONS RELATING TO THE PLANNING APPLICATION’. They read as follows:

f ‘94. Bearing in mind the above findings of fact, I am of the opinion that the land-use of the application site can if necessary be considered independently of, and in advance of, any overall proposals for the Grafton study area as it is cut off from other parts of the study area by a railway and by properties which would remain primarily in industrial use. Redevelopment of the site could be effected without prejudicing a comprehensive scheme for the whole area.

g ‘95. Nevertheless, despite the undoubted urgent need for more housing in Camden, I do not consider the site is suitable for residential development. Evidence given at the inquiry indicates that the noise of [the applicants’] heavy traffic in the accessway from 6.30 a.m. onwards, and the noise of their operations in the depot during the day (and occasionally at night), would be a considerable nuisance and would have a severe environmental effect on the occupants of the dwellings proposed by the council. The fact that [the applicants] tried to purchase the Long Shed (on the application site) for a depot extension suggests that their activities may intensify in the future and that the noise nuisance is more likely to increase, than to decrease, with time. Double-glazed non-openable windows would obviously reduce noise levels within the proposed dwellings (though not on the balconies or pedestrian deck) but, in my view, the need for such precautions only emphasizes the inherent unsuitability of the site for housing. Railway noise would cause less nuisance and, by itself, might be tolerable but

—considered in conjunction with the noise from [the applicants'] depot—it must be regarded as adding a little more weight to the general planning objections. a

'96. A decked residential development, as proposed by the council, is physically practicable but would clearly be very expensive. While the council are satisfied that a detailed scheme could be designed to meet the Department's yardsticks, it seems to me that the above-average cost is yet another factor which demonstrates the unsuitability of the site for housing. b

'97. In my opinion, as no major change of use is envisaged for the industrial area adjoining the southern side of the site, it would be far better for the site itself to be redeveloped—in whole or in part—for industrial or commercial purposes, thus according generally with the allocations in the initial development plan. c

'98. I do not think that a refusal of the planning application need necessarily involve an overall loss of potential housing. It may be possible, on further consideration, to find alternative land elsewhere in the Grafton study area which is more suitable than the present site and which is additional to the residential areas already proposed.'

The Minister gave his decision on the planning application in his letter of 17th December 1971. He set out, virtually verbatim, paras 95, 96, 97 and 98 of the inspector's report. He then stated: d

'9. It is noted that the Inspector took the view that the proposed new use of the application site could be considered independently of and in advance of the remainder of the Grafton study area which the Council proposed should be the subject of later redevelopment proposals; and that although, having regard to the noise nuisance, he considered the site to be more suitable for redevelopment for industrial or commercial, rather than residential, purposes, he accepted that a decked residential development, as proposed by the Council, is physically practicable, though very expensive. e

'10. The cost of developing a site for a particular purpose is not thought to be a relevant consideration in determining whether planning permission should be granted. f

'11. As regards noise it is noted that conflicting evidence was put forward at the inquiry by the Council on the one hand and by [the applicants] on the other, and that the Inspector concluded that the noise of traffic and of operations in the depot would be a considerable nuisance and would have a severe environmental effect on the occupants of the proposed dwellings. g

'12. But the view is taken that in areas such as inner London, where there is an exceptional and urgent need for more housing land, planning disadvantages in the use of particular sites for residential purposes, which would be unacceptable elsewhere, must sometimes be accepted for reasons of wider policy where the sites are capable with careful treatment of providing reasonable housing accommodation.' h

The Minister therefore decided not to accept the inspector's recommendation. He granted planning permission for the residential use of the land subject to the approval of the details of the siting, design and external appearance of the building etc being obtained from the local planning authority.

I now turn to deal with the two distinct grounds on which the motion to quash the Minister's decision is based. j

(1) *The Minister failed to have regard to a material consideration, namely the cost of developing the site*

There can be no doubt from the terms of para 10 of his letter that the Minister declined to have regard to the cost of developing the site, because he said in terms

a that the cost of developing a site for a particular purpose is an irrelevant consideration
in determining whether planning permission should be granted. Thus the essential
and only question is: is the cost of developing a site for a particular purpose a relevant
consideration in determining whether or not planning permission should be granted? Planning permission is required for the carrying out of any development of land
(s 23 of the Town and Country Planning Act 1971). 'Development' is defined by s 22
b of the Act as meaning the carrying out of building, engineering, mining or other
operations in, on, over or under the land, or the making of any material change in
the use of any buildings or other land. In considering such an application, there is
no provision in the Act requiring the authority who considers the application for
planning permission to look beyond the effect of the land use or change of use pro-
posed and to enquire into matters of cost and cost benefits. I have never heard it
c suggested before that a planning application involves a valuation exercise of a kind
which one would associate more with the activities of the Lands Tribunal nor is
there any reported decision to this effect. What the planning authority is concerned
with, is how the land is to be used, and not whether the development proposed is
going to be a wise commercial venture. The planning authority exercises no paternal-
istic or avuncular jurisdiction over would-be developers to safeguard them from their
d financial follies. If it had such jurisdiction, planning inquiries would last even longer
than they do now, and the problems of establishing whether or not a particular
development was or was not economically justifiable would be countless.

I asked counsel for the applicants whether a planning authority would be entitled
to refuse permission to an eccentric millionaire, who wished to build a house on land
otherwise wholly suitable for such development, but which required an enormous
and wholly irrecoverable expenditure, on the foundations. He considered that such
e a decision would be perverse. However, since a planning approval enures for the
benefit of the land and not the particular developer who is making the application, I
find difficulty in following why the decision should be perverse, unless of course it
has had regard, as in my judgment it would, to an irrelevant consideration. I am of
course dealing solely with applications for planning permission under the Town and
f Country Planning Acts. I am not concerned with inquiries under the Highway Acts
as to the desirability of building a road or roads, where the power of the Minister of
Transport is at large and matters of cost are of course highly relevant, nor am I
of course concerned with an extra-statutory inquiry such as occurred in relation to the
proposal to build a third London airport. Examples of such development seem to
me to be of no assistance. The only other example which counsel for the applicants
provided, where he submitted that costs of development had been taken into con-
g sideration, was the not unfamiliar case of planning permission being refused on the
grounds that the proposed development, usually a house, was premature, because
there was as yet no sewage system to which the house could be connected. In such a
case it does not seem to me that the planning authority is having regard to the cost
of the development. The planning authority, conscious that there is an obligation on
the local authority to provide appropriate sewage facilities, is merely deciding that it
h is premature to carry out this development until the sewage works which will in
due course be provided in the area are in fact provided, otherwise the whole planning
by the local authority of its sewage system might be quite unjustifiably disrupted.
Counsel for the respondents knew of no case of an application to develop being dis-
missed, because the cost to the developer would be too high. So far as the compulsory
purchase order is concerned counsel for the applicants accepted that the remedy
j he sought depended on his success in his motion to quash the Minister's decision
on the planning application. I would only add therefore this comment. In para 7 of
the Minister's decision he states:

'... The Council gave evidence that the costs of the proposed scheme, including
measures to combat the noise nuisance, would meet the Department's yardstick
requirements, and although this was challenged by the objectors the application

of the cost yardstick to outline proposals is not a primary consideration in arriving at a decision on an order, since detailed proposals are subject to yardstick scrutiny at a later stage if the order is confirmed.' a

In para 3 of the notice of motion the point was taken as a ground for the application to suspend or quash the order, that the Minister had failed to have any or any sufficient regard to material considerations, namely the likely costs of developing the land for the purpose for which such compulsory purchase was authorised or was capable of being so developed in such a way as to meet the cost yardstick requirements imposed by the first named respondent for the purpose of such development. This point was abandoned before me and in my judgment rightly so abandoned. It would in my view be odd indeed if the Minister when considering the compulsory purchase order was right in the view which he adopted with regard to the cost of the proposed developments but was wrong when he adopted a similar approach when dealing with the planning application. I hold that as a matter of law the Minister is not entitled to have regard to the cost of developing a site in determining whether planning permission under the Planning Acts should be granted and accordingly his statement in para 10 of his decision letter is unexceptionable. b c

(2) *Has the Minister differed from his inspector on a finding of fact?* d

In answering this question it is essential to draw a distinction between *findings of fact* by the inspector and an *expression of opinion* by him on the planning merits (see *Lord Luke of Pavenham v Minister of Housing and Local Government*¹). If the Minister differs from his inspector on a finding of fact, he must, pursuant to r 12 (2) of the Town and Country Planning (Inquiries Procedure) Rules 1969, notify the applicant before coming to his decision. However, if he differs from his inspector on the planning merits, he can announce his decision immediately without prior notification to the applicant. So far as this inquiry was concerned, there were two essential matters on which the inspector was required to express his opinion on the planning merits, that is, to express his planning judgment. These were: (1) was the land suitable for residential development? (2) if there were any respects in which the land was unsuitable for residential development, should nevertheless such development be permitted, having regard to the urgent need for more housing in Camden? In the inspector's judgment (a) the site was not suitable for residential development and (b) planning permission should not be granted even though there was this undoubted urgent need for more housing in Camden. The findings of fact made by the inspector on which he based his planning judgments (other than findings of fact on matters of cost, which I have held to be irrelevant) related essentially to noise. These findings have been accurately recorded by the Minister in para 11 of his letter, i.e. that the noise of traffic and of operations in the depot would be a considerable nuisance and would have a severe environmental effect on the occupants of the proposed dwellings. Counsel for the applicants contends that the Minister has differed from those findings. He argues that the findings had been wrongly inserted by the inspector in that part of his report headed 'CONCLUSIONS RELATED TO THE PLANNING APPLICATION', and the Minister in using in para 11 the phrase 'the Inspector concluded . . .' has fallen into the same error as the inspector. He also argues that the opening sentence in para 11, where the Minister notes the conflicting evidence given at the inquiry on the subject of noise, is a prelude to the Minister expressing a different view on that subject to that expressed by his inspector. This latter point, in my judgment, substantially nullifies the first point, since I find it difficult to accept that the Minister, having noted the conflict of fact as to the degree of noise, would have treated the inspector's decision on the degree of noise, as other than a finding of fact. Counsel for the applicants contends that it is in para 12 that one finds that the Minister has differed from the inspector on the latter's finding of fact as to the degree of noise. e f g h j

¹ [1967] 2 All ER 1066, [1968] 1 QB 172

- a If the paragraph had ended with the words 'wider policy' counsel for the applicants accepts that he could make no such submission. He accepts that then the paragraph would clearly be expressing the Minister's opinion that because of the exceptional and urgent need for more housing in Camden, the planning disadvantages in the use of the particular site which the inspector found unacceptable, namely the noise, would have to be tolerated for reasons of policy. Such an expression of opinion would not involve any differing by the Minister from his inspector's findings of fact.
- b It would merely involve a difference of opinion between the Minister and his inspector on the planning merits. It is in the final words of the paragraph '... where the sites are capable with careful treatment of providing reasonable housing accommodation' that it is said that there is to be found the rejection by the Minister of his inspector's finding of fact as to the degree of noise. I cannot accept that this is a valid interpretation of these words. Such an interpretation makes otiose if not nonsensical the previous words in this long sentence, of which the phrase relied on is but the tail end. The final words of para 12, in my judgment, are but an expression of the Minister's opinion that, with the careful treatment of the site proposed by the council and described in some detail in the inspector's report, reasonable housing accommodation can be provided on the site, albeit that the degree of noise to which it will be subjected would have been unacceptable in areas where there was no exceptional and urgent need for more housing land. I am accordingly quite satisfied that the Minister did not disagree with his inspector on any finding of fact.

Accordingly the motions are dismissed.

Motions dismissed.

- e Solicitors: *Montague Gardner & Howard* (for the applicants); *Treasury Solicitor*.

E H Hunter Esq Barrister.

Halifax Building Society v Clark and another

- f CHANCERY DIVISION
PENNYQUICK V-C
10th APRIL 1972

Mortgage – Possession of mortgaged property – Suspension of execution of order for possession – Mortgagor likely to be able within reasonable period to pay any sums due under the mortgage – Power to suspend execution conditional on likelihood of mortgagor paying sums due – Mortgagor failing to pay instalments – Mortgagee entitled to redemption – Mortgagee seeking possession – Mortgagor likely to be able to pay arrears within reasonable period and to pay future instalments – No prospect of mortgagor paying redemption moneys within reasonable period – Mortgagor not entitled to suspension of possession order – Administration of Justice Act 1970, s 36 (1), (2).

- h The first defendant was the owner of a freehold dwelling-house. The property was mortgaged to the plaintiffs, a building society. Under the terms of the mortgage the sum advanced to the first defendant was to be repaid, with interest, by instalments. By cl 7 (2) of the mortgage deed the redemption money became immediately payable to the plaintiffs if the first defendant failed 'for two consecutive monthly subscription meetings to pay all the subscriptions fines interest or other money' covenanted under the deed. The 'redemption money' was defined as the sum of money equal to the principal and interest required to redeem the property together with arrears of subscriptions etc. In 1964 the first defendant deserted his wife, the second defendant, who continued to occupy the property. Since May 1958 the first defendant had been consistently in arrears in payment of the instalments. The plaintiffs sought possession of the property under cl 7 (2) of the mortgage. The second defendant stated that

she hoped within a relatively short time to pay off the arrears and to keep up the instalments; there was, however, no suggestion that she would, in the foreseeable future, be in a position to pay the redemption money in full. The master made an order for possession but, in purported exercise of his powers under s 36 (2)^a of the Administration of Justice Act 1970, suspended the order on terms that the second defendant paid the current instalments and £20.73 per month until the arrears had been paid.

Held – An order for possession should be made. The court only had power to suspend the order under s 36 (2) of the 1970 Act if the condition in s 36 (1) had been complied with, i.e. it appeared likely that the mortgagor would be able, within a reasonable period, to pay any sums due under the mortgage. Since the words ‘any sums due under the mortgage’ meant the redemption money and there was no likelihood of the first or second defendant paying the redemption money under the mortgage within a reasonable period the court had no power to suspend the order for possession under s 36 (2) (see p 37 j to p 38 b d and f, post).

Birmingham Citizens Permanent Building Society v Caunt [1962] 1 All ER 163 applied.

Notes

For the making of a conditional order for possession, see 27 Halsbury's Laws (3rd Edn) 365, para 690.

For the right of a mortgagee by way of legal mortgage to possession of the mortgaged property, see 27 Halsbury's Laws (3rd Edn) 277, para 511, and for cases on the subject, see 35 Digest (Repl) 454, 455, 1459-1467.

For the Administration of Justice Act 1970, s 36, see 40 Halsbury's Statutes (3rd Edn) 1060.

Cases referred to in judgment

Birmingham Citizens Permanent Building Society v Caunt [1962] 1 All ER 163, [1962] Ch 883, [1962] 2 WLR 323, Digest (Cont Vol A) 77, 187a.

Hastings and Thanet Building Society v Goddard [1970] 3 All ER 954, [1970] 1 WLR 1544, CA, Digest (Cont Vol C) 429, 621gqe.

Case also cited

Brighton & Shoreham Building Society v Hollingdale [1965] 1 All ER 540, [1965] 1 WLR 376.

Originating summons

By an originating summons dated 3rd December 1971, the plaintiffs, the Halifax Building Society, claimed against the defendants, Leonard William Clark and his wife, Doris Eileen Clark, possession of all the freehold land and premises situate at and known as 47 Redriff Road, Romford, within the London borough of Havering, all of which property was, by a mortgage deed dated 14th September 1954 and made between the first defendant and the plaintiffs, charged by the first defendant by way of a legal mortgage in favour of the plaintiffs to secure repayment to the plaintiffs of the principal sum of £1,530 (payment of which sum was thereby acknowledged by the first defendant) and payment in the meantime of interest thereon at the initial rate of 4½ per cent per annum in accordance with the covenants therein contained. The summons came before the master on affidavit evidence and he made an order for possession but, pursuant to s 36 of the Administration of Justice Act 1970, suspended its execution on certain specified terms. The plaintiffs caused the summons to be adjourned into court, contending that the court had no power to make a suspended order in the terms specified by the master. The facts are set out in the judgment.

John Cherryman for the plaintiff society.

Henry H Harris for the second defendant.

The first defendant did not appear and was not represented.

^a Section 36, so far as material, is set out at p 37 f to j, post

PENNYCUICK V-C. I have before me a summons for possession by a mortgagee. The plaintiff is the Halifax Building Society. The defendants are Leonard William Clark and his now separated wife, Mrs Doris Eileen Clark. The summons relates to certain premises known as 47 Redriff Road, Romford, which was then in the county of Essex. The mortgage deed was made between the first defendant, Leonard William Clark, who on the same day acquired the freehold of this property, of the one part, and the plaintiff society of the other part. It recites that the mortgagor has applied to the society for an advance of £1,530, the amount he is entitled to according to the rules in respect of 1,530 shares held by him in the society. Then in consideration of the sum of £1,530 advanced by the society to the mortgagor it witnesses as follows. Clause 1 contains a number of definitions, including:

“The Redemption Money” shall mean such a sum of money as at the time when the same has to be ascertained shall be equal to the principal money and interest required under the Rules or this Mortgage to redeem the mortgaged property together with all subscriptions in arrear fines [and so forth].’

Then cl 2:

‘THE said sum of One thousand five hundred and thirty pounds is advanced upon the terms of the Society’s twenty five years Period Table under which no profits are allowed in respect of the sum per share advanced and (subject as hereinafter provided) the sum advanced is repayable with interest . . . at the rate of £4. 10. 0. per centum per annum in twenty five years . . . by payments of ten shillings and fivepence every month for each share such payments to be made at the said monthly subscription meetings’.

It will be remembered that the mortgagor was entitled to 1,530 shares and therefore the amount of each monthly payment works out at the new figure of £7.96 per month.

Clause 3 contains covenants by the mortgagor:

‘(1) That he will pay to the Society in accordance with the said terms of advance the monthly payments hereinbefore specified . . .’

Then cl 3 (6):

‘That if the Society shall cause to be given to the Mortgagor or left at the Mortgagor’s usual or last known place of abode or upon any part of the mortgaged property six months previous notice in writing [he will make the required payment of the redemption money forthwith on the expiration of such notice].’

Clause 4 contains a charge by way of legal mortgage on the property. Clause 7 sets out:

‘(1) The Society shall permit the Mortgagor to hold and enjoy the mortgaged property and to receive the rents and profits thereof until any of the events or defaults mentioned in paragraph 2 of this clause shall happen.’

Then cl 7 (2):

‘In case the Mortgagor shall . . . (c) Fail for two consecutive monthly subscription meetings to pay all the subscriptions fines interest or other money herein covenanted by him to be paid or (d) Fail to pay the Redemption Money in accordance with a notice given to him as aforesaid or . . . (f) Fail to observe or perform any of the covenants by the Mortgagor herein contained then and in any of such cases the Redemption Money shall immediately become payable by the Mortgagor to the Society and shall be recoverable by the Society with interest thereon from the time of the same becoming payable . . . and the Society may at any time thereafter without any previous notice to or concurrence on the part of the Mortgagor (i) Take possession of the mortgaged property . . .’

In 1964, according to the uncontradicted evidence of the second defendant, Mrs Clark, her husband deserted her and since that time she has lived with her son at 47 Redriff Road. In 1966 there was an agreement between the society and the first defendant increasing the amount of the monthly instalments to £9.27 as from 1st November 1966. This alteration was made after the first defendant had deserted his wife but it is not contended on her behalf that the first defendant could not properly make the agreement—as indeed, I think, having regard to the terms of the mortgage, he clearly could—nor is it contended on her behalf that the increase in the amount of the instalments is not binding on her.

According to the affidavit filed on behalf of the society, the first defendant went into arrears in payment of the instalments on 15th May 1968 and he has been consistently in arrears since that date. The monthly subscriptions, fines and other moneys due on 3rd December 1971, that is, at the date of issue of the summons amounted to £72.97, and at the date of the affidavit, 18th February 1972, £100.78, and the total amount due on 18th February 1972 was £1,420.58. It is not disputed by the second defendant that those are indeed the amount of arrears and the amount due on 18th February 1972. Nor is it in dispute that the first defendant has failed for two consecutive monthly subscription meetings to pay his subscriptions, fines, interest or other money covenanted to be paid by him, with the consequence that the redemption money, i.e. now £1,420.58, has become immediately payable by him to the society.

According to the second defendant's affidavit, she has now commenced proceedings for divorce against the first defendant on the grounds that the marriage has irretrievably broken down. Negotiations, she said, are being conducted with a view to settling the divorce proceedings and it is anticipated that the settlement will involve the property. However, there is no suggestion in her affidavit that she will at any time in the foreseeable future be in a position to pay to the society the total amount of the redemption moneys. All she hopes to be able to do is to pay off the instalment arrears within a relatively short time and keep up the instalments.

The present originating summons was issued on 3rd December 1971 and came before Chief Master Ball on affidavit evidence, on the one hand by Mr Byott on behalf of the society, and on the other hand by the second defendant. I have already summarised the affidavit evidence. The first defendant was not represented. The Chief Master made an order in the following terms:

'Possession within 28 days of personal service; suspended on terms that the Defendant pays the current instalments and £20.73p. per month until the arrears are paid; 1st payment on or within 14 days after 14.4.72.'

There was some disagreement between counsel who appeared for the second defendant and the solicitors for the society as to exactly what took place before the master but that is the order he made as recorded in his note. The society caused the summons to be adjourned into court and contended before the master that there was no power in the court to make a suspended order in those terms.

I was referred to two or three cases. The first was *Birmingham Citizens Permanent Building Society v Caunt*¹. Russell J, after a full review of the authorities, concluded his judgment in these terms²:

'Accordingly, in my judgment, where, as here, the legal mortgagee under an instalment mortgage under which, by reason of default, the whole money has become payable, is entitled to possession, the court has no jurisdiction to decline to make the order or to adjourn the hearing, whether on terms of keeping up payments or paying arrears, if the mortgagee cannot be persuaded to agree to

1 [1962] 1 All ER 163, [1962] Ch 883

2 [1962] 1 All ER at 182, [1962] Ch at 912

a this course. The sole exception to this is that the application may be adjourned for a short time to afford to the mortgagor a chance of paying off the mortgagee in full or otherwise satisfying him; but this should not be done if there is no reasonable prospect of this occurring. When I say the sole exception, I do not, of course, intend to exclude adjournments which in the ordinary course of procedure may be desirable in circumstances such as temporary inability of a party to attend, and so forth.'

b It is not in dispute that, leaving out of account for the moment recent statutory legislation, that passage is a correct statement of the law and, so far as I am aware, the statement has always been acted on. So, in the present case, there is no question but that the society is entitled by reason of the first defendant's default to possession under the terms of the mortgage. Accordingly, it is entitled as of right to an order for possession. The court has no jurisdiction to decline to make that order or adjourn it, subject to the sole exception mentioned by Russell J; that exception has no relevance here since the second defendant does not suggest that she is in a position to pay off the principal of the mortgage in full.

c The question then arises whether that principle has been in some way affected by recent legislation? I was referred to the provisions of the Matrimonial Homes Act 1967 by counsel for the second defendant but, very properly it seems to me, he did not rely on those provisions as conferring any right on her in the present connection. On that point I was referred to one paragraph from the judgment of Russell LJ in *Hastings and Thanet Building Society v Goddard*¹:

e 'Now, it is plain that the [husband] could not resist the order for possession except by redeeming the mortgage. The wife was not by virtue of her interest under the 1967 Act in any better position. Section 36 of the Administration of Justice Act 1970 was not and still is not in force . . .'

f Section 36 of the Administration of Justice Act 1970 is now in force and counsel for the second defendant, for all practical purposes, rests his entire case on the provisions of that section. I will read the first three subsections:

g '(1) Where the mortgagee under a mortgage of land which consists of or includes a dwelling-house brings an action in which he claims possession of the mortgaged property, not being an action for foreclosure in which a claim for possession of the mortgaged property is also made, the court may exercise any of the powers conferred on it by subsection (2) below if it appears to the court that in the event of its exercising the power the mortgagor is likely to be able within a reasonable period to pay any sums due under the mortgage or to remedy a default consisting of a breach of any other obligation arising under or by virtue of the mortgage.

h '(2) The court—(a) may adjourn the proceedings, or (b) on giving judgment, or making an order, for delivery of possession of the mortgaged property, or at any time before the execution of such judgment or order, may—(i) stay or suspend execution of the judgment or order, or (ii) postpone the date for delivery of possession, for such period or periods as the court thinks reasonable.

i '(3) Any such adjournment, stay, suspension or postponement as is referred to in subsection (2) above may be made subject to such conditions with regard to payment by the mortgagor of any sum secured by the mortgage or the remedying of any default as the court thinks fit.'

It was pursuant to that section that the master made the order which he did make.

Now, looking at the first two subsections of s 36, it seems to me clear beyond argument that the powers conferred by s 36 (2) are only exercisable by the court if the

condition in s 36 (1) is complied with, i.e. it appears to the court that the mortgagor is likely to be able within a reasonable period to pay any sums due under the mortgage. The powers are expressly made exercisable on that condition and it seems to me quite impossible to construe the subsection as conferring powers under s 36 (2) on the court irrespective of whether or not this condition in s 36 (1) is satisfied.' a

Counsel for the second defendant attacked that construction of s 36 by the following reasoning. He contended that that construction of s 36 (1) and (2) does no more than confer on the court the very limited powers that are already vested in it under the principles laid down in the *Birmingham Citizens Permanent Building Society* case¹. That, he says, cannot have been the intention of an Act designed to confer benefits on mortgagors and therefore one must construe s 36 (2) as conferring the specified powers on the court free from the condition specified in s 36 (1). I see a great deal of force in the premise. Without going into the matter in detail, s 36 (1) and (2) together do appear to me to go a very little way beyond the principles laid down in the *Birmingham* case¹. Counsel for the society says that they do in certain respects extend the jurisdiction of the court. If they do, they do so to a very small extent. I do not propose to go into that now. Be that as it may, I am quite unable to accept the conclusion that counsel for the second defendant draws. The Act is perfectly clear and explicit and it seems to me plainly impossible to construe s 36 (2) as unconditional; to do so would fly in the face of the express words contained in the Act. b c d

It occurred to me that, where s 36 (1) refers to 'any sums due under the mortgage', the subsection might conceivably have been intended to mean any instalments due, in contradistinction to the entire redemption moneys, but again I think that is an impossible construction of the section, nor did counsel for the second defendant advance that contention. e

I conclude that in the present case, since on the second defendant's own evidence there is no likelihood of the first defendant as mortgagor or herself (bearing in mind the terms of the Matrimonial Homes Act 1967) being likely within a reasonable period to pay the redemption moneys under the mortgage—and it being conceded that 'any sums due under the mortgage' must mean the redemption moneys—the condition in s 36 (1) is not satisfied. Therefore the court has none of the powers expressly conferred by s 36 (2). Counsel for the second defendant made the point that the society has been a long time in taking proceedings to enforce this mortgage. I cannot see how that forbearance on the part of the society can possibly prejudice its right to do so now. If, contrary to my view, the court had the power conferred by s 36 (2), then the court would have a wide discretion and all sorts of matters might come under consideration including the possibility that under arrangements being negotiated in connection with the divorce proceedings the second defendant might be in a position to pay off the arrears and keep up the instalments. That is all beside the point. She has failed to establish any likelihood of the redemption moneys being paid off as a whole. I concluded therefore that I must take a different view from that advanced by the learned Chief Master and I must make the order for possession sought on the present summons. I will suspend the order for 28 days after personal service of the order on the defendants. f g h

Order accordingly.

Solicitors: *J R Capstick-Dale & Partners*, Romford (for the plaintiff society); *J Twinn & Co*, Romford (for the second defendant). j

Susan Corbett Barrister.

a **L Schuler A G v Wickman Machine Tool Sales Ltd**

HOUSE OF LORDS

LORD REID, LORD MORRIS OF BORTH-Y-GEST, LORD WILBERFORCE, LORD SIMON OF GLAISDALE AND LORD KILBRANDON

b 30th, 31st JANUARY, 1st, 5th, 6th, 7th, 8th FEBRUARY, 4th APRIL 1973

Contract – Condition – Breach of condition – Right of other party to terminate contract forthwith – Written contract – Clause of contract expressed to be a ‘condition’ – Breach of clause – Breach trivial – Whether breach entitling other party to repudiate contract.

c Contract – Construction – Conduct of parties – Conduct subsequent to execution of contract – Written agreement – Ambiguity – Relevance of conduct in ascertaining intention of parties.

Schuler, a German company which manufactured engineering products including panel presses, entered into a written agreement with Wickman, an English company,

d whereby Wickman was given the sole right to sell Schuler products in territory which included the United Kingdom. The agreement included the following provisions with regard to promoting sales of Schuler products: ‘7 ... (a) ... [Wickman] will use its best endeavours to promote and extend the sale of Schuler products in the Territory. (b) It shall be condition of this Agreement that:—(i) [Wickman] shall send its representatives to visit the six firms whose names are listed in the Schedule hereto at least once in every week for the purpose of soliciting orders for

e panel presses; (ii) that the same representative shall visit each firm on each occasion unless there are unavoidable reasons preventing the visit being made by that representative ... 12 ... (b) [Wickman] undertakes, at its expense, to look after Schuler’s interests carefully and will visit Schuler customers regularly, particularly those customers principally in the motor car and electrical industries whose names are set out on the list attached hereto ...’ Clause 11 contained powers for determining the agreement; after setting out various dates on which the agreement might by notice be terminated, cl 11 (a) went on to provide that either party might, by notice in writing, ‘determine this Agreement forthwith if:—(i) the other shall have committed a material breach of its obligations hereunder and shall have failed to remedy the same within 60 days of being required in writing so to do ...’ Wickman failed to comply with its obligations under cl 7 (b); although in most weeks the named

f representatives visited the firms listed in the schedule to the agreement, on a few occasions they failed to do so. In consequence Schuler claimed to be entitled to repudiate the agreement, contending that, since cl 7 (b), unlike any other provision of the agreement, was expressed to be a ‘condition’, one failure by a named representative to visit one of the listed firms gave it an absolute right to treat the contract as at an end.

h **Held** (Lord Wilberforce dissenting) – A breach of cl 7 (b) did not entitle Schuler to repudiate the agreement. Although there was a presumption that, if the word ‘condition’ was used in a formal contract, it indicated a term of the contract breach of which, however small, gave rise to a right to repudiate, the word would not be given that meaning if such a construction produced a result so unreasonable that the parties could not have intended it, and if there was some other possible and reasonable construction. Although the word ‘condition’ indicated that cl 7 (b) was a term of special importance, to read it as meaning that once one of Wickman’s representatives had failed to make one visit out of the thousands contracted for, Schuler thereby acquired an immediate right to repudiate the agreement, was so unreasonable that the parties could not have intended it; the word ‘condition’ in that context was to be construed (per Lord Reid and Lord Simon of Glaisdale) as

meaning that breach of cl 7 (b), however excusable, was a 'material breach' within cl 11 (a) (i), or (per Lord Morris of Borth-y-Gest) as denoting that the stipulation in cl 7 (b) had a special significance in considering whether Wickman had committed a 'material breach' (see p 44 e to g, p 45 b d to f and g, p 48 j, p 49 g, p 51 e to h, p 52 c to e, p 55 j, p 56 a b and g to p 57 b and p 62 j to p 63 a c and e, post).

Per Curiam. In construing a contract, whether to resolve an ambiguity or for any other purpose, the court is not entitled to take into account the conduct of the parties subsequent to the execution of the contract as throwing light on the meaning to be given to it (see p 45 h, p 46 a, p 52 h to p 53 a and c to e, p 54 b, p 59 h, p 60 b and c and p 63 f, post); *James Miller and Partners Ltd v Whitworth Street Estates (Manchester) Ltd* [1970] 1 All ER 796 applied; *Watcham v Attorney-General of East Africa Protectorate* [1918-19] All ER Rep 455 distinguished and doubted.

Decision of the Court of Appeal sub nom *Wickman Machine Tool Sales Ltd v L Schuler AG* [1972] 2 All ER 1173 affirmed.

Notes

For conditions of a contract, see 8 Halsbury's Laws (3rd Edn) 194, 195, para 328 and for cases on the subject, see 12 Digest (Reissue) 521, 522, 3612, 3613.

For the construction of an instrument by reference to the conduct of parties, see 11 Halsbury's Laws (3rd Edn) 410, para 666, and for cases on the subject, see 17 Digest (Repl) 335, 336, 1409-1425.

Cases referred to in opinions

Attorney-General v Drummond (1842) Dr & War 353, 1 Con & Law 210, 17 Digest (Repl) 326, *714.

Bettini v Gye (1876) 1 QBD 183, [1874-80] All ER Rep 242, 45 LJQB 209, 34 LT 246, 40 JP 453, 12 Digest (Reissue) 534, 3694.

Dawsons Ltd v Bonnin [1922] 2 AC 413, [1922] All ER Rep 88, 91 LJPC 210, 128 LT 1, 11 Lloyd LR 57, 29 Digest (Repl) 450, 3289.

Foley v Classique Coaches Ltd [1934] 2 KB 1; generally [1934] All ER Rep 88, 103 LJKB 550, 151 LT 242, CA, 39 Digest (Repl) 501, 471.

Gaisberg v Storr [1949] 2 All ER 411, [1950] 1 KB 107, CA, 12 Digest (Reissue) 219, 1410.

Glaholm v Hays (1841) 2 Man & G 257, Drinkwater 130, 2 Scott NR 471, 10 LJCP 98, 133 ER 743, 39 Digest (Repl) 522, 610.

Hillas & Co Ltd v Arcos Ltd [1932] All ER Rep 494, 147 LT 503, 38 Com Cas 23, 43 Lloyd LR 359, HL, 39 Digest (Repl) 448, 34.

Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd [1962] 1 All ER 474, [1962] 2 QB 26, [1962] 2 WLR 474, [1961] 2 Lloyd's Rep 478, CA, 41 Digest (Repl) 363, 1553.

London Guarantee Co v Fearnley (1880) 5 App Cas 911, 43 LT 390, 45 JP 4, HL, 29 Digest (Repl) 553, 3757.

Miller (James) and Partners Ltd v Whitworth Street Estates (Manchester) Ltd [1970] 1 All ER 796, [1970] AC 583, [1970] 2 WLR 738, [1970] 1 Lloyd's Rep 269, HL; *rvsg* sub nom *Whitworth Street Estates (Manchester) Ltd v James Miller and Partners Ltd* [1969] 2 All ER 210, [1969] 1 WLR 377, CA, Digest (Cont Vol C) 29, 1949a.

Prenn v Simmonds [1971] 3 All ER 237, [1971] 1 WLR 1381, HL.

Radio Pictures Ltd v Inland Revenue Comrs (1938) 22 Tax Cas 106, CA, 28 (1) Digest (Reissue) 155, 495.

Ritchie v Atkinson (1808) 10 East 295, [1803-13] All ER Rep 586, 103 ER 787, 41 Digest (Repl) 569, 3473.

Shore v Wilson (1842) 9 Cl & Fin 355, 11 Sim 615n, 4 State Tr NS App 1370, 5 Scott NR 958, 7 Jur 787n, 8 ER 450, HL; subsequent proceedings sub nom *Attorney-General v Shore* (1843) 11 Sim 592; sub nom *Attorney-General v Wilson* (1848) 16 Sim 210, 17 Digest (Repl) 266, 699.

Suisse Atlantique Société D'Armement Maritime SA v N V Rotterdamsche Kolen Centrale [1966] 2 All ER 61, [1967] 1 AC 361, [1966] 2 WLR 944, [1966] 1 Lloyd's Rep 529, HL, Digest (Cont Vol B) 652, 2413a.

- a* *Sussex Caravan Parks Ltd v Richardson* [1961] 1 All ER 731, [1961] 1 WLR 561, 125 JP 237, CA, Digest (Cont Vol A) 1280, 207a.
- Sydall v Castings Ltd* [1966] 3 All ER 770, [1967] 1 QB 302, [1966] 3 WLR 1126, CA, Digest (Cont Vol B) 454, 3146a.
- Thomson v Weems* (1884) 9 App Cas 671, HL, 29 Digest (Repl) 42, 1.
- Wallis, Son & Wells v Pratt & Haynes* [1910] 2 KB 1003, 79 LJKB 1013, 103 LT 118, CA; *on appeal* [1911] AC 394, [1911-13] All ER Rep 989, 80 LJKB 1058, 105 LT 146,
- b* HL, 12 Digest (Reissue) 522, 3613.
- Watham v Attorney-General of East Africa Protectorate* [1919] AC 533, [1918-19] All ER Rep 455, 87 LJPC 150, 120 LT 258, PC, 17 Digest (Repl) 287, 935.

Appeal

- c* By a written agreement dated 1st May 1963 the appellants, L Schuler A G ('Schuler'), appointed the respondents, Wickman Machine Tool Sales Ltd ('Wickman'), as sole distributors in a defined territory, which included the United Kingdom, of panel presses manufactured by Schuler. A dispute arose between the parties and, in accordance with cl 19 of the agreement, the dispute was referred to an arbitrator (Peter Bristow QC). On 6th October 1969 the arbitrator stated his award in the form of a special case for the opinion of the High Court. The question formulated for
- d* the purpose of the special case was set out in para 20 as follows:

'Whether on the facts found and the true construction of the documents Schuler were entitled by reason of breach by Wickman of their obligations under clause 7 (b) of the distributorship agreement (a) to terminate the agreement under clause 11 (a) (i); (b) to repudiate that agreement in or about early November 1964'.

- e* The arbitrator answered the question as follows: (a) Schuler were not entitled to terminate the agreement under cl 11 (a) (i); (b) Schuler were not entitled to repudiate the agreement in or about November 1964. On 18th February 1971 Mocatta J held that the question formulated in para 20 (b) of the special case should be answered
- f* in the affirmative. On 26th April 1972 the Court of Appeal¹ (Lord Denning MR and Edmund Davies LJ, Stephenson LJ dissenting) allowed an appeal by Wickman against that decision. Schuler appealed to the House of Lords. The facts are set out in the opinion of Lord Morris of Borth-y-Gest.

David Hirst QC, R A Gatehouse QC and A Whitfield for Schuler.

- g* *Andrew J Bateson QC and Charles Gray* for Wickman.

Their Lordships took time for consideration.

4th April. The following opinions were delivered

- h* **LORD REID.** My Lords, the appellants are a German company which manufactures machine tools and other engineering products. The respondents are a selling organisation. On 1st May 1963 they entered into an elaborate 'distributorship agreement' under which the appellants (whom I shall call Schuler) granted to the respondents (called Sales in the agreement but whom I shall call Wickman) the sole right to sell Schuler products in territory which included the United Kingdom.
- i* These products included 'panel presses' defined in cl 2 and general products. The panel presses are large machine tools used by motor manufacturers. Wickman were to act as agents for Schuler in selling the panel presses but were to purchase and resell the general products.

Wickman's obligation with regard to the promotion of sales of Schuler products is contained in cl 7 and 12 (b), which are in the following terms:

'7. Promotion by Sales

'(a) Subject to Clause 17 Sales will use its best endeavours to promote and extend the sale of Schuler products in the Territory.

'(b) It shall be condition of this Agreement that:—

'(i) Sales shall send its representatives to visit the six firms whose names are listed in the Schedule hereto at least once in every week for the purpose of soliciting orders for panel presses;

'(ii) that the same representative shall visit each firm on each occasion unless there are unavoidable reasons preventing the visit being made by that representative in which case the visit shall be made by an alternate representative and Sales will ensure that such a visit is always made by the same alternate representative.

'Sales agrees to inform Schuler of the names of the representatives and alternate representatives instructed to make the visits required by this Clause ...

'12 ... (b) Sales undertakes, at its expense, to look after Schuler's interests carefully and will visit Schuler customers regularly, particularly those customers principally in the motor car and electrical industries whose names are set out on the list attached hereto and initialled by the parties hereto and will give all possible technical advice to customers.'

The six firms referred to in cl 7 are six of the largest motor manufacturers in this country. The agreement was to last until the end of 1967 so that cl 7 (b) (i) required Wickman to make a total of some 1,400 visits during the period of the agreement. Wickman failed in their obligation. At first there were fairly extensive failures to make these visits. Then there were negotiations with a view to improving the position and Schuler have been held to have waived any right arising out of those failures. Thereafter there was an improvement but there were still a considerable number of failures.

After some correspondence Schuler wrote to Wickman in October 1964 terminating the agreement on the ground that failure to fulfil their obligation for weekly visits to the six firms entitled Schuler to treat that failure as a repudiation of the agreement by Wickman. In accordance with cl 19 of the agreement this question was referred to arbitration. In spite of the apparently simple and limited nature of the question in dispute, proceedings before the arbitrator were elaborate and protracted. Ultimately the arbitrator issued his award in the form of a special case on 6th October 1969. He held that Schuler were not entitled to terminate the agreement. This finding was reversed by Mocatta J but restored by the Court of Appeal¹.

In order to explain the contention of the parties, I must now set out cl 11 of the agreement.

'11. Duration of Agreement

'(a) This Agreement and the rights granted hereunder to Sales shall commence on the First day of May 1963 and shall continue in force (unless previously determined as hereinafter provided) until the 31st day of December 1967 and thereafter unless and until determined by either party upon giving to the other not less than 12 months' notice in writing to that effect expiring on the said 31st day of December 1967 or any subsequent anniversary thereof PROVIDED that Schuler or Sales may by notice in writing to the other determine this Agreement forthwith if:—

- a (i) the other shall have committed a material breach of its obligations hereunder and shall have failed to remedy the same within 60 days of being required in writing so to do or
- (ii) the other shall cease to carry on business or shall enter into liquidation (other than a members' voluntary liquidation for the purposes of reconstruction or amalgamation) or shall suffer the appointment of a Receiver of the whole or a material part of its undertaking;
- b 'and PROVIDED FURTHER that Schuler may by notice determine this Agreement forthwith if Sales shall cease to be a wholly-owned subsidiary of Wickman Limited.
- c '(b) The termination of this Agreement shall be without prejudice to any rights or liabilities accrued due prior to the date of termination and the terms contained herein as to discount commission or otherwise will apply to any orders placed by Sales with Schuler and accepted by Schuler before such termination.'

Wickman's main contention is that Schuler were only entitled to determine the agreement for the reasons and in the manner provided in cl 11. Schuler, on the other hand, contend that the terms of cl 7 are decisive in their favour: they say that 'It shall be condition of this Agreement' in cl 7 (b) means that any breach of cl 7 (b) (i) or 7 (b) (ii) entitles them forthwith to terminate the agreement. So as there were admittedly breaches of cl 7 (b) (i) which were not waived they were entitled to terminate the contract.

I think it right first to consider the meaning of cl 11 because, if Wickman's contention with regard to this is right, then cl 7 must be construed in light of the provisions of cl 11. Clause 11 expressly provides that the agreement 'shall continue in force (unless previously determined as hereinafter provided) until' 31st December 1967. That appears to imply the corollary that the agreement shall not be determined before that date in any other way than as provided in cl 11. It is argued for Schuler that those words cannot have been intended to have that implication. In the first place Schuler say that anticipatory breach cannot be brought within the scope of cl 11 and the parties cannot have intended to exclude any remedy for an anticipatory breach. And, secondly, they say that cl 11 fails to provide any remedy for an irremediable breach however fundamental such breach might be.

There is much force in this criticism. But on any view the interrelation and consequences of the various provisions of this agreement are so ill-thought out that I am not disposed to discard the natural meaning of the words which I have quoted merely because giving to them their natural meaning implies that the draftsman has forgotten something which a better draftsman would have remembered. If the terms of cl 11 are wide enough to apply to breaches of cl 7 then I am inclined to hold that cl 7 must be read subject to the provisions of cl 11.

It appears to me that cl 11 (a) (i) is intended to apply to all material breaches of the agreement which are capable of being remedied. The question then is what is meant in this context by the word 'remedy'. It could mean obviate or nullify the effect of a breach so that any damage already done is in some way made good. Or it could mean cure so that matters are put right for the future. I think that the latter is the more natural meaning. The word is commonly used in connection with diseases or ailments and they would normally be said to be remedied if they were cured although no cure can remove the past effect or result of the disease before the cure took place. And in general it can only be in a rare case that any remedy of something that has gone wrong in the performance of a continuing positive obligation will, in addition to putting it right for the future, remove or nullify damage already incurred before the remedy was applied. To restrict the meaning of remedy to cases where all damage past and future can be put right would leave hardly any scope at all for this clause. On the other hand, there are cases where it would seem a misuse of

language to say that a breach can be remedied. For example, a breach of cl 14 by disclosure of confidential information could not be said to be remedied by a promise not to do it again. a

So the question is whether a breach of Wickman's obligation under cl 7 (b) (i) is capable of being remedied within the meaning of this agreement. On the one hand, failure to make one particular visit might have irremediable consequences, e.g. a valuable order might have been lost when making that visit would have obtained it. But looking at the position broadly I incline to the view that breaches of this obligation should be held to be capable of remedy within the meaning of cl 11. b Each firm had to be visited more than 200 times. If one visit is missed I think that one would normally say that making arrangements to prevent a recurrence of that breach would remedy the breach. If that is right and if cl 11 is intended to have general application then cl 7 must be read so that a breach of cl 7 (b) (i) does not give to Schuler a right to rescind but only to require the breach to be remedied within 60 days under cl 11 (a) (i). I do not feel at all confident that this is the true view but I would adopt it unless the provisions of cl 7 point strongly in the opposite direction; c so I turn to cl 7.

Clause 7 begins with the general requirement that Wickman shall 'use its best endeavours' to promote sales of Schuler products. Then there is in cl 7 (b) (i) specification of those best endeavours with regard to panel presses, and in cl 12 (b) a much more general statement of what Wickman must do with regard to other Schuler products. This intention to impose a stricter obligation with regard to panel presses is borne out by the use of the word 'condition' in cl 7 (b). I cannot accept Wickman's argument that condition here merely means term. It must be intended to emphasise the importance of the obligations in sub-cll (b) (i) and (b) (ii). But what is the extent of that emphasis? d

Schuler maintain that the word 'condition' has now acquired a precise legal meaning; that, particularly since the enactment of the Sale of Goods Act 1893, its recognised meaning in English law is a term of a contract any breach of which by one party gives to the other party an immediate right to rescind the whole contract. Undoubtedly the word is frequently used in that sense. There may, indeed, be some presumption that in a formal legal document it has that meaning. But it is frequently used with a less stringent meaning. One is familiar with printed 'conditions of sale' incorporated into a contract, and with the words 'for conditions see back' printed on a ticket. There it simply means that the 'conditions' are terms of the contract. e

In the ordinary use of the English language 'condition' has many meanings, some of which have nothing to do with agreements. In connection with an agreement it may mean a pre-condition: something which must happen or be done before the agreement can take effect. Or it may mean some state of affairs which must continue to exist if the agreement is to remain in force. The legal meaning on which Schuler rely is, I think, one which would not occur to a layman; a condition in that sense is not something which has an automatic effect. It is a term the breach of which by one party gives to the other an option either to terminate the contract or to let the contract proceed and, if he so desires, sue for damages for the breach. f

Sometimes a breach of a term gives that option to the aggrieved party because it is of a fundamental character going to the root of the contract, sometimes it gives that option because the parties have chosen to stipulate that it shall have that effect. Blackburn J said in *Bettini v Gye*¹: 'Parties may think some matter, apparently of very little importance, essential; and if they sufficiently express an intention to make the literal fulfilment of such a thing a condition precedent, it will be one.' g

In the present case it is not contended that Wickman's failures to make visits amounted in themselves to fundamental breaches. What is contended is that the terms of cl 7 'sufficiently express an intention' to make any breach, however small, h

a of the obligation to make visits a condition so that any such breach shall entitle Schuler to rescind the whole contract if they so desire.

Schuler maintain that the use of the word 'condition' is in itself enough to establish this intention. No doubt some words used by lawyers do have a rigid inflexible meaning. But we must remember that we are seeking to discover intention as disclosed by the contract as a whole. Use of the word 'condition' is an indication—
b even a strong indication—of such an intention but it is by no means conclusive. The fact that a particular construction leads to a very unreasonable result must be a relevant consideration. The more unreasonable the result the more unlikely it is that the parties can have intended it, and if they do intend it the more necessary it is that they shall make that intention abundantly clear.

Clause 7 (b) requires that over a long period each of the six firms shall be visited
c every week by one or other of two named representatives. It makes no provision for Wickman being entitled to substitute others even on the death or retirement of one of the named representatives. Even if one could imply some right to do this, it makes no provision for both representatives being ill during a particular week. And it makes no provision for the possibility that one or other of the firms may tell Wickman that they cannot receive Wickman's representative during a particular
d week. So if the parties gave any thought to the matter at all they must have realised the probability that in a few cases out of the 1,400 required visits a visit as stipulated would be impossible. But if Schuler's contention is right failure to make even one visit entitles them to terminate the contract however blameless Wickman might be. This is so unreasonable that it must make me search for some other possible meaning of the contract. If none can be found then Wickman must suffer the consequences. But only if that is the only possible interpretation.

If I have to construe cl 7 standing by itself then I do find difficulty in reaching any other interpretation. But if cl 7 must be read with cl 11 the difficulty disappears. The word 'condition' would make any breach of cl 7 (b), however excusable, a material breach. That would then entitle Schuler to give notice under cl 11 (a) (i) requiring the breach to be remedied. There would be no point in giving such a notice if
f Wickman were clearly not in fault but if it were given Wickman would have no difficulty in shewing that the breach had been remedied. If Wickman were at fault then on receiving such a notice they would have to amend their system so that they could shew that the breach had been remedied. If they did not do that within the period of the notice then Schuler would be entitled to rescind.

In my view, that is a possible and reasonable construction of the contract and I would therefore adopt it. The contract is so obscure that I can have no confidence
g that this is its true meaning but for the reasons which I have given I think that it is the preferable construction. It follows that Schuler were not entitled to rescind the contract as they purported to do. So I would dismiss this appeal.

I must add some observations about a matter which was fully argued before your Lordships. The majority of the Court of Appeal¹ were influenced by a consideration of actings subsequent to the making of the contract. In my view, this was inconsistent
h with the decision of this House in *James Miller and Partners Ltd v Whitworth Street Estates (Manchester) Ltd*². We were asked by Wickman to reconsider that decision on this point and I have done so. As a result I see no reason to change the view which I expressed in that case. It was decided in *Watcham v Attorney-General of East Africa Protectorate*³ that in deciding the scope of an ambiguous title to land it was proper to have regard to subsequent actings and there are other authorities for that view.
i There may be special reasons for construing a title to land in light of subsequent possession had under it but I find it unnecessary to consider that question. Otherwise

1 [1972] 2 All ER 1173, [1972] 1 WLR 840

2 [1970] 1 All ER 796, [1970] AC 583

3 [1919] AC 533, [1918-19] All ER Rep 455

I find no substantial support in the authorities for any general principle permitting subsequent actings of the parties to a contract to be used as throwing light on its meaning. I would therefore reserve my opinion with regard to *Watcham's* case¹ but repeat my view expressed in *Whitworth*² with regard to the general principle. a

LORD MORRIS OF BORTH-Y-GEST. My Lords, in his judgment in the Court of Appeal³ Lord Denning MR said that this is a case which turns on the meaning of the one word 'condition'. I think it does. But it turns on the meaning of that one word in its context and setting in a distributorship agreement made on 1st May 1963. The journey which brings to this House what is seemingly so concentrated an issue has been one which has required the ascertainment of facts and one in the course of which certain issues have by now fallen by the wayside. The events of 1963 and 1964 were examined in an arbitration lasting seven days in 1969. The award of the learned arbitrator raised questions which were debated before the learned judge for seven days in January and February 1971. Thereafter the issue which now remains (and which has met with varying fortune) was debated for some five or six days in the Court of Appeal⁴. b

The facts as found are all carefully recorded in the award of the learned arbitrator. I need only briefly refer to the evolution of the point of law which now calls for decision. The award of the learned arbitrator which was stated in the form of a special case recorded that the agreed formulated question was as follows: c

'Whether on the facts found and the true construction of the documents Schuler were entitled by reason of breach by Wickman of their obligations under clause 7 (b) of the distributorship agreement (a) to terminate that agreement under clause 11 (a) (i); (b) to repudiate that agreement in or about early November 1964.' d

The learned arbitrator answered the question in the negative. Clause 7 of the agreement is in the following terms:

'7. Promotion by Sales

'(a) Subject to Clause 17 Sales will use its best endeavours to promote and extend the sale of Schuler products in the Territory. e

'(b) It shall be condition of this Agreement that:—

'(i) Sales shall send its representatives to visit the six firms whose names are listed in the Schedule hereto at least once in every week for the purpose of soliciting orders for panel presses;

'(ii) that the same representative shall visit each firm on each occasion unless there are unavoidable reasons preventing the visit being made by that representative in which case the visit shall be made by an alternate representative and Sales will ensure that such a visit is always made by the same alternate representative. f

Sales agrees to inform Schuler of the names of the representatives and alternate representatives instructed to make the visits required by this Clause.' g

Clause 11 of the agreement is in the following terms: h

'11. Duration of Agreement

'(a) This Agreement and the rights granted hereunder to Sales shall commence on the First day of May 1963 and shall continue in force (unless previously determined as hereinafter provided) until the 31st day of December 1967 and thereafter unless and until determined by either party upon giving to the other not i

¹ [1919] AC 533, [1918-19] All ER Rep 455

² [1970] 1 All ER 796, [1970] AC 583

³ [1972] 2 All ER 1173 at 1179-1181, [1972] 1 WLR 840 at 849-851

⁴ [1972] 2 All ER 1173, [1972] 1 WLR 840

a less than 12 months' notice in writing to that effect expiring on the said 31st day of December 1967 or any subsequent anniversary thereof PROVIDED that Schuler or Sales may by notice in writing to the other determine this Agreement forthwith if:—

(i) the other shall have committed a material breach of its obligations hereunder and shall have failed to remedy the same within 60 days of being required in writing so to do or

b (ii) the other shall cease to carry on business or shall enter into liquidation (other than a members' voluntary liquidation for the purposes of reconstruction or amalgamation) or shall suffer the appointment of a Receiver of the whole or a material part of its undertaking;

and PROVIDED FURTHER that Schuler may by notice determine this Agreement forthwith if Sales shall cease to be a wholly-owned subsidiary of Wickman Limited.

c '(b) The termination of this Agreement shall be without prejudice to any rights or liabilities accrued due prior to the date of termination and the terms contained herein as to discount commission or otherwise will apply to any orders placed by Sales with Schuler and accepted by Schuler before such termination.'

As will have been seen Wickman are called 'Sales' in the distributorship agreement.

d The question so formulated reflects the events which occurred. Schuler wrote a letter to Wickman on 27th October 1964 (for convenience I so refer to the parties). In the course of the letter Schuler wrote:

e 'Furthermore, we have within the last few days received information which clearly indicates that you have also failed to fulfil your obligations under the Agreement to send the named representatives to visit each week the six scheduled companies. You are, of course, fully aware that this requirement was one to which fundamental importance was attached when the Agreement was entered into, and your failure to send the representatives on these visits was the subject of our complaint earlier this year. This obligation on your part is a condition of the Agreement and your failure to fulfil its terms (quite apart from any other grounds) entitled us to treat your failure as a repudiation of the Agreement on your part. Accordingly, we advise you that we regard the Distributorship Agreement between us of May 1, 1963 as now at an end and this letter is to give you notice to this effect.'

f Wickman replied (on 2nd November 1964) that they did not accept that they had failed to fulfil their obligations or were in breach of the agreement of 1st May 1963 and that they regarded Schuler's letter as a wrongful repudiation of the agreement. Pursuant to a clause in the agreement arbitration proceedings followed. Wickman were claimants. By their points of claim (delivered on 2nd July 1965) they asserted that Schuler had by letters (including that of 27th October 1964) and by conduct repudiated the agreement and that they (Wickman) had accepted the repudiation. By their defence (served on 1st January 1966) Schuler admitted that by their letter of 27th October 1964 they had summarily terminated the agreement but they claimed that they had been entitled to do so under the provisions of cl 11 (a) (i) by reason of certain material breaches of the agreement which they alleged had been committed by Wickman and which were pleaded: they were (1) breaches of cl 7 (a) and (2) breaches of cl 7 (b), the latter being certain failures to send representatives to visit. By the reply (served 20th September 1966) it was pleaded that if there had been breaches there had been no proper notice under cl 11 (a) (i) and further that breaches had been waived.

i So the parties proceeded to a hearing before the learned arbitrator in July 1969. It lasted seven days. Before it began Schuler gave notice that they would ask the leave of the learned arbitrator to amend their defence. Leave was given and to the defence there was added the contention:

'Further or alternatively the Claimants having broken the express condition contained in the said clause 7 (b) of the said agreement, the Respondents were entitled to repudiate the said agreement forthwith as they in fact did.'

It is solely this contention that now remains. As I have stated, the learned arbitrator answered the agreed question as to both limbs of it, (a) and (b) in the negative. The learned judge decided in agreement with the learned arbitrator that Schuler were not entitled to terminate the agreement under cl 11 (a) (i). That conclusion was not challenged in this House. The learned judge held, however, that, by reason of breach by Wickman of obligations under cl 7 (b), Schuler were entitled to repudiate the agreement in or about early November 1964. By a majority the Court of Appeal¹ in agreement with the learned arbitrator held that Schuler were not so entitled. So the question which arises is whether, quite independently of cl 11, Schuler were entitled to treat the agreement as at an end if Wickman committed any breach of cl 7 (b).

That there were certain breaches by Wickman of their obligations under cl 7 (b) has been found as a fact. Visits were not made to the extent laid down by cl 7 (b). It has been found that the failures prior to 13th January 1964 were waived. Thereafter there were certain failures to visit which were not waived. It was held that those failures were not 'material' breaches within the meaning of cl 11 (a). That finding of fact of the learned arbitrator has not been and I think could not have been assailed. But there were some breaches. Between 13th January 1964 and 29th June 1964 visits should in total have been 144: the visits made were in total 125. Because of the exhibition at Olympia² no visits were made between 29th June 1964 and 13th July 1964. The learned arbitrator held that there was no implication that visits in that period were excused. From 13th July to 27th October the visits should in total have been 96. The visits made were 87 in number.

The exact details of the failures to make the total requisite visits are not, however, of special consequence inasmuch as Schuler say that had there been but one failure to make one visit and indeed had such failure only become known to them at a subsequent date they (Schuler) would have had an absolute right to treat the contract as at an end. The word 'condition' they say was used and so they say that the contract gave them a right to 'repudiate' it (although they prefer the word rescind) if at any time they discovered that one single visit had been missed.

The contemplated first period of the agreement was from the beginning of May 1963 to the end of the year 1967: thereafter it was to continue unless either party gave a year's notice (which had to expire at the end of a calendar year) to determine it. So the agreement might have continued in operation for very many years but always, so Schuler say, with the power in them to end it if they found that at any time one visit had not taken place. Thus, in the contemplated first period there would have to be over 1,400 separate visits. If the agreement had continued and if, say in 1970, Schuler had for some reason wished to terminate it without waiting to give the contractual period of notice, the word 'condition' would have come to their aid if they had found out that, either in a recent or an earlier period, one visit to one firm had not taken place or had been made by an alternate representative when it could and should have been made by a named representative.

Subject to any legal requirements businessmen are free to make what contracts they choose but unless the terms of their agreement are clear a court will not be disposed to accept that they have agreed something utterly fantastic. If it is clear what

¹ [1972] 2 All ER 1173, [1972] 1 WLR 840

² In paras 10 and 41 of the special case the arbitrator stated that every four years there was held in England an exhibition of machine tools which was regarded as of great importance to the industry. In 1964 the exhibition was held at Olympia in the fortnight beginning 29th June. Wickman had a stand there. All the Wickman representatives were on duty at Olympia where they were visited by representatives of the six firms.

a they have agreed a court will not be influenced by any suggestion that they would have been wiser to have made a different agreement. If a word employed by the parties in a contract can have only one possible meaning then, unless any question of rectification arises, there will be no problem. If a word either by reason of general acceptance or by reason of judicial construction has come to have a particular meaning then, if used in a business or technical document, it will often be reasonable to suppose that the parties intended to use the word in its accepted sense. But if a word in a contract may have more than one meaning then, in interpreting the contract, a court will have to decide what was the intention of the parties as revealed by or deduced from the terms and subject-matter of their contract.

b Words are but the instruments by which meanings or intentions are expressed. Often the same word has in differing contexts to do service to convey differing meanings. In contracts of insurance an insurer will often wish to stipulate that his acceptance of a risk is strictly contingent on the complete accuracy of some statement or representation, that has been made to him. The word 'warranty' if used by a proposer or an insured person in reference to such a statement or representation may denote much more than a promise for the breach of which (if the statement or representation is inaccurate) damages might be sought. So the word 'warranty' may be used to denote one of the meanings that can be given to the word 'condition'.
 c An insurer may provide that he will only be liable if his insured does this or that: even if 'this or that' is not of special importance a court may decide that it was clearly the intention of the parties that there should only be liability if this or that had been done. If in the contract it is stated that such performance is a condition precedent to a right to recover the intention of the parties may be clearly revealed (see *London Guarantee Co v Fearnley*¹).

d If it is correct to say, as I think it is, that where there are problems of the construction of an agreement the intention of the parties to it may be collected from the terms of their agreement and from the subject-matter to which it relates, then I doubt whether, save insofar as guidance on principle is found, it is of much value (although it may be of much interest) to consider how courts have interpreted various differing words in various differing contracts. Nor is it of value to express either agreement or disagreement with the conclusions reached in particular cases.

e Just as the word 'warranty' may have differing meanings according to the context so may the word 'condition'. The words 'condition precedent' may have a specific meaning. But the 'conditions' of a contract may be no more than its terms or provisions. A condition of a contract may according to the context be a term of it or it may denote something to be satisfied before the contract comes into operation or it may denote something basic to its continuing operation. *Glaholm v Hays*² related to a charterparty one term of which provided that the vessel was to sail from England on or before 4th February. The question which there arose was whether that term was a condition precedent on the non-compliance wherewith the freighters were at liberty to throw up the charter. In giving judgment Tindal CJ said³:

f "Whether a particular clause in a charter-party shall be held to be a condition, upon the non-performance of which by the one party, the other is at liberty to abandon the contract and consider it at an end; or whether it amounts to an agreement only, the breach whereof is to be recompensed by an action for damages, must depend upon the intention of the parties to be collected, in each particular case, from the terms of the agreement itself, and from the subject matter to which it relates. "It cannot depend" as Lord Ellenborough observes, "on any formal arrangement of the words, but (must depend) on the reason
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 h
 i

1 (1880) 5 App Cas 911

2 (1841) 2 Man & G 257

3 (1841) 2 Man & G at 266

and sense of the thing as it is to be collected from the whole contract": See *Ritchie v. Atkinson*¹.

Looking at the language of the charter and the variation of language in the term in question in that case the court considered that a distinction was intended and that while one set of terms sounded in agreement the one in question sounded in condition. Looking also at the subject-matter the court considered that construing the term as a condition precedent carried into effect the intention of the parties.

When Mr Bettini and Mr Gye made an agreement providing that Mr Bettini should sing in concerts and operas, the engagement to begin on 30th March 1875 and to terminate on 13th July 1875, they included a term under which Mr Bettini agreed to be in London 'without fail' at least six days before 30th March for the purpose of rehearsals. He did not arrive until 28th March. It was held that the term was not a condition precedent; it was an agreement a breach of which would not justify a repudiation of the contract but would only be a cause of action for compensation in damages (see *Bettini v Gye*²).

Resisting the temptation to examine numerous decisions concerned with the interpretation of various clauses in their setting in various contracts I pass to consider the meaning of cl 7 (b) of the contract now under review. Having regard to the scope and purpose of the distributorship agreement and having regard to the words used and their context in the agreement—how should the sub-clause be interpreted? Clause 7 is headed '*Promotion by Sales*'. There is a considerable overlap with cl 12 which is headed '*Sales*' *Obligations*'. Clause 12 is in the following terms:

'Sales' Obligations

'(a) Sales will be responsible for importing, establishing prices, preparing quotations, issuing invoices, and giving after sales service to customers in respect of the general products.

'(b) Sales undertakes, at its expense, to look after Schuler's interests carefully and will visit Schuler customers regularly, particularly those customers principally in the motor car and electrical industries whose names are set out on the list attached hereto and initialled by the parties hereto and will give all possible technical advice to customers.

'(c) Sales will carefully examine complaints from customers immediately to see whether they are justified and, as far as possible, will remove the cause of the complaints or at least clarify them. In all cases of complaints Sales will report to Schuler without delay and arrange with Schuler for a quick remedy.'

The central purpose of the agreement is I think set out in cl 7 (a). Wickman are to use their best endeavours to promote and extend the sale of Schuler products in the territory. That is a general and positive and all-embracing obligation. Then in cl 7 (b) is a more special or particularised obligation. It relates to one part of the way in which Wickman must use their 'best endeavours' to promote sales (cl 7 (a)) or 'look after Schuler's interests carefully' (cl 12 (b)). It relates to panel presses. Under cl 12 (b) Wickman must visit Schuler customers 'regularly' and 'particularly' those named on a list. Clause 7 (b) is even more specific. Those on another list (the six in the schedule) are to be visited at least once a week and (unless there are unavoidable reasons) by the same named representatives. But cl 7 (b) unlike cl 12 (b) has these words of introduction: 'It shall be condition of this Agreement that...' The words are there and clearly cannot be ignored. It is argued for Schuler that the obligations which they introduce should be regarded as basic to the contract or to its continuance from time to time or as having been elevated by the parties to the

1 (1808) 10 East 295, [1803-13] All ER Rep 586

2 (1876) 1 QBD 183, [1874-80] All ER Rep 242

a status of being basic or fundamental. So much so that if, for example, one of the six firms requested Wickman not to pay a visit in a particular week and if Wickman would be using their best endeavours to promote Schuler's interests if they observed the customer's wish it is said that a failure to visit would nevertheless entitle Schuler to end the contract unless Wickman had sought and secured prior absolution.

b What, then, in the context is the meaning of the words 'It shall be condition'. Unless the words are recast and altered there must be some addition. It is pointed out that the word 'condition' is nowhere else to be found in the agreement. The contrast is drawn with such words as 'undertakes' or 'agrees to'. It is not suggested that the omitted word should be 'the'. Had the draftsman used some such words as 'This agreement is conditional upon' then it would seem likely that the provision would have had higher pride of place than that of a second sub-clause: furthermore, the wording that follows in cl 7 (b) would have been different. It is said that the c indefinite article 'a' should be added in cl 7 (b). If it is then cl 7 (b) reads to me like a provision or stipulation in detail as to what Wickman in general were undertaking by cl 7 (a) to do. The general and overriding obligation of doing all they could to promote sales as set out in cl 7 (a) was particularised and made specific in the case of panel presses (by cl 7 (b)) by laying down the details as to how the promotion of sales of panel presses was to be undertaken. In the event of Wickman being remiss in their d duties proof of this would be easy and doubts would be removed if (in the case of panel presses) a precise programme of operations had been agreed on. I regard cl 7 (b) as being collateral to cl 7 (a) and as prescribing the specific way in which Wickman agreed that, as regards panel presses, their obligations under cl 7 (a) were to be performed. In the context the word 'condition' denoted a term of stipulation or e provision which, being prescribed in detail, was made specially prominent and significant. I do not take the view that before the word 'condition' can be construed in the technical sense of denoting something fundamental to the continued operation of an agreement there must in every case be found words expressly spelling out the consequences of a breach, but I am left strongly with the impression that the agreement now in question would have been differently worded had it been the f intention that one missed visit out of hundreds or thousands contracted for would place the one party at the mercy of the other.

I conclude, therefore, that it was not the intention of the parties to give to the word 'condition' in cl 7 (b) the meaning contended for by Schuler, viz 'a stipulation such that any breach of it however slight would give the promisee a right to be quit of his future obligations and sue for damages'. The word denoted a stipulation which by reason of its detail had special significance. I agree with the decision of the learned g arbitrator whose finding was that:

'It is an expression which indicates the importance attached by the parties to that stipulation when you come to consider under Clause 11 (a) (i) whether a party has committed a material breach of its obligations, such obligations h including the obligation in Clause 7 (b).'

This view is, I think, reinforced on a reading of cl 11. The agreement was to continue in force for an initial period of over 4½ years and thereafter unless and until determined by either party on giving to the other not less than a year's notice in writing which had to expire either on 31st December 1967 or on 31st December in any later year. That was so 'unless' the contract was previously determined in one of certain specified j ways. Wickman could assert that Schuler had committed 'a material breach' of one of their obligations and could in writing require Schuler to remedy such breach within 60 days and if there was a failure so to do Wickman could by notice in writing to Schuler forthwith 'determine' the agreement. Schuler could take corresponding action against Wickman. As I have indicated Schuler asserted that Wickman committed various material breaches of their obligations both under cl 7 (a) and under

cl 7 (b). So far as concerns the breaches under cl 7 (b) subsequent to 13th January 1964 it has been held (1) that none of the breaches was material and (2) that no notice in respect of them was given under cl 11. These findings of fact are not challenged. As it has been found that there were no 'material' breaches the question does not arise whether, had the breaches been material, a notice in writing would have been necessary on the basis that the breaches were remediable or whether no such notice would have been necessary on the basis that the breaches were not remediable.

Other specific ways in which, under cl 11, either party might by notice in writing determine the agreement were (1) if the other ceased to carry on business or (2) if the other entered into liquidation (subject to an exception) or (3) if the other suffered the appointment of a receiver of the whole or a material part of its undertaking. But in addition to all these ways Schuler could determine if Wickman ceased to be a wholly owned subsidiary of another company. Finding provisions of such detail in both cl 7 and 11 I would have expected a specific mention in cl 11 of a right in Schuler to determine the agreement on notice alone for any breach by Wickman of their cl 7 (b) obligations had it been the intention of the parties that Schuler would have such a right. It follows that I cannot accept the view that cl 11 has no application to cl 7. The parties to the contract provided by cl 11 that there would be certain rights of repudiation in the event of there being 'material' breaches of contract. If it had been the intention of the parties to provide by cl 7 (b) that any breach of it (by any failure to visit) was to be so basic to the further continuance of the contract as to entitle Schuler at once to treat the contract as ended, then such a breach would automatically and inevitably be a 'material' breach and one which Schuler need give Wickman no opportunity to remedy. The fact that the detailed provisions of cl 11 do not preserve what (on Schuler's submissions) would have been Schuler's undoubted rights under cl 7 (b) is a pointer which confirms my view as to the meaning of cl 7 (b).

For the reasons which I have given I would dismiss the appeal. I would, however, not base or support my conclusion by having regard to the way in which Schuler at certain times expressed themselves in reference to the agreement. Nor is it of any moment that the issue in the litigation which now survives was not at first pleaded. If the point taken on behalf of Schuler is a valid one it cannot matter that for a period neither its existence nor its strength was appreciated. It is said, however, that the way in which the meaning of cl 7 (b) was interpreted by Schuler during the currency of the agreement made it plain that they did not consider themselves entitled to end the agreement if there were breaches of the clause. It is said that as the result of a meeting in November 1963 Schuler proceeded on the basis that there had been failures by Wickman to make weekly visits and that that put them 'in breach of contract which, under the terms of the agreement must be righted in 60 days from notice thereof'. It is said that in December 1963 Schuler were advised that if Wickman had failed to fulfil their contractual obligations as to visits to the six companies they (Wickman) were entitled under the contract to have 60 days within which to remedy their breach. So it is said that it is shown that (from November 1963) the parties understood or interpreted their contract in the sense that a breach by Wickman of cl 7 (b) would not entitle Schuler to rescind as Schuler now contend that they were so entitled. But assuming that the parties did so reveal their understanding of the matter, there being no suggestion of a new agreement or of an estoppel, I do not think that the task of the court in interpreting the contract is assisted or is in any way altered. There may or may not be special considerations in cases where there have been operations in regard to land which have taken place pursuant to or subsequent to some document or title or contract concerning the land. That need not now be considered. But in a case such as the present I see no reason to doubt the applicability or the authority of what was said in *James Miller and Partners Ltd v Whitworth Street Estates (Manchester) Ltd*¹. If on the true construction of a contract a right is

a given to a party, that right is not diminished because during some period either the existence of the right or its full extent was not appreciated.

For the reasons which I have given I would dismiss the appeal.

b **LORD WILBERFORCE.** My Lords, with two qualifications, this case is one of interpretation of the written agency or distributorship agreement between the appellants and the respondents dated 1st May 1963, in particular of cl 7 (b) of that agreement.

c The first qualification involves the legal question whether this agreement may be construed in the light of certain allegedly relevant subsequent actions by the parties. Consideration of such actions undoubtedly influenced the majority of the Court of Appeal¹ to decide, as they did, in the respondents' favour: and it is suggested, with
d much force that, but for this, Edmund Davies LJ would have decided the case the other way. In my opinion, subsequent actions ought not to have been taken into account. The general rule is that extrinsic evidence is not admissible for the construction of a written contract; the parties' intentions must be ascertained, on legal principles of construction, from the words they have used. It is one and the same principle which excludes evidence of statements, or actions, during negotiations, at the time of the contract, or subsequent to the contract, any of which to the lay mind might at first sight seem to be proper to receive. As to statements during negotiations this House has affirmed the rule of exclusion in *Prenn v Simmonds*², and as to subsequent actions (unless evidencing a new agreement or as the basis of an estoppel) in *James Miller and Partners Ltd v Whitworth Street Estates (Manchester) Ltd*³.

e There are of course exceptions. I attempt no exhaustive list of them. In the case of ancient documents, contemporaneous or subsequent action may be adduced in order to explain words whose contemporary meaning may have become obscure. And evidence may be admitted of surrounding circumstances or in order to explain technical expressions or to identify the subject-matter of an agreement: or (an overlapping exception) to resolve a latent ambiguity. But ambiguity in this context is not to be equated with difficulty of construction, even difficulty to a point where
f judicial opinion as to meaning has differed. This is, I venture to think, elementary law. On this test there is certainly no ambiguity here.

The arguments used in order to induce us to depart from these settled rules and to admit evidence of subsequent conduct generally in aid of construction were fragile. They were based first on the Privy Council judgment in *Watcham v Attorney-General of East Africa Protectorate*⁴, not, it was pointed out, cited in *Whitworth's case*⁵. But there was no negligence by counsel or incuria by their Lordships in omitting to refer to a precedent which I had thought had long been recognised to be nothing but the refuge of the desperate. Whether in its own field, namely, that of interpretation of deeds relating to real property by reference to acts of possession, it retains any credibility in the face of powerful judicial criticism is not before us. But in relation to the interpretation of contracts or written documents generally I must deprecate
h its future citation in English courts as an authority. It should be unnecessary to add that the well-known words of Lord St Leonards (*Attorney-General v Drummond*⁶) 'tell me what you have done under *such* a deed, and I will tell you what *that deed* means' relate to ancient instruments and it is an abuse of them to cite them in other applications. Secondly, there were other authorities cited, *Hillas & Co Ltd v Arcos Ltd*⁶ and

i 1 [1972] 2 All ER 1173, [1972] 1 WLR 840

2 [1971] 3 All ER 237, [1971] 1 WLR 1381

3 [1970] 1 All ER 796, [1970] AC 583

4 [1919] AC 533, [1918-19] All ER Rep 455

5 (1842) Dr & War 353 at 368

6 [1932] All ER Rep 494, 147 LT 359

*Foley v Classique Coaches Ltd*¹. But, with respect, these are not in any way relevant to the present discussion, and the judgment of Lawrence J in *Radio Pictures Ltd v Inland Revenue Comrs*², so far as it bears on this point was disapproved in the Court of Appeal and in my opinion was not correct in law. a

In my opinion, therefore, the subsequent actings relied on should have been left entirely out of account: in saying this I must not be taken to agree that the particular actings relied on are of any assistance whatever towards one or other construction of the contract. Indeed if one were to pursue the matter, the facts of the present case would be found to illustrate, rather vividly, the dangers inherent in entertaining this class of evidence at all. b

The second legal issue which arises I would state in this way: whether it is open to the parties to a contract, not being a contract for the sale of goods, to use the word 'condition' to introduce a term, breach of which ipso facto entitles the other party to treat the contract at an end. c

The proposition that this may be done has not been uncriticised. It is said that this is contrary to modern trends which focus interest rather on the nature of the breach, allowing the innocent party to rescind or repudiate whenever the breach is fundamental, whether the clause breached is called a condition or not: that the affixing of the label 'condition' cannot pre-empt the right of the court to estimate for itself the character of the breach. Alternatively it is said that the result contended for can only be achieved if the consequences of a breach of a 'condition' (sc, that the other party may rescind) are spelt out in the contract. In support of this line of argument reliance is placed on the judgment of the Court of Appeal in *Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd*³. d

My Lords, this approach has something to commend it: it has academic support. The use as a promissory term of 'condition' is artificial, as is that of 'warranty' in some contexts. But in my opinion this use is now too deeply embedded in English law to be uprooted by anything less than a complete revision. I shall not trace the development of the term through 19th century cases, many of them decisions of Lord Blackburn, to the present time; this has been well done by academic writers. I would only add that the *Hong Kong Fir* case³, even if it could, did not reverse the trend. What it did decide, and I do not think that this was anything new, was that although a term (there a 'seaworthiness' term) was not a 'condition' in the technical sense, it might still be a term breach of which if sufficiently serious could go to the root of the contract. Nothing in the judgments as I read them casts any doubt on the meaning or effect of 'condition' where that word is technically used. e

The alternative argument, in my opinion, is equally precluded by authority. It is not necessary for parties to a contract, when stipulating a condition, to spell out the consequences of breach: these are inherent in the (assumedly deliberate) use of the word (*Suisse Atlantique Société D'Armement Maritime SA v NV Rotterdamsche Kolen Centrale*⁴ per Lord Upjohn). f

It is on this legal basis, as to which I venture to think that your Lordships are agreed, that this contract must be construed. Does cl 7 (b) amount to a 'condition' or a 'term'? (to call it an important or material term adds, with all respect, nothing but some intellectual assuagement). My Lords, I am clear in my own mind that it is a condition, but your Lordships take the contrary view. On a matter of construction of a particular document, to develop the reasons for a minority opinion serves no purpose. I am all the more happy to refrain from so doing because the judgments of Mocatta J, h

1 [1934] 2 KB 1, [1934] All ER Rep 88

2 (1938) 22 Tax Cas 106

3 [1962] 1 All ER 474, [1962] 2 QB 26

4 [1966] 2 All ER 61 at 86, [1967] 1 AC 361 at 422

a Stephenson LJ¹, and indeed of Edmund Davies LJ² on construction, give me complete satisfaction and I could in any case add little of value to their reasons. I would only add that, for my part, to call the clause arbitrary, capricious or fantastic, or to introduce as a test of its validity the ubiquitous reasonable man (I do not know whether he is English or German) is to assume, contrary to the evidence, that both parties to this contract adopted a standard of easygoing tolerance rather than one of aggressive, insistent punctuality and efficiency. This is not an assumption I am b prepared to make, nor do I think myself entitled to impose the former standard on the parties if their words indicate, as they plainly do, the latter. I note finally, that the result of treating the clause, so careful and specific in its requirements, as a term is, in effect, to deprive the appellants of any remedy in respect of admitted and by no means minimal breaches. The arbitrator's finding that these breaches were not 'material' was not, in my opinion, justified in law in the face of the parties' own c characterisation of them in their document: indeed the fact that he was able to do so, and so leave the appellants without remedy, argues strongly that the legal basis of his finding—that cl 7 (b) was merely a term—is unsound.

I would allow this appeal.

d **LORD SIMON OF GLAISDALE.** My Lords, the decision in this appeal depends on the answers to two questions: first, can 'subsequent conduct' of the parties be relied on for the construction of the distributorship agreement of 1st May 1963? and, secondly, with or without assistance from 'subsequent conduct' (dependent on the answer to the first question), was Wickman's breach of cl 7 (b) of the agreement on its proper construction such as to entitle Schuler to rely on it so as to amount to a rescission of the agreement in November 1964?

e There is one general principle of law which is relevant to both questions. This has been frequently stated, but it is most pungently expressed in Norton of Deeds³, though it applies to all written instruments:

f '... the question to be answered always is, "What is the meaning of what the parties have said?" not, "What did the parties mean to say?" ... it being a presumption *juris et de jure* ... that the parties intended to say that which they have said.'

g It is, of course, always open to a party to claim rectification of an instrument which has failed to express the common intention of the parties; but, so long as the instrument remains unrectified, the rule of construction is as stated by Norton. It is, indeed, the only workable rule. In the instant case no question of rectification arises.

h Although, logically, the first question should be answered first, in the circumstances of the present case it is more convenient to consider the second question first (i.e. whether the agreement can be construed adequately without reference to subsequent conduct), and then to consider the first question (i.e. whether subsequent conduct is available either to control, or to supply inadequacies in, the primary tools of construction).

Construction independently of subsequent conduct

On this part of the case I agree so completely with what has been said by my noble and learned friend, Lord Reid, that I do not attempt to cover any ground which he has traversed.

i The case finally turns on the meaning to be attached to the word 'condition' in cl 7 (b) read in the light of all the rest of the contract. Various meanings of this word,

1 [1972] 2 All ER at 1187, [1972] 1 WLR at 858

2 [1972] 2 All ER at 1182, [1972] 1 WLR at 853

3 (1906), p 43; 2nd Edn (1928), p 50

both in popular usage and as a legal term of art, have been debated before your Lordships. The agreement was intended to have legal effect and was drawn up by lawyers. This raises a presumption that the words in the contract are used in a sense that they bear as legal terms of art, if they are reasonably capable of bearing such meaning in their context (see *Sydall v Castings Ltd*¹). But this presumption is rebuttable; so that, even in a document drawn up by lawyers and intended to have legal effect, a word capable of bearing meaning as a legal term of art will be construed in a popular sense if the instrument shows that the parties intended to use it in that sense. Most words in English are capable of a number of meanings, either in popular usage or as legal terms of art or both. In either category, *prima facie* they will be read in their most usual and natural (or primary) sense. But this again is a rebuttable presumption; so that a word will be construed in a less usual or natural (or secondary) sense if the instrument shows that it is intended in such sense. In the distributorship agreement there is nothing to suggest that the word 'condition' was used in any of its popular senses or to displace the presumption that it was used as a legal term of art in one or other of its senses.

The primary legal sense of 'condition' appears from the judgment of Fletcher Moulton LJ² (approved by your Lordships' House) in *Wallis, Son & Wells v Pratt & Haynes*³:

"There are some [obligations] which go so directly to the substance of the contract or, in other words, are so essential to its very nature that their non-performance may fairly be considered by the other party as a substantial failure to perform the contract at all. On the other hand there are other obligations which, though they must be performed, are not so vital that a failure to perform them goes to the substance of the contract . . . later usage has consecrated the term "condition" to describe an obligation of the former class and "warranty" to describe an obligation of the latter class."

It was argued on behalf of Wickman that 'condition' does not, since recent cases (e.g. *Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd*⁴), bear this primary meaning in the law of contract. But the fact that it has now been made explicit that there lies intermediate between conditions and warranties a large 'innominate' class of contractual terms (any breach of which does not give rise to a right in the other party to terminate the contract, but only a material breach, immaterial breaches merely giving rise, like breaches of warranty, to a right to claim damages) does not involve in any way that 'condition' is no longer the appropriate word to describe a contractual term any breach of which (by express stipulation or by its innate nature in its context) gives rise to a right in the other party to terminate the contract. The sense designated by Fletcher Moulton LJ² is still, in my view, the primary meaning of 'condition' as a legal term of art. It is therefore, *prima facie*, in this sense that the word is used in cl 7 (b). This *prima facie* sense is reinforced by the fact that the stipulation in cl 7 (b) is the only one which starts 'It shall be [a] condition . . .' This is a further indication that 'condition' here means something more than 'contractual term', which is unquestionably one of the senses which it can bear as a legal term of art.

On the other hand, to read 'condition' in cl 7 (b) in what I regard as its primary sense as a term of art produces, as my noble and learned friend, Lord Reid, has shown, such absurd results that this cannot be the meaning to be ascribed to it, provided that it is reasonably capable of some other meaning. A secondary meaning of 'condition' as a term of art is 'contractual term'. But it must mean more than

1 [1966] 3 All ER 770, [1967] 1 QB 302

2 [1910] 2 KB 1003 at 1012

3 [1911] AC 394, [1911-13] All ER Rep 989

4 [1962] 1 All ER 474, [1962] 2 QB 26

a merely this in cl 7 (b), since this stipulation is singled out from all the other contractual terms to be dubbed a 'condition'. I agree with my noble and learned friend that, in the light of the rest of the contract, it means a contractual term breach of which if unremedied (i.e. unrectified for the future, if capable of rectification) gives Schuler the right to terminate the contract in accordance with cl 11. It follows that I agree with the decision of the learned arbitrator and with the conclusion of the majority of the Court of Appeal¹ and would therefore dismiss the appeal.

b *Construction by subsequent conduct*

The majority of the Court of Appeal¹ came to their conclusion in favour of Wickman by construing the agreement by reference to the subsequent conduct of the parties thereunder. They recognised that it had been stated by four of their Lordships who decided *James Miller and Partners Ltd v Whitworth Street Estates (Manchester) Ltd*² that the conduct of the parties under a contract is not available as an aid to construction; but held that this rule only applied when the instrument to be construed is unambiguous, and that *Watcham v Attorney-General of East Africa Protectorate*³ (which was not cited in the *Whitworth Street Estates* case²) was authority entitling the court to have recourse to subsequent conduct of the parties under this contract to resolve the ambiguity that they descried therein. The distribution agreement is not drafted with entire felicity, and therefore presents difficulties in construction. But this is not the same as embodying an ambiguity. Agreeing as I do with the interpretation of my noble and learned friend, Lord Reid, I cannot on final resolution find that there is any ambiguity in the agreement. Nevertheless, the question of the availability of subsequent conduct as an aid to interpretation is an important one which ought not if possible to be left in its present state of uncertainty; and, since e it was fully and carefully argued before your Lordships, I do not feel that I would be justified in remaining silent on it.

The *Whitworth Street Estates* case² was concerned with a contract (containing an arbitration clause) between an English and a Scots company which was to be performed in Scotland, but was silent whether the contract (and the arbitration thereunder) was to be governed by English or by Scots law. Disputes having arisen, f an arbitration took place in Scotland. The issue before the Court of Appeal⁴ and your Lordships' House² was whether the arbiter could be required to state a case for the opinion of the English High Court, which in turn depended on what was the curial law of the arbitration. If the contract was to be governed by Scots law, that too would be the curial law of the arbitration; but it was argued that even if the law of the contract were English the curial law of the arbitration was Scottish. In the g Court of Appeal⁵ Lord Denning MR held that the crucial question in determining what was the law governing the contract was to ask: 'what is the system of law with which the transaction has the closest and most real connection?' He concluded that that was English law. He went on⁶:

h 'I am confirmed in this view by the subsequent conduct of the parties. This is always available to aid the interpretation of a contract and to find out its closest connections. On two occasions the parties seem to have assumed that the transaction was governed by English law'.

Davies LJ agreed⁷. Widgery LJ, who also agreed that English was the proper law of the contract, said⁸:

i 1 [1972] 2 All ER 1173, [1972] 1 WLR 840

2 [1970] 1 All ER 796, [1970] AC 583

3 [1919] AC 533, [1918-19] All ER Rep 455

4 [1969] 2 All ER 210, [1969] 1 WLR 377

5 [1969] 1 WLR at 380, cf [1969] 2 All ER at 212

6 [1969] 2 All ER at 212, [1969] 1 WLR at 381

7 See especially [1969] 2 All ER at 214, [1969] 1 WLR at 383

8 [1969] 2 All ER at 215, [1969] 1 WLR at 383, 384

'To solve a problem such as arises in this case one looks first at the express terms of the contract to see whether that intention is there to be found. If it is not, then in my judgment the next step is to consider the conduct of the parties to see whether that conduct shows that a decision in regard to the proper law of the contract can be inferred from it. If the parties' conduct shows that they have adopted a particular view with regard to the proper law, then it may be inferred that they have agreed that that law shall govern the contract accordingly.'

When the *Whitworth Street Estates* case¹ came to your Lordships' House it was argued that the subsequent conduct of the parties could not be looked at to determine what was the proper law of the contract². Four of the five members of the appellate committee dealt expressly with this matter. My noble and learned friend, Lord Reid, said³:

'It has been assumed in the course of this case that it is proper, in determining what was the proper law, to have regard to actings of the parties after their contract had been made. Of course the actings of the parties (including any words which they used) may be sufficient to show that they made a new contract. If they made no agreement originally as to the proper law, such actings may show that they made an agreement about that at a later stage. Or if they did make such an agreement originally such actings may show that they later agreed to alter it. But with regard to actings of the parties between the date of the original contract and the date of Mr Underwood's appointment, I did not understand it to be argued that they were sufficient to establish any new contract, and I think that they clearly were not. As I understood him, counsel sought to use those actings to show that there was an agreement when the original contract was made that the proper law of that contract was to be the law of England. I must say that I had thought it now well settled that it is not legitimate to use as an aid in the construction of the contract anything which the parties said or did after it was made. Otherwise one might have the result that a contract meant one thing the day it was signed, but by reason of subsequent events meant something different a month or a year later.'

My noble and learned friend, Lord Hodson, said⁴:

'I should add that I cannot assent to the view which seems to have found favour in the eyes of Lord Denning MR⁵ and Widgery LJ⁶ that as a matter of construction the contract can be construed not only in its surrounding circumstances but also by reference to the subsequent conduct of the parties.'

My noble and learned friend, Viscount Dilhorne, said⁷:

'I do not consider that one can properly have regard to the parties' conduct after the contract has been entered into when considering whether an inference can be drawn as to their intention when they entered into the contract although subsequent conduct by one party may give rise to an estoppel.'

My noble and learned friend, Lord Wilberforce, said⁸:

1 [1970] 1 All ER 796, [1970] AC 583
 2 [1970] AC at 590; contra at p 594
 3 [1970] 1 All ER at 798, [1970] AC at 603
 4 [1970] 1 All ER at 801, [1970] AC at 606
 5 [1969] 2 All ER at 212, [1969] 1 WLR at 381
 6 [1969] 2 All ER at 215, [1969] 1 WLR at 384
 7 [1970] 1 All ER at 805, [1970] AC at 611
 8 [1970] 1 All ER at 808, [1970] AC at 614

a '... once it was seen that the parties had made no express choice of law, the correct course was to ascertain from all relevant contemporary circumstances including, but not limited to, what the parties said or did at the time, what intention ought to be imputed to them on the formation of the contract. Unless it were to found an estoppel or a subsequent agreement, I do not think that subsequent conduct can be relevant to this question.'

b It will be noticed that, except perhaps for Widgery LJ's, all these pronouncements (both in the Court of Appeal¹ in favour of there being a rule whereby subsequent conduct is available as an aid to interpretation and contra in your Lordships' House²) are perfectly general, none drawing the distinction which was drawn by the majority of the Court of Appeal³ in the instant case between ambiguous and unambiguous instruments. It must therefore be determined, first, whether or not the *Whitworth Street Estates* case² was one where the instrument was ambiguous; secondly, if not, whether the situation there was so closely analogous to an ambiguity that it would be wrong to draw a distinction; thirdly, whether what was said on the matter in the *Whitworth Street Estates* case² was part of the ratio decidendi or obiter; and, fourthly, if the latter, whether it should nonetheless be regarded as settling the law. It is convenient to consider together the first and second and the third and fourth points respectively.

d The problem posed by the *Whitworth Street Estates* case² was that the contract made no express provision on a matter which turned out to be crucial, namely, whether English or Scots law governed the contract and the arbitration. The only way of distinguishing such a situation from an ambiguity would be to say that in a situation such as *Whitworth*² the difficulty facing the court was that the contract was silent on a crucial point, whereas in a case such as *Watcham*⁴ a patent ambiguity appeared on the face of the instrument, i.e. to regard the former as a case where the court was invited to take account of subsequent conduct to add an absent term, the latter as one where the court was invited to take account of subsequent conduct to determine which of two present but inconsistent terms was to be preferred. But such a distinction would, in my view, merely be to complicate the law and to introduce intolerable refinements. There was, it is true, considerable older authority which suggested that, although extrinsic evidence could be adduced to resolve ambiguity (although never direct evidence of intention in the case of a patent ambiguity), it could not be adduced to influence the interpretation of an unambiguous instrument (see Norton on Deeds⁵). The justification for the adduction of extrinsic evidence to resolve an ambiguity must be that it might be the last resort to save an instrument from being void for uncertainty. This type of practical consideration is characteristically potent in shaping our law; but in this field its practical recommendation is, in my judgment, outweighed by the inconveniences and anomalies involved. In particular, the distinction between the admissibility of direct and circumstantial evidence of intention seems to me to be quite unjustifiable in these days. And the distinctions between patent ambiguities, latent ambiguities and equivocations as regards admissibility of extrinsic evidence are based on outmoded and highly technical and artificial rules and introduce absurd refinements. What was said in *Whitworth*² should, therefore, in my judgment, be taken to apply generally to documentary construction, even when an ambiguity can be spelt out.

h This brings me to consider how far what was said about this matter in *Whitworth*² was part of its ratio decidendi. Lord Reid held the contract to be governed by Scots law; and he therefore did not find it necessary to determine whether, if the proper

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1 [1969] 2 All ER 210, [1969] 1 WLR 377

2 [1970] 1 All ER 796, [1970] AC 583

3 [1972] 2 All ER 1173, [1972] 1 WLR 840

4 [1919] AC 533, [1918-19] All ER Rep 455

5 (1906) ch iv, p 56; 2nd Edn (1928), ch iv, p 63

law of contract were English the arbitration was nevertheless governed by Scots law. In order to arrive at the conclusion that the law of the contract was Scottish, Lord Reid had, in my view, necessarily to determine whether to take into account the subsequent conduct of the parties which had been relied on by the Court of Appeal¹ in holding the law of the contract to be English. In other words, what he said about the availability of subsequent conduct as an aid to interpretation of a contract was part of the ratio decidendi of his judgment. It is true that, on strict analysis, what was said by Lord Hodson, Viscount Dilhorne and Lord Wilberforce cannot be regarded as a vital step towards their conclusions; but, as I have already ventured to demonstrate, the point was directly in issue between the parties in your Lordships' House. I am therefore firmly of opinion that what was said should be regarded as settling the law on this point. I am reinforced in this opinion because, in my view, *Whitworth Street Estates*² was a correct decision on the point for reasons additional to those given in the speeches. First, subsequent conduct is of no greater probative value in the interpretation of an instrument than prior negotiations or direct evidence of intention; it might, indeed, be most misleading to let in subsequent conduct without reference to these other matters. But *Prenn v Simmonds*³ gives convincing reasons why negotiations are not available as an aid to construction; and it does not, and could not consistently, with its reasoning, make any exception in the case of ambiguity. As for direct evidence of intention, there is clear authority that this is not available in the case of a patent ambiguity; and I have already ventured to submit to your Lordships the undesirability of distinguishing between direct and circumstantial evidence and between latent and patent ambiguities in this regard. Secondly, subsequent conduct is equally referable to what the parties meant to say as to the meaning of what they said; and, as the citation from Norton⁴ shows, it is only the latter which is relevant. Sir Edward Sugden's frequently quoted and epigrammatic dictum in *Attorney-General v Drummond*⁵: '... tell me what you have done under such a deed, and I will tell you what that deed means' really contains a logical flaw: if you tell me what you have done under a deed, I can at best tell you only what you think that deed means. Moreover, Sir Edward Sugden was expressly dealing with 'ancient instruments'. I would add, thirdly, that the practical difficulties involved in admitting subsequent conduct as an aid to interpretation are only marginally, if at all, less than are involved in admitting evidence of prior negotiations.

In their printed case Wickman invited your Lordships to depart from the decision in *Whitworth Street Estates*² if it could not be distinguished. But nothing was laid before your Lordships which would bring this case within the Lord Chancellor's statement⁶ of 26th July 1966 which sets the bounds of your Lordships to depart from a previous decision for your Lordships' House. The fact that even a relevant authority is not cited is no ground in itself for departure from precedent in your Lordships' House.

*Watcham's case*⁷ was already considerably weakened as a persuasive authority by what was said about it in *Gaisberg v Storr*⁸ and *Sussex Caravan Parks Ltd v Richardson*⁹. In the light of the *Whitworth Street Estates* case² it can no longer be regarded as authority for the proposition for which it was cited in the Court of Appeal¹⁰ in the

1 [1969] 2 All ER 210, [1969] 1 WLR 377

2 [1970] 1 All ER 796, [1970] AC 583

3 [1971] 3 All ER 237, [1971] 1 WLR 1381

4 (1906), p 43; 2nd Edn (1928), p 50

5 (1842) Dr & War 353 at 368

6 See Note [1966] 3 All ER 77, [1966] 1 WLR 1234

7 [1919] AC 533, [1918-19] All ER Rep 455

8 [1949] 2 All ER 411 at 415, [1950] 1 KB 107 at 114

9 [1961] 1 All ER 731 at 736, [1961] 1 WLR 561 at 568

10 [1972] 2 All ER 1173, [1972] 1 WLR 840

a instant case. It is possible that the actual decision can be justified, as can certainly many of the authorities on which it purports to found, by well recognised exceptions to the rule against adduction of extrinsic evidence to interpret an instrument. These are authoritatively stated by Parke B in *Shore v Wilson*¹:

b 'In the first place, there is no doubt that not only where the language of the instrument is such as the Court does not understand, it is competent to receive evidence of the proper meaning of that language, as when it is written in a foreign tongue; but it is also competent, where technical words or peculiar terms, or indeed any expressions are used, which at the time the instrument was written had acquired an appropriate meaning, either generally or by local usage, or amongst particular classes . . . This description of evidence is admissible, in order to enable the Court to understand the meaning of the words contained c in the instrument itself, by themselves, and without reference to the extrinsic facts on which the instrument is intended to operate. For the purpose of applying the instrument to the facts, and determining what passes by it, and who takes an interest under it, a second description of evidence is admissible, viz. every material fact that will enable the Court to identify the person or thing mentioned d in the instrument, and to place the Court, whose province it is to declare the meaning of the words of the instrument, as near as may be in the situation of the parties to it.'

I would add that Parke B continued²:

e 'From the context of the instrument, and from these two descriptions of evidence, with such circumstances as by law the Court, without evidence, may of itself notice, it is its duty to construe and apply the words of that instrument; and no extrinsic evidence of the intention of the party to the deed, from his declarations, whether at the time of his executing the instrument, or before or after that time, is admissible; the duty of the Court being to declare the meaning of what is written in the instrument, not of what was intended to have been f written.'

To which I would also add, once more from Norton on Deeds³:

g 'The subsequent admission as to the true meaning of a deed by, or subsequent conduct of, a party to . . . a deed, cannot be received to aid the construction of the deed [although:] This rule does not apply to ancient documents . . .'

LORD KILBRANDON. My Lords, the appellants ('Schuler'), who are machine tool manufacturers in Germany, entered into an agreement with the respondents h (Wickman), who sell machine tools in Britain and elsewhere, providing, inter alia, that Wickman should sell as agents for Schuler, on a commission basis to six named motor manufacturers, panel presses made by them. This is a commercial relationship of a commonplace character, and it seems extraordinary that the contract embodying it should have been drafted in terms which have given rise to such acute differences of judicial opinion. There was only one feature of the agreement which called for what j may be an unusual stipulation in contracts of this nature; cl 7, after providing, in the

1 (1842) 9 Cl & Fin 355 at 555, 556

2 (1842) 9 Cl & Fin at 556

3 (1906), pp 138, 139; cf 2nd Edn (1928), p 151

ordinary way, that '(a) Subject to Clause 17 [Wickman] will use its best endeavours to promote and extend the sale of Schuler products in the Territory', goes on as follows: a

'(b) It shall be condition of this Agreement that:—

'(i) [Wickman] shall send its representatives to visit the six firms whose names are listed in the Schedule hereto at least once in every week for the purpose of soliciting orders for panel presses; b

'(ii) that the same representative shall visit each firm on each occasion unless there are unavoidable reasons preventing the visit being made by that representative in which case the visit shall be made by an alternate representative and [Wickman] will ensure that such a visit is always made by the same alternate representative.

'[Wickman] agrees to inform Schuler of the names of the representatives and alternate representatives instructed to make the visits required by this Clause.' c

The question in this appeal is, whether when they used the word 'condition' in cl 7 (b) the parties meant to constitute a fundamental condition of the contract—'going to the root of the contract so that it is clear that the parties contemplated any breach of it entitles the other party at once to treat the contract as at an end': *Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd*¹, per Upjohn LJ. It is undoubted that parties may, if they so desire, make any term whatever, unimportant as it might seem to be to an observer relying on a priori reasoning of his own, a condition giving entitlement, on its breach, to rescission at the instance of the party aggrieved. The judgments in *Bettini v Gye*² are commonly cited as authority for a proposition which no one now challenges. Whether the words which the parties have used in setting out their agreement do indeed exhibit a particular intention, as regards any particular stipulation, is a question of law. But one would have hoped that by this time it would have been possible to select words, in the context of the agreement as a whole, which would have made clear what the parties intended mutually to agree on. Such has not, evidently, been achieved in the instant case. d

If, as Schuler submit, the use of the word 'condition' in cl 7 (b) marks the intention of parties to provide, in the event of breach, a ground for rescission, one is immediately struck by the fact that special provision for a right to rescind, in certain other circumstances, has been made under the heading 'Duration of Agreement' in cl 11. Those circumstances, again, are of a very mixed character. While the effect of cl 11 is to give a right to rescind if a party, '... shall have committed a material breach of its obligations hereunder and shall have failed to remedy the same within 60 days of being required in writing so to do', many of the obligations referred to are, in the strict sense, irremediable. For example, once Wickman have communicated Schuler's trade secrets in breach of cl 14, or once Schuler have published advertising matter not containing Wickman's name, in breach of cl 17, the damage is done, and nothing can be done within 60 days, or ever, by way of remedy. It is possible that 'remedy' means 'satisfy the other party that it won't happen again'. It is also possible that, in the case of a truly irremediable material breach, which goes to the root of the contractual relationship, as would presumably a breach of cl 14, you simply write the provision for remedying in 60 days out of the document as a term incapable of being fulfilled. And your Lordships have already noticed the difficulties, under this clause, to which an anticipatory breach will give rise. e

On the whole, though without a great deal of confidence, I come to the conclusion that the use of the word 'condition' in cl 7 (b) was not intended by the parties to isolate an individual fundamental term, and to provide for rescission, on any breach, in f

¹ [1962] 1 All ER 474 at 483, [1962] 2 QB 26 at 63

² (1876) 1 QBD 183, [1874-80] All ER Rep 242 g

a addition to the other more general provisions for rescission set out in cl 11, without the opportunity being given to the party at fault by cl 11 to put things right for the future, where the nature of the breach made that possible. Thus, when Schuler first had reason to complain in January 1963 of material breaches of cl 7 (b), they could have called on Wickman to make better arrangements within 60 days, on pain of rescission. It is only in this way that I can give any meaning to the remedial provision.

b But when one comes to October 1964 and the situation as to visiting obtaining at the time Wickman claimed to rescind, considerable amendment had been made; as the learned arbitrator finds, the irregularities did not amount to a material breach, and the provisions of cl 11 were therefore of no effect. Unless, therefore, contrary to my view, there is an independent right to rescind under cl 7 to be deduced from the fact that the parties selected the word 'condition' in order to express their intention, Schuler cannot succeed.

c I respectfully agree with Lord Denning MR¹ that one is not constrained, by analogies from the Sale of Goods Act 1893, or by authorities such as the insurance cases, *Thomson v Weems*² and *Dawsons Ltd v Bonnin*³, or by *Wallis, Son & Wells v Pratt & Haynes*⁴, so to hold. One must, above all other considerations as I think in a case where the agreement is in obscure terms, see whether an interpretation proposed is likely to lead to unreasonable results, and if it is, be reluctant to accept it. The grotesque consequences of an insistence on a right to rescind on any breach of cl 7 (b) do not require emphasis. It was suggested that one must concede to Schuler the right to inflict severe terms, since they will have known their own interests better than we can do. Be that so, I am not prepared to accept that if, instead of using the equivocal word 'condition' in cl 7, Schuler's draftsman had spelled out the consequences he intended should follow on the slightest breach, Wickman would have been prepared to sign the agreement presented to them. I understand the view of the learned arbitrator to be that they would not.

d While I agree that this appeal should be dismissed, I would not be prepared to do so on a consideration of the actings of the parties, subsequent to the agreement, as permitting me to infer their contractual intentions therefrom. I think this would be contrary to the principle of *James Miller and Partners Ltd v Whitworth Street Estates (Manchester) Ltd*⁵. The decision in *Watcham v Attorney-General of East Africa Protectorate*⁶, which was referred to by Lord Denning MR, does not, I believe, command universal confidence, though I would not question it so far as it merely lays down that, where the extent of a grant of land is stated in an ambiguous manner in a conveyance, it is legitimate to interpret the deed by the extent of the possession which proceeded on it. And I am not sure that I see any reason to confine such a rule to ancient deeds. It is, however, a dubious expedient to attempt to make out what parties meant by what they did; in the ordinary way one is limited to deciding what they meant by what they said in the agreement under construction. Of the cases concerning commercial contracts to which we were referred, I understand *Hillas & Co Ltd v Arcos Ltd*⁷ to hold that in what I will call an extension to a contract of sale, in the absence of necessary stipulations literally provided therein, the necessary stipulations contained in the original contract may be therein implied, in order to prevent the sterile result of avoidance for uncertainty. In *Radio Pictures Ltd v Inland Revenue Comrs*⁸ the problem was whether a particular document could properly be

j 1 [1972] 2 All ER 1173, [1972] 1 WLR 840
 2 (1884) 9 App Cas 671
 3 [1922] 2 AC 413, [1922] All ER Rep 88
 4 [1911] AC 394, [1911-13] All ER Rep 989
 5 [1970] 1 All ER 796, [1970] AC 583
 6 [1919] AC 533, [1918-19] All ER Rep 455
 7 [1932] All ER Rep 494, 147 LT 503
 8 (1938) 22 Tax Cas 106

included among the batch of documents which as a whole formed the contract, so that the stipulations therein were themselves contractual. I can see that these cases are in some degree analagous to *Watcham*¹, in as much as they concern the ambit or extent of the contract rather than the interpretation of particular mutual obligations. That distinction may not be easily expressed in words, but at any rate I would be reluctant to apply the *Watcham*¹ doctrine to the construction of mercantile contracts. In the present case, such application is, in any event, in my view unnecessary. I would dismiss this appeal.

Appeal dismissed.

Solicitors: *Allen & Overy* (for Schuler); *Joynton-Hicks & Co*, agents for *Rotherham & Co*, Coventry (for Wickman).

S A Hatteea Esq Barrister.

Practice Direction

QUEEN'S BENCH DIVISION

Practice – Payment into court – Transfer of money in court to short-term investment account – Procedure.

As from 2nd April 1973 the Practice Direction dated 24th March 1970² is revoked. On and after 2nd April 1973 any application to transfer moneys paid into court to short-term investment account may be made on Form 11³, Supreme Court Funds Rules 1927, Part II, Payment Schedule, made out in duplicate by one of the parties in the action. Such form shall state the title of the action, the amount standing in court to the credit of the action which it is desired to invest; that the sum be placed on short-term investment account and the interest thereon do accumulate until further order.

The party applying or his solicitors shall on the same form certify that the time for acceptance of such sum has expired. The Form 11 should be taken to the Action Department, Central Office of the Supreme Court, or sent in by post to the Head Clerk of that department, and shall be endorsed with the name and address of the solicitors of the party applying or, if the party is acting personally, his name and address. Carbon copies will not be accepted.

W RUSSELL LAWRENCE

23rd March 1973 Senior Master

¹ [1919] AC 533, [1918-19] All ER Rep 455

² [1970] 1 All ER 1107, [1970] 1 WLR 602

³ See The Supreme Court Practice 1973, vol 2, p 337, para 1365

Taylor v Provan (Inspector of Taxes)

COURT OF APPEAL, CIVIL DIVISION

RUSSELL, BUCKLEY AND ORR LJJ

20th, 21st FEBRUARY, 15th MARCH 1973

- b** *Income tax – Income – Emoluments from office or employment – Expenses – Deduction from emoluments – Expenses necessarily incurred in performance of duties of office or employment – Travelling expenses – Taxpayer resident abroad – Taxpayer director of English company – Sole function to expand company by mergers etc – Arrangement with company contemplating duties would be performed mainly outside United Kingdom – Taxpayer flying to United Kingdom periodically in connection with duties – Taxpayer reimbursed by company for money expended on air fares – Sums reimbursed constituting emoluments of office – Whether cost of air fares necessarily incurred by taxpayer in performance of duties of his office of director – Income Tax Act 1952, s 156 (Sch E), Sch 9, para 7.*

- d** *Income tax – Income – Emoluments from office or employment – Expenses allowances – Sums paid in respect of expenses by body corporate to director or employee – Director – Expenses in respect of activity outside normal duties – Director given special assignment – Director paid travelling expenses – Expenses relating only to special assignment and not to directorship – Whether expenses chargeable as emoluments from office of director – Income Tax Act 1952, ss 156 (Sch E), 160 (1).*

- e** The taxpayer, who lived and had business commitments in Canada, voluntarily organised the merger of a number of breweries in the United Kingdom. The amalgamated breweries became United Breweries Ltd and the taxpayer was appointed a director of that company with a special assignment, namely to plan, negotiate and carry through, for example by mergers, the expansion of its activities in the brewing industry. His sole function in the company was to pursue that special assignment. He had none of the normal duties of a company director. It was arranged (i) that he would do as much as possible of his work for the company in and from Canada but
- f** that when it was necessary for him to visit the United Kingdom in connection with that work he would be regarded as travelling on the business of the company and the company would reimburse the cost of his transatlantic air travel; (ii) that he would receive no remuneration for his services. On the occasions that the taxpayer did come to the United Kingdom in connection with his work for the company, he paid his air fares and the company reimbursed him the amount of those fares. He was assessed
- g** to income tax under Sch E (s 156 of the Income Tax Act 1952, as amended by s 10 (1) of the Finance Act 1956) on the amounts of those reimbursements as emoluments of his office as director. The taxpayer contended that (i) the reimbursements were not within the scope of s 160 (1)^a of the 1952 Act and chargeable as emoluments, as they related only to the special assignment and not to his directorship, and (ii) even if they were emoluments they were deductible under para 7^b of Sch 9 to that Act

- h** **a** Section 160 (1), so far as material, provides: '(1) . . . any sum paid in respect of expenses by a body corporate to any of its directors . . . shall, if not otherwise chargeable to income tax as income of that director . . . be treated . . . as a perquisite of the office . . . of that director . . . and included in the emoluments thereof assessable to income tax accordingly: Provided that nothing in this subsection shall prevent a claim for a deduction being made under paragraph 7 of the . . . Ninth Schedule in respect of any money expended wholly, exclusively and necessarily in performing the duties of the office . . .'

- j** **b** Paragraph 7 provides: 'If the holder of an office or employment of profit is necessarily obliged to incur and defray out of the emoluments thereof the expenses of travelling in the performance of the duties of the office or employment, or of keeping and maintaining a horse to enable him to perform the same, or otherwise, to expend money wholly, exclusively and necessarily in the performance of the said duties, there may be deducted from the emoluments to be assessed the expenses so necessarily incurred and defrayed.'

as expenses necessarily incurred in the performance of the duties of his office of director. a

Held – The taxpayer had been properly assessed to income tax on the reimbursements for the following reasons—

(i) the sums reimbursed were chargeable to income tax as emoluments because (a) on the true construction of s 160 (1) expenses paid by a company in respect of expenses of its director came within that subsection irrespective of whether they were paid in respect of an activity outside the normal scope of a director's duties, and (b) in any event the payments had been made to the taxpayer as a director of the company (see p 73 b to d, post); b

(ii) sums equivalent to those reimbursed were not deductible under para 7 of Sch 9 because expenses were only deductible under that paragraph if they were necessitated by the nature of the office and the duties involved in it without reference to the personal circumstances of the particular holder of it and on the evidence it could not be said that the taxpayer's office with its special assignment necessarily involved transatlantic flights by whoever might hold the office (see p 73 f to j, post); *Ricketts v Colquhoun (Inspector of Taxes)* [1926] AC 1 applied. c

Decision of Pennycuik V-C [1972] 3 All ER 930 reversed. d

Notes

For the taxation of expenses allowances paid to directors and certain employees, see 20 Halsbury's Laws (3rd Edn) 314, 315, para 577.

For the deduction of expenses incurred in the performance of the duties of an office or employment, see *ibid* 327-329, paras 600-602, and for cases on the subject, see 28 (1) Digest (Reissue) 347-355, 1253-1302. e

For the Income Tax Act 1952, ss 156, 160, Sch 9, para 7, see 31 Halsbury's Statutes (2nd Edn) 149, 155, 524.

For the Finance Act 1956, s 10, see 36 Halsbury's Statutes (2nd Edn) 408.

For the year 1970-71 and subsequent years of assessment, ss 156, 160 of and Sch 9, para 7, to the 1952 Act have been replaced respectively by ss 181 (1), 195 and 189 (1) of the Income and Corporation Taxes Act 1970. f

Case referred to in judgment

Ricketts v Colquhoun (Inspector of Taxes) [1926] AC 1, 10 Tax Cas 118, 95 LJBK 82, 134 LT 106, 90 JP 9, HL; *affg* [1925] 1 KB 725, 94 LJBK 340, 132 LT 331, CA, 28 (1) Digest (Reissue) 347, 1253. g

Appeal

The Commissioners for the Special Purposes of the Income Tax Acts stated the following case for the opinion of the High Court.

1. At a meeting of the commissioners held on 17th and 18th December 1970 Edward Plunket Taylor ('the taxpayer') appealed against the following assessments to income tax: h

Year	Amount of assessment
1961-62	£8,033
1962-63	£4,557
1963-64	£3,060
1964-65	£1,854
1965-66	£806

i

2. The questions for decision, shortly stated, were: (i) whether or not certain sums reimbursed to the taxpayer in respect of transatlantic travelling expenses were

a emoluments within the scope of the charge of tax under Sch E; and (ii) if so, whether or not the taxpayer was entitled, under para 7 of Sch 9 to the Income Tax Act 1952, to deductions in respect of such travelling expenses.

3. The taxpayer gave evidence before the commissioners.

[Paragraph 4 set out the documents which were proved or admitted before the commissioners.]

b 5. The following facts were proved or admitted. (1) The taxpayer was born in Canada of Canadian parents, and was educated there. After obtaining a university degree in mechanical engineering he entered a firm of mercantile bankers, becoming a partner in 1927. He also became associated with his family's brewing business, but took little part in it until about 1929, when he resigned from the banking partnership. From 1930 to 1939 he concerned himself with brewery amalgamations, and built up Canadian Breweries, of which he became the president. In 1930 there were some c 100 or more breweries in Canada; in 1939 that number was reduced as a result of amalgamations to some 15 or 20.

(2) During the 1939-1945 war the taxpayer was engaged on government service. He then returned to Canadian Breweries as president and continued its policy of mergers and amalgamations in Canada and North America.

d (3) In about 1958 the taxpayer became involved with the Hope and Anchor Brewery ('Hope and Anchor') of Sheffield, England. The latter was endeavouring to become larger, with a view to attracting a favourable take-over bid. Negotiations by Hope and Anchor to take over four smaller breweries had become bogged down, and the taxpayer suggested that he should try his hand in the matter without reward. His suggestion was accepted and he succeeded in bringing three of the four breweries under the wing of Hope and Anchor. The amalgamated breweries became United Breweries e Ltd ('United Breweries') and the taxpayer was made a director thereof, with a special assignment, namely, to expand the group by further mergers and amalgamations, without being paid any remuneration, but being reimbursed for proper expenses. As a result of the taxpayer's efforts further breweries in Scotland, Northern Ireland and the northern half of England were taken over by United Breweries.

f (4) In or about 1962, as a result of the taxpayer's further efforts, United Breweries merged with Charrington Ltd, becoming Charrington United Breweries Ltd ('Charrington United Breweries'). The group now acquired outlets in the southern half of England and the taxpayer was again made a director, with a similar unpaid assignment as before.

g (5) In 1967 Charrington United Breweries merged with Bass Mitchells and Butlers Ltd, becoming Bass Charrington Ltd ('Bass Charrington') and the taxpayer was once more made a director with a similar unpaid assignment.

h (6) The taxpayer was made a director of United Breweries, Charrington United Breweries and Bass Charrington for reasons of prestige. His sole function in each company was a special assignment of the nature described in (3) above. He had none of the normal duties of a company director and did not attend board meetings, unless he happened to be in England on the business of his special assignment, and not always on those occasions. There was no written agreement with any of the companies, but arrangements were expressed to be confirmed in a resolution of the board of Charrington United Breweries passed on 21st September 1967 in the following terms:

i 'MR E P TAYLOR [the taxpayer] The Board recalled its decision to set up the Expansion Committee of the Board on 10 July 1962 and formally resolved that in view of the Company's merger with Bass, Mitchells & Butlers Ltd, this Committee be and is hereby dissolved. The Board wished to express its appreciation to [the taxpayer] of the special services he has contributed in guiding the Expansion Committee in the continuous work upon which it has been engaged over the last 5 years and in particular for the many journeys he has made to the United Kingdom for this purpose.

'The Board recalled that the principal business commitments of [the taxpayer] were in Canada and the Bahamas and the consequent arrangement that he would perform his duties on behalf of this Company as far as he could from his offices in those countries, but that it was necessarily envisaged that he would be required to visit the UK from time to time as well. The Board having felt that a reconfirmation of its arrangements with [the taxpayer] was desirable, it was Resolved:— (1) that he was to receive no remuneration for his services; (2) that he had no day to day administrative duties and was not normally required to attend the Company's offices or routine Board Meetings; (3) that his special assignment was the expansion and development of the Group, and, in particular, to take charge of negotiations for other brewery companies to join the Group; (4) that it was recognised that he did not reside in the UK and that, accordingly, his duties were to be performed so far as possible from his residence abroad. If and to the extent that it was necessary for him to come to the UK to carry out the duties of his special assignment, he would be regarded as travelling on the business of the Company, and consequently the Company would bear all expenses of such visits to the UK.'

It was reported that the above arrangements have been invariably adhered to. A resolution in similar terms was passed by the board of United Breweries on the same date.

(7) The taxpayer recalled that for a short period he was deputy chairman of United Breweries, after the sudden death of the previous holder of that office. He was at a loss to explain how he came to be chairman of that company—he was so described in its letter heading during the years 1962 and 1963—as he considered that he had no responsibilities other than those of his special assignment.

(8) The taxpayer carried out his special assignment with each company as follows:

(a) He first consulted reference books and listed breweries according to size and location. He obtained copies of filed company accounts, lists of shareholders and reports from Bush House or from various mercantile banks. Gradually he built up a library, which he carried around with him, leaving duplicates in England. Out of 100 possible mergers he carried through some 25 or 30. Planning a merger included view of the premises, discussions with directors (who preferred to meet him in London rather than at their local brewery), buying shares to obtain copies of accounts or reports. The complete plan included merger terms which were proposed for acceptance by his board. Prices were usually 25 per cent over market value, which would have to be justified by estimates of higher future profits resulting from economies in plant and brands. During his negotiations he always worked closely with a mercantile bank, and was often accompanied by the bank's representative. (b) He had no fixed base for working on his special assignment. He did his thinking and planning wherever he happened to be, which during the early years under appeal was mostly in Toronto, Canada. The presentation of a merger scheme was largely a matter of judgment, and it was no use proposing something that was going to fail. Although personal visits to breweries or persons in England were important, the bulk of his work was done outside the United Kingdom by correspondence or telephone. On occasions he interviewed brewers from the United Kingdom in his Canadian office. He had not found it necessary always to visit the United Kingdom for completion of negotiations—sometimes his merchant banker could close the deal. (c) He had an office on his farm near Toronto, an office at Canadian Breweries in Toronto until 1965, and after 1965 an office at the Argus Corporation in Toronto. From 1965 he had a residence in the Bahamas. He had a secretary in Toronto and one in the Bahamas. (d) He never came to England specially to attend board meetings. Whenever he came an office was always made available to him in London by United Breweries. He usually brought a secretary with him, but if he did not, secretarial services were provided for him. When he came to England, he stayed initially at Claridges, and subsequently at a private residence in Bagshot.

(9) In 1965 the taxpayer retired from presidency of Canadian Breweries. He was a director of numerous other concerns, but gradually gave up most of them as opportunity arose. In 1963 he took residential status in the Bahamas, but at no time was he ever resident or ordinarily resident in the United Kingdom. He lived on capital, not income.

(10) The taxpayer undertook his special assignment as a kind of business recreation — amalgamations were what he knew most about, and he enjoyed the processes. He was instrumental in setting up a subsidiary investment company for Charrington United Breweries to acquire interests in breweries which might subsequently be taken over. He was also instrumental in persuading Canadian Breweries to finance the British breweries with which he was concerned, to the extent of some £20 million, which in some cases had assisted mergers.

(11) During the years under appeal the taxpayer incurred travel and hotel and other expenses. He paid his own bills and was subsequently reimbursed the amounts which he claimed. Nothing had been included in his claims for reimbursement in respect of the expenses of his wife, who had accompanied him on occasions. The inspector of taxes assessed him to income tax in respect of amounts reimbursed for Atlantic air fares, but not in respect of amounts reimbursed for hotel and other expenses. The air fares were all for flights between London and Canada either direct, or via New York and/or Nassau, except on two occasions when he had flown from Nassau direct to London. The significance of travelling via New York was purely for the purpose of travelling by day.

(12) On yearly average the taxpayer spent between 100 and 150 days in Canada, 50 to 85 in the United Kingdom and the remainder in the Bahamas. In July 1962 the taxpayer had come to the United Kingdom for 28 days, had returned to Canada for eight days and come back to the United Kingdom for a further eight days. The reason for his return to Canada had been to attend the yearling sales at Saratoga which he had attended yearly for the previous 40 years.

6. It was contended on behalf of the taxpayer: (a) that the amounts of travelling expenses reimbursed were not emoluments within the scope of charge to tax under Sch E; (b) alternatively that if the reimbursements were emoluments, the travelling disbursements made by the taxpayer were allowable expenses, being necessarily incurred in the performance of the duties of an office or employment, namely his special assignment; (c) that the appeals should be upheld and the assessments discharged.

7. It was contended on behalf of the Crown: (a) that the reimbursements were within the scope of s 160 of the Income Tax Act 1952 and therefore chargeable to tax as emoluments; (b) that the expenses in question were not deductions permitted by paragraph 7 of Sch 9 to the Income Tax Act 1952; (c) that the appeals should be determined accordingly.

[Paragraph 8 set out the cases¹ referred to.]

9. The commissioners who heard the appeals took time to consider their decision and gave it in writing on 9th February 1971 as follows:

‘As a director in a group of English brewery companies, the [taxpayer’s] special assignment was the expansion and development of the group and, in particular, the conduct of negotiations for other brewery companies to join the group. The arrangement was that he, being neither resident nor ordinarily resident in

¹ *Brown v Bullock (Inspector of Taxes)* [1961] 3 All ER 129, [1961] 1 WLR 1095, 40 Tax Cas 1, CA; *Chamberlain v Inland Revenue Comrs* [1945] 2 All ER 351, 28 Tax Cas 88, CA; *Hochstrasser (Inspector of Taxes) v Mayes* [1959] 3 All ER 817, [1960] AC 376, 38 Tax Cas 673, HL; *Newlin v Woods (Inspector of Taxes)* (1966) 42 Tax Cas 649, CA; *Newsom v Robertson (Inspector of Taxes)* [1952] 2 All ER 728, [1953] Ch 7, 33 Tax Cas 452, CA; *Owen v Pook (Inspector of Taxes)* [1969] 2 All ER 1, [1970] AC 244, 45 Tax Cas 571, HL; *Ricketts v Colquhoun (Inspector of Taxes)* [1926] AC 1, 10 Tax Cas 118, HL

the United Kingdom, should perform his duties as far as he could from his offices in Canada and the Bahamas. He received no remuneration for his services, but was reimbursed certain amounts representing the cost of air flights between (or including) Toronto, Nassau and London. Having been assessed in these amounts under the description "Expenses payments received as director" for the years in question, he now appeals against the assessments. The first ground of appeal is that the [taxpayer] is not as a matter of principle chargeable to income tax. Arguments were addressed to us, to the effect that the special assignment was not an office or employment of profit, that there was no element of profit in the reimbursements, and that on the authority of *Owen v Pook*¹ such reimbursements were not emoluments and therefore not chargeable. The [taxpayer] was, however, a director of an English company, and the issue arises whether the reimbursements were required by Section 160 (1) of the Income Tax Act 1952 to be treated as "perquisites" of the office and "included in the emoluments thereof". In our view Section 160 (1) obliges us to treat the reimbursements, being sums paid in respect of expenses, as "perquisites" of the office for the purposes of Section 156 of the Income Tax Act 1952, as affected by paragraph 1 (1) of the Second Schedule to the Finance Act 1956. We hold that the amounts were emoluments and assessable in principle. The second ground of appeal is that, if the [taxpayer] is assessable as a result of the operation of Section 160 (1) of the Income Tax Act 1952, he is nevertheless entitled to a deduction in respect of the air fares, as being travelling expenses which he was necessarily obliged to incur in the performance of his duties. We were invited by Counsel for the [taxpayer] to find on the facts of this unusual case that the [taxpayer] was travelling (on transatlantic flights) not to his work, but on his work; that his work did not begin but ended in London: and that, if Toronto was not held to be his only place of work, he had in effect two places of work.

'On this kind of question Lord Wilberforce in *Owen v Pook*² said: "What is required is proof, to the satisfaction of the fact-finding commissioners, that the taxpayer, in a real sense, in respect of the office or employment in question, had two places of work, and that the expenses were incurred in travelling from one to the other in the performance of his duties." In the earlier case of *Ricketts v Colquhoun*³ Lord Blanesburgh said: "... the deductible expenses do not extend to those which the holder has to incur mainly and, it may be, only because of circumstances in relation to his office which are personal to himself or are the result of his own volition." Having considered the facts as a whole we are not satisfied that the [taxpayer's] offices in Toronto and Nassau were or should be regarded as places of work for the purposes of his special assignment and we have reached the conclusion that the travelling expenses in question arose, not from the nature of the [taxpayer's] office, but from circumstances personal to himself. Accordingly we dismiss the appeals in principle and leave figures to be agreed.'

10. Figures were agreed between the parties on 21st April 1971 and on 6th May 1971 the assessments were accordingly adjusted as follows:

1961-62 reduced to £2,492
 1962-63 reduced to £2,567
 1963-64 reduced to £1,625
 1964-65 reduced to £1,063
 1965-66 reduced to £798

1 [1969] 2 All ER 1, [1970] AC 244, 45 Tax Cas 571

2 [1969] 2 All ER at 11, [1970] AC at 262, 45 Tax Cas at 595

3 [1926] AC 1 at 7, 8, 10 Tax Cas 118 at 135

a 11. The taxpayer immediately after the determination of the appeals declared his dissatisfaction therewith as being erroneous in point of law and on 7th May 1971 required the commissioners to state a case for the opinion of the High Court.

By his judgment dated 30th June 1972 and reported at [1972] 3 All ER 930, Penny-
cuiqu V-C held that the reimbursements made to the taxpayer for his air fares were
b chargeable to income tax as emoluments. He held, however, that on the evidence the taxpayer had two places of work, one in Canada and the Bahamas and the other in the United Kingdom, and accordingly the expenses involved in travelling between the two places were deductible as expenses necessarily incurred in the performance of his duties to the group of companies. The Crown appealed to the Court of Appeal.

M P Nolan QC and Patrick Medd for the Crown.

F Heyworth Talbot QC and Barry Pinson for the taxpayer.

c *Cur adv vult*

15th March. **RUSSELL LJ** read the following judgment of the court. This appeal from the decision of Pennyquick V-C¹ raises a number of points of argument on the question whether in years of assessment 1961-62 to 1965-66 inclusive the taxpayer was
d rightly assessed to tax under Sch E, Case II, in respect of sums paid to him as reimbursement of the cost incurred by him of air flights across the Atlantic to the United Kingdom and vice versa.

At the relevant times the taxpayer lived and had his business in Canada. (We do not think that the Nassau factor is really relevant and the case may be stated in that simplified form.) He had considerable experience of arranging brewery mergers and amalgamations in Canada, and found this an interesting activity. In the United
e Kingdom he volunteered to try to procure a merger of four United Kingdom breweries with the Hope and Anchor Brewery, which was trying to expand its activities, and he succeeded as to three: the result was called United Breweries. This service on his part was gratuitous.

Thereafter, from 1962 to 1966 inclusive, he conducted similar activities for United Breweries and Charrington United Breweries, the latter company having come into
f existence as the result of one of such activities. In the case of each of those companies, his work in organising expansionist mergers over the years was on the basis set out in the resolutions of the two companies, passed post hoc in 1967, set out in the case stated to which reference should be made². In summary, he was made a director of each company with a special assignment to plan, negotiate and carry through, by for
g example mergers, expansion of the activities in the brewery industry of the company. (Again for simplicity we will speak as if there was only one company, since there is no relevant distinction between the two.) By the arrangement, put very shortly, he was to fulfil his office of director with the special assignment gratuitously, doing as much as possible of the work of preparation, negotiation and so forth in and from Canada, where his life was centred; but, since it was recognised that his activities would also from time to time involve transatlantic air travel, the company would reimburse
h the cost thereof as being expended on the company's business.

The taxpayer was assessed to tax under Sch E on the amounts of these reimbursements as emoluments of his office of director. We say at once that this may well be considered to be, to say the least, unfair; but one is by now familiar with systems of fiscal legislation which, in order to prevent avoidance devices, cast the net so wide as to ensnare the innocent; and we dare say that the company will feel it proper in
j due course ex gratia to make good to the taxpayer the tax on the assessments if they are upheld.

We first examine the relevant enactments. By s 156 of the Income Tax Act 1952, as amended, tax under Sch E is to be charged in respect of any office or emoluments

1 [1972] 3 All ER 930, [1972] 1 WLR 1459

2 See pp 67, 68, ante

therefrom which fall under Case II; that case covers, where the person holding the office is not resident in the United Kingdom, any emolument in respect of duties performed in the United Kingdom. In order to see what are emoluments for this purpose it is necessary to turn to s 160 (1). That provides that any sum paid in respect of expenses by a company to any of its directors shall be treated for the purposes of para 1 of Sch 9 to the 1952 Act as a perquisite of the office of that director and included in the emoluments thereof assessable to income tax accordingly. That reference to para 1 of Sch 9 is now a reference to para 1 of Sch 2 to the Finance Act 1956 (see para 9 of that Sch 2), which provides that tax under Case II shall be chargeable on the full amount of the emoluments falling under that case and the expression 'emoluments' shall include all salaries, fees, wages, perquisites and profits whatsoever.

Thus far, subject to arguments later noticed, the enactments accordingly appear to provide that payments of expenses to a director of a company are assessable to tax under Sch E as emoluments of the office. The first question for determination arises under that head.

If, however, the payments fall within emoluments of the taxpayer's office as director, para 7 of Sch 9 of the Income Tax Act 1952 (which is kept in being by para 9 of Sch 2 to the Finance Act 1956), if applicable to the present case, will permit deduction of amounts equivalent to the assessments and so reduce them to nil. The second question for determination arises under that head. (There is a third question which may arise, to which we will come later, to what extent the payments in question, if emoluments not in effect cancelled out under that para 7, are, in the language of Case II, 'emoluments . . . in respect of duties performed in the United Kingdom.') Paragraph 7 of Sch 9 provides that if the holder of an office is necessarily obliged to incur and defray out of the emoluments thereof the expenses of travelling in the performance of the duties of the office, or otherwise to expend money wholly, exclusively and necessarily in the performance of the duties, there may be deducted from the emoluments to be assessed the expenses so necessarily incurred and defrayed. Section 160 (1) of the 1952 Act, in embracing expenses payments to a director in his emoluments, preserves to him the ability to deduct under para 7 of Sch 9 by a proviso to that section.

We return to the first point in the appeal. For the taxpayer it is contended that s 160 (1), when referring to sums paid in respect of expenses by a company to any of its directors, refers to such sums only when paid to a director as such and in relation to the performance of his ordinary duties of a director; and that in the present case the air flights in question were related entirely to the special assignment, as, it is argued, appears from the findings of the commissioners.

For the second branch of that contention reliance was particularly placed on the findings of fact in para 5 (6) of the case stated as follows:

'The [taxpayer] was made a director of United Breweries, Charrington United Breweries and Bass Charrington for reasons of prestige. His sole function in each company was a special assignment of the nature described in sub-paragraph (3) above. He had none of the normal duties of a company director and did not attend board meetings, unless he happened to be in England on the business of his special assignment, and not always on those occasions.'

This it was contended showed that his special assignment was something quite separate from his directorship; the latter was of no importance, did not involve any normal duties of a director, was a prestige title to facilitate the execution of the special assignment.

The Crown was not in this court prepared to accept that a gloss could be put on s 160 (1) such as is involved in the suggested enquiry whether the sums paid were paid to the director 'as such'; if sums were paid by a company in respect of expenses to its director, they were within the section. Alternatively, the Crown contended that on the basis of the case stated the sums in question were paid to the taxpayer as

a director. Attention was called to para 5 (3) of the case, where it is found that the taxpayer 'was made a director [of the company] with a special assignment': this shows, it was said, that it was to him as a director that the matters in question were specially assigned. Further, it was pointed out that the record in the 1967 board resolution showed that there was set up an 'Expansion Committee of the Board', and that the taxpayer had contributed services in guiding that committee in its continuous work. Finally, attention was drawn to the language of the commissioners' decision, 'As a director . . . the [taxpayer's] special assignment was the expansion', etc.

b In our judgment, the contentions for the Crown are to be preferred. We do not see any justification in the language of the section for an analysis or breakdown of sums shown to have been paid to a director in respect of expenses, so that, for example, an expense in respect of an activity outside the normal scope of a mere director's task is not within the section; if it were otherwise, it is plain that problems of nicety and complexity would arise, for example in connection with sales directors, personnel directors, works directors, and any other director with special responsibility, at any rate if they were below the level of £2,000 per annum referred to in s 163 of the 1952 Act. Furthermore, we also accept the alternative contention of the Crown that in any event these payments were made to the taxpayer as director. Accordingly, c in our judgment, the sums representing the cost of transatlantic air flights reimbursed are assessable to income tax under Sch E as emoluments of the office of the taxpayer as director of the company.

d The second question is whether equivalent sums are deductible from those emoluments so as to reduce the assessments to nil. This depends on whether the outlay of the taxpayer on these same flights comes within para 7 of Sch 9 to the 1952 Act. Was the taxpayer 'necessarily obliged to incur and defray [those sums as] the expenses of travelling in the performance of the duties of the office' of director with the special assignment?

e It is clear that if regard is to be had to the personal position of the taxpayer, ordinarily resident as he was across the Atlantic, and required by the nature of his special assignment to come from time to time to the United Kingdom, then these expenses would come within para 7. But this approach, which found favour with Warrington LJ in his dissenting judgment in *Ricketts v Colquhoun*¹, is clearly established on authority to be wrong: see, for example, the same case. The test is an objective one: it must be established that the expenditure was necessitated by the nature of the office and the duties involved in it without reference to the personal circumstances of the particular holder of that office; the expenses are confined to—

f 'those which each and every occupant of the particular office is necessarily obliged to incur in the performance of its duties—to expenses imposed upon each holder *ex necessitate* of his office, and to such expenses only':

g per Lord Blanesburgh in *Ricketts v Colquhoun*².

h Applying that test to the present case, it seems to us to be clear that it cannot be said that the office of director of this company with a special assignment to promote expansion by mergers etc within the United Kingdom involved necessarily transatlantic flights by whoever might hold that office. The company had no business on the other side of the Atlantic. There is no evidence that no one could hold the office and perform its duties other than a person living across the Atlantic. It cannot suffice that the taxpayer was no doubt thought to be the best man for the job: presumably Mr Ricketts at the time of his appointment to the recordership of Portsmouth was so regarded.

i The decision of Pennycuik V-C was based on the view that the arrangement between the company and the taxpayer as recorded in the board minute of 1967 meant

1 [1925] 1 KB 725, 10 Tax Cas 118

2 [1926] AC 1 at 7, 10 Tax Cas at 135

that the taxpayer was required by his office to have two places of work, one on each side of the Atlantic, having regard in particular to the phrase 'his duties were to be performed so far as possible from his residence abroad'. In our judgment, this is a misreading of the situation; the arrangement, in our judgment, did no more than to recognise the particular and personal situation of the taxpayer, and was in no way dictated by the nature of the tasks involved in the office.

We turn to a final point raised by the taxpayer. It was said that it was not established that these reimbursements of air fares were, within the language of Case II, 'emoluments . . . in respect of duties performed within the United Kingdom' and that the matter should be remitted to the commissioners to decide on a proper apportionment thereof between duties performed here and elsewhere. We can only say that inasmuch as they were only paid for the purpose of enabling the taxpayer to perform such of his duties as required his presence in the United Kingdom, they must necessarily all come within the quoted phrase in Case II, and we see no justification for any apportionment.

Accordingly, the appeal will be allowed and the decision of the commissioners restored.

Appeal allowed. Leave to appeal refused.

Solicitors: *Solicitor of Inland Revenue; Allen & Overy* (for the taxpayer).

Christine Ivamy Barrister.

Pasternack v Poulton

QUEEN'S BENCH DIVISION

HIS HONOUR JUDGE KENNETH JONES QC

9th, 12th FEBRUARY 1973

Negligence – Contributory negligence – Apportionment of liability – Plaintiff's share of responsibility for damage – Road accident – Motor car – Plaintiff front seat passenger – Car belonging to and driven by defendant – Car fitted with seat belts – Plaintiff failing to wear seat belt – Defendant failing to draw attention to seat belt – Accident caused by driver's negligence – Plaintiff suffering injury – Evidence that injury caused or contributed to by failure to wear seat belt – Plaintiff's share of responsibility for injury.

The plaintiff was given a lift by the defendant in his car late at night after a party. The plaintiff did not know the defendant well although she had been a passenger in the rear seat of the car earlier in the evening. The car was fitted with seat belts. The plaintiff got into the front passenger seat. The defendant, who was driving, did not wear a seat belt himself nor did he tell the plaintiff that there was a seat belt for her. In consequence she did not put the seat belt on, nor did she take steps to find out whether there was one to put on. As a result of the defendant's negligent driving the car collided with a lamp post. The windscreen was shattered and the plaintiff suffered severe injuries to her face. In an action by the plaintiff for negligence the defendant alleged that she had been guilty of contributory negligence by failing to wear the seat belt. At the trial expert evidence was given that a statistical examination of car accidents had shown that the risk of injury was substantially reduced if a seat belt was worn. The plaintiff did not own a car herself but she was familiar with the use of seat belts and stated in evidence that she would as a matter of general practice wear a seat belt if she saw the driver wearing such a belt, but stressed that in a strange car she thought one had to be told how to use them.

- a Held** – (i) The plaintiff ought reasonably to have foreseen the possibility of the car being involved in an accident and of her suffering injury as a result. She could easily have found out whether the car had seat belts and therefore ought to have known that a seat belt was available. On the evidence, and in view of the fact that at the date of the accident it was generally accepted by road users as sensible practice for the occupants of cars to wear seat belts, the plaintiff, acting reasonably, ought to have foreseen the possibility that, by wearing a seat belt, she would suffer no, or certainly less, injury if the car were involved in an accident. It followed that she had been guilty of contributory negligence in failing to do so (see p 77 j, p 78 a and d and p 79 f, post).
- b** (ii) The failure of the plaintiff to wear a seat belt had caused, or materially contributed to, the injuries which she had suffered (see p 79 g and j, post).
- c** (iii) The defendant, however, had been negligent, not only the manner in which he had driven and controlled the car, but also in his failure either to demonstrate the need to wear a safety belt by wearing one himself or by at least pointing out the existence of the seat belt and explaining that it was for her use. In all the circumstances the plaintiff bore only a very small share of the blame for her injuries which would be assessed at 5 per cent (see p 80 c to e and g, post).

O'Connell v Jackson [1971] 3 All ER 129 applied.

d Notes

For contributory negligence, see 28 Halsbury's Laws (3rd Edn) 87-92, paras 92-96, and for cases on the subject, see 36 Digest (Repl) 170-190, 912-1005.

Cases referred to in judgment

- e** *Geier v Kujawa* [1970] 1 Lloyd's Rep 364.
MacDonnell v Kaiser (1968) 68 DLR (2d) 104.
O'Connell v Jackson [1971] 3 All ER 129, [1972] 1 QB 270, [1971] 3 WLR 463, [1971] 2 Lloyd's Rep 354, [1972] RTR 51, CA.

Action

- f** The plaintiff, Wendy Phyllis Pasternack, brought an action against the defendant, Christopher Poulton, claiming damages for personal injuries. The facts are set out in the judgment.

A M Kenny for the plaintiff.

J R Playford for the defendant.

- g HIS HONOUR JUDGE KENNETH JONES QC.** In this case the plaintiff claims damages for personal injuries suffered by her when she was being driven as a front seat passenger by the defendant in his car. The defendant, although in his defence he denies negligence, before me admitted, or it was admitted on his behalf by counsel, that he had been negligent in the driving of his car. But he now says, or alleges in his amended defence, that the plaintiff should be deprived of at least a part of the damages to which she would otherwise have been entitled by reason of her failure to wear a seat belt. He himself wore no seat belt and it can be seen immediately that such a defence is extremely unattractive. However, I have to set out of my mind all such considerations and decide this case according to the law as I judge it to be.

- h** The only issue is whether it has been shown that the plaintiff here was guilty of contributory negligence in not wearing her seat belt. The only issue concerns the wearing of a seat belt by the plaintiff but it falls into two parts because there is the allegation in the amended defence that she was guilty of contributory negligence in failing to wear her seat belt and there is also an allegation in the amended statement of claim that the defendant himself was negligent in failing to make sure that the plaintiff wore her seat belt. I have had the advantage in this case of two forceful and most helpful arguments presented to me on each side by counsel and I have been
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referred to all the authorities which are known to exist on the wearing of seat belts, both in this country and in Canada and the United States of America. a

I turn first to deal with the facts of the case. The plaintiff who was called to give evidence was, at the time of the accident on 5th December 1971, a young woman of nearly 19 years of age; she was then an undergraduate in the University at Bristol and obviously a young woman of some intelligence. She was not a driver herself. She told me that she had had experience for several years of seat belts in cars and that on many occasions she had worn them. On this particular evening she had attended some three parties starting out at 10 p.m.; at the first party she had met the defendant whom previously she had really only known very casually by name and sight. She travelled in his car probably in the rear seat between the first party and the second party and indeed between the second and the third party, each of those journeys being short journeys. At the end of the third party, when the time was about 1 a.m., she accepted a lift in the defendant's car to her home. The journey involved was she thought about ten minutes in duration; the defendant told me it was about 1½ miles through the built-up area of Bristol. The car itself was a Morris 1000, an old car, which the defendant had bought some time previous to the summer for £70. It was, the plaintiff told me, a two door saloon. The defendant told me that it was, in fact, a four door saloon and undoubtedly he was right in that. It was fitted with seat belts, the belt for the front seat passenger, according to the defendant, was hanging from the door post between the near side doors and he said that had it been light it could have been seen. b
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The plaintiff, for this last journey, got into the front passenger seat. She told me, and I accept it as the truth, that she did not know that the car was fitted with seat belts. There were apparently, also two passengers in the rear of the car but nothing was said between the four occupants about seat belts and, in particular, the defendant himself did not wear his seat belt. During the course of the journey there was not much traffic about. The defendant apparently drove quite normally to start with but then, after having overtaken a police car, went out of control and collided with a lamp post. It was a head on collision. The windscreen was shattered and the plaintiff suffered severe injuries to her face. I was able to see, as she gave evidence, the quite serious scarring which was mostly on the left side of her face but which seemed to continue in a line across her mouth into the right side of her face. It is pleaded amongst the particulars of the injuries that, in addition to the extensive laceration to her face, she suffered chipping and backward displacement of three of her teeth, and she also suffered a minor injury to the left elbow. She told me that she thought she had hit the dashboard with her left arm and leg. In cross-examination she said she would wear as a matter of general practice a seat belt if she saw the driver wearing such a belt, but she stressed that in a strange car she thought you have to be told how to use them. e
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The defendant also gave evidence and he confirmed that he was not wearing his seat belt himself. He said, and I accept his evidence, that he did not consider the problem of whether or not to wear a belt at all on this particular night. He said his practice was to use seat belts on long journeys and generally, when he used seat belts, he asked his passengers to put them on as well, and he said he would expect to have to assist his front seat passenger to put the belt on. So much for the circumstances of the accident and the views both of the plaintiff and the defendant as to the wearing of seat belts. h

There was also called on behalf of the defendant a police officer who had been driving the police car which had been overtaken by the defendant shortly before the accident. The police officer described it as travelling quite a bit faster than he, the police officer, was travelling; he said that the defendant was probably travelling at anything up to 40 m.p.h. He witnessed the collision and went to the scene and found the plaintiff being helped out of the passenger seat. He told me that he had been in the police force for some four years. Up to about two years ago he was somewhat i

a casual in his approach to the question whether he should wear a seat belt. Sometimes he did, sometimes he did not. But, as a result of subsequent publicity and of what he, himself, had seen in attending accidents, he had over the last two years decided on all occasions to wear a seat belt and to the best of his recollection had always done so.

b The final witness called on behalf of the defendant was a Mr Smith who was a statistician from the Department of the Environment. He gave evidence which I can summarise in really two propositions. First, that a statistical examination of accidents showed that the risk of injury was substantially reduced if a seat belt was worn. In the case of serious or fatal injury the risk of injury was reduced by the wearing of seat belts by as much as 50 per cent. The second proposition which his statistics supported, was that there was really no difference in accidents which had occurred in built-up areas and those outside the built-up areas. In other words the wearing of seat belts minimised or decreased the risk of injury to some extent irrespective of whether the car was being driven in a built-up area or outside a built-up area. That is a matter, of course, to be borne in mind by a driver such as the defendant who prefers, perhaps in common with many motorists, to think that seat belts should be worn only on long journeys and that no good comes of wearing them on short journeys which so often take place within a built-up area.

d So much for the evidence. The first, and major problem here, arises from the determination whether this plaintiff was guilty of contributory negligence. I remind myself that the Law Reform (Contributory Negligence) Act 1945, s 1 (1), provides:

e 'Where any person suffers damage as a result partly of his own fault and partly of the fault of any other person or persons . . . the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage . . .'

And by s 4 damage is defined as including personal injury. So, I must ask the question: was the damage which the plaintiff suffered in this accident caused partly as a result of her own fault, ie as a result of her failure to exercise reasonable care for her own safety? It is to be borne in mind that in this case I am called on to deal with a safety device, namely a seat belt, and to consider the plaintiff's failure to use it.

f In connection with safety devices, the exercise of reasonable care for one's own safety involves an appreciation or assessment, first of the risk of injury and secondly of the availability and effectiveness of the safety device. As to the risk of injury to the plaintiff here, I am assisted by the decision of the Court of Appeal in *O'Connell v Jackson*¹. In that case the court was dealing with the driver of a moped driving on a major road in a busy traffic area, and was called on to decide whether or not he ought reasonably to have foreseen the possibility of his being involved in an accident, even though he drove with the greatest care, and the court decided in the circumstances of that case that he ought reasonably to have foreseen the possibility of his being involved in an accident and that he could not rely on other users of the road to exercise reasonable care.

h In this case the journey took place at about 1 a.m., at a time when traffic would be expected to be light. It was to lie through the built-up area in or adjacent to the centre of a large city. The journey was to be carried out in this rather old, small car, driven by a fellow student. I can only say that in all the circumstances of this case, in my view the plaintiff ought reasonably to have foreseen the possibility of this car being involved in an accident, either through a want of care on the part of the driver over whom she had no control, or because of some want of care on the part of some other user of the road. I also bear in mind that the extent of the risk of injury has always to be measured in relation to the safety device itself. A seat belt is something which can be easily and quickly put on and worn. Therefore, in my judgment, a reasonable man, in deciding whether or not to use that safety device, would take

account of even a comparatively small risk of an accident taking place. In any event I repeat that I have come to the conclusion in this case, that the plaintiff ought, reasonably, to have foreseen the possibility of being involved in an accident and, of course, of suffering injury as a result of such an accident. a

I turn to deal with the other assessment which a reasonably prudent passenger must make. First of all, there is the question of the availability to the plaintiff herself of the seat belt. Whether or not that was available to her or provided for her as is alleged in the amended defence must depend on the fitting of the seat belt in the car, on the plaintiff's knowledge of seat belts generally, and of her knowledge or means of knowledge of the existence of the seat belts in this particular car. In this car the seat belt was fitted in an entirely normal position. It was hanging from the post of the car, easily visible in daylight and even if not easily visible at night it needed only the simplest gesture on the part of the passenger, the simplest movement of her hand, to discover whether it was there or not. She knew about seat belts and had often used them herself. I appreciate and I accept that on this particular occasion she did not know that this car was fitted with seat belts and I accept as being wholly in accordance with the probabilities for young people after a party late at night, that she never addressed her mind to the question whether this car had seat belts or not. But in my judgment that is not good enough. She could easily have found out whether the car was fitted with seat belts. If she had done so she would have found the seat belt there available for her use. In my judgment she ought to have known that the seat belt was available. b
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I turn finally to perhaps the most hotly contested part of this case which deals with the effectiveness of the seat belt as a safety device. The test I can take again from *O'Connell's case*¹ to which I have already referred. In that case the court was dealing with the wearing of a crash helmet and Edmund Davies LJ set out the test which was applicable in these words²: e

'But ought he also to have been mindful of the possibility that were he, riding his moped, involved in an accident, he could well sustain greater hurt if he failed to wear a crash helmet?' f

It follows that the test in this case is this: ought the plaintiff to have been mindful of the possibility that, were the car involved in an accident, she could well sustain greater hurt if she failed to wear a seat belt? I observe first of all that, of course, the test must be applied to the plaintiff herself. In *Geier v Kujawa*³ Brabin J, faced with a very similar problem, held that it had not been shown that the passenger was guilty of contributory negligence because of the peculiar position of the plaintiff herself who was a German girl who had never before seen seat belts and indeed the occasion under review in that case was the first occasion on which she had ever seen a seat belt. g

Next, was there a possibility that this plaintiff could well have sustained greater hurt if she failed to wear a seat belt or, put the other way, was there a possibility that she would suffer considerably substantially less hurt if she wore a seat belt? Times change, knowledge of the effectiveness of safety devices increases with the passage of time and in my judgment it is very important that the court should approach this problem, not in any way as an academic exercise, but against the known realities of conditions on our roads today and taking full account of the development and increase with time of the knowledge of the part which seat belts play in reducing injuries or the likelihood of injuries in the course of accidents. I have been referred to *MacDonnell v Kaiser*⁴, where in April 1968 Dubinsky J, sitting in the Nova Scotia h
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¹ [1971] 3 All ER 129, [1972] 1 QB 270

² [1971] 3 All ER at 131, [1972] 1 QB at 275

³ [1970] 1 Lloyd's Rep 364

⁴ (1968) 68 DLR (2d) 104

a Supreme Court, observed that his reading on the subject convinced him that the effectiveness of seat belts was still in the realm of speculation and controversy. Such may have been the position in 1968, but, as Brabin J observed in *Geier's* case¹, it is quite clear that factors which might or might not arise in the appropriate cases in respect of the failure to use a seat belt in recent times, that is in 1970, would not be the same as the failure to use seat belts in 1964 which was the date to which he was referring in that case. I am fully prepared to acknowledge that circumstances at the time of this accident in 1971, the factors influencing the advisability of using seat belts might very well be different and were different from what they had been or might have been in 1968 or even earlier in 1964. What then was the position in 1971? First of all, my attention has been directed to the Highway Code itself which was available at the time of this accident, at para 23, under the part headed 'The road user on wheels', there appears this injunction: 'Fit seat belts in your car and see that they are always used, even on short trips.' Again the proper approach for a court to the Highway Code, was given in *O'Connell's* case² and I need only read from the headnote where it says³:

d "That the Highway Code was declaratory of sensible practice generally accepted by road users, and to rely upon it in accordance with section 74 of the Road Traffic Act 1960 the defendant did not have to show that the latest edition was available to the plaintiff, or that the plaintiff had actually read it."

So, looked at in that way, the Highway Code at the relevant time declared that the sensible practice, generally accepted by road users, was for the occupants of the car (ie by those using the road on wheels) to use seat belts, even on short trips. That was confirmed from his experience by the police officer. As counsel for the defendant e pointed out, it was accepted by the plaintiff herself that it was sensible to wear seat belts. I also have the evidence given by Mr Smith, the statistician, as to the substantial effect in mitigating injury which seat belts have.

On all this evidence I am satisfied, not only that on this occasion the real possibility was that by wearing a seat belt the plaintiff would suffer no, or certainly less, injury if the car were involved in an accident, but also that she, acting reasonably, would have f foreseen that possibility. It follows that I find on the facts of this case that this plaintiff was guilty of contributory negligence.

The next matter of which I must be satisfied is that that contributory negligence caused, at least to some extent, the injury which she suffered. It is obvious that in many cases the precise connection between the failure to wear a seat belt and the injuries suffered may be very difficult indeed to determine. It may sometimes happen, as it did in *O'Connell's* case², that the court comes to the conclusion that such a causative g connection existed in respect of some of the injuries but not in respect of others. But this is a case where I am driven to the conclusion that this young woman's injuries were caused by her face coming into contact with, either the windscreen or at least with some part of the car which was in front of her and against which she was thrown by her own momentum when the car came into head-on collision with the lamp post.

h There remains the question whether the use of the seat belt would have prevented or mitigated those injuries. This is a point which has been argued with great clarity and force by counsel for the plaintiff. I am afraid I cannot accept the arguments which he put forward. In my judgment the application of common sense satisfies me that there was here the clearest connection between her failure to wear a seat belt and the injury which she suffered.

j There remains for me to consider the conduct of the defendant himself. Of course, it is not necessary for the plaintiff to rely on the defendant's negligence in connection with the use of seat belts as rendering him liable in damages for the injuries which

1 [1970] 1 Lloyd's Rep 364

2 [1971] 3 All ER 129, [1972] 1 QB 270

3 [1972] 1 QB at 271

have been suffered by the plaintiff. However, it is necessary for me to consider whether and to what extent he was negligent in this respect because I have to decide the apportionment of blame between the parties. As I have said, in the amended statement of claim, it is alleged that the defendant himself was negligent in connection with the seat belt. I cannot avoid the obvious comment that if this accident had taken place between the defendant's car and some other car and if the driver of that other car had been wholly to blame for the accident, and further if the defendant had then appeared in the role of the plaintiff, everything that I have said about the plaintiff in this case would have applied with equal force to him. He would have been guilty of contributory negligence by failing to wear his own seat belt. It would be strange indeed if the duty which he owed to himself to take reasonable care for his own safety were higher than the duty of care which he owed to his front seat passenger.

In my judgment the duty to take reasonable care for her safety which he owed to the plaintiff in this case involved not merely a duty to drive and to control the car itself with reasonable care and skill but also involved the taking of some step directed to seeing that the plaintiff wore the seat belt which was fitted to the car. What steps the driver must take must depend on all the facts of the case but in this case, at the very least, the duty of care which the defendant owed to the plaintiff involved either demonstrating the existence of and the need for the use of a safety belt by simply wearing his own, or at least pointing out to the plaintiff the existence of the seat belt and explaining to her in only a very few words that it was there for her to use. He did neither. He did, as he frankly confessed, nothing in relation to the wearing of seat belts either by himself or by his passengers. In my judgment in so conducting himself he was negligent.

I therefore come to deal with the question of apportionment. It is abundantly obvious that by far the greater share of blame for this accident must be borne by the defendant because it was his carelessness in connection with his driving which caused the accident. Also, the share of blame which would fall on a plaintiff driving the car and found to blame only in respect of his failure to wear a seat belt would obviously be greater than would be just and appropriate for the plaintiff in this case.

Again, looked at from the point of view of the defendant, his want of care operated not merely in the field of controlling and driving the car, but also in the field of the failure to wear a seat belt, ie in the very same field as that in which the plaintiff's want of care alone had effect. I have, therefore, come to the conclusion that as I indicated at an earlier stage of this case, the proportion of blame which should be attributed to the plaintiff here should be very small indeed and I assess it at 5 per cent. This is a case in which I have been called on to decide only the question of liability; the question of damages will be decided at a later stage, obviously after the plaintiff has undergone further remedial treatment to improve the cosmetic results of her scars. I need say no more than that, when those damages come to be assessed, they shall be reduced by 5 per cent and judgment given in her favour for the balance.

Judgment for the plaintiff. Damages to be assessed and reduced by 5 per cent.

Solicitors: *L Dawson & Co* (for the plaintiff); *Davies, Arnold & Cooper* (for the defendant).

E H Hunter Esq Barrister.

M v M (child: access)

FAMILY DIVISION

WRANGHAM, LATEY AND DUNN JJ

30th, 31st OCTOBER 1972

Infant – Custody – Access – Adopted child – Welfare of child – Right of access – Access to be regarded as a right of child rather than parent – Fact that child adopted irrelevant – Custody awarded to father – Circumstances in which mother may be deprived of access.

The parties were married in 1956. On 24th October 1966 they adopted a boy who was then a year old. In April 1969 an order was made placing the boy under the supervision of the local authority. On 4th April 1970 the marriage broke up and the wife left the home. On 26th June 1970 the wife complained to the justices that her husband had been cruel and asked for custody of the boy. The summons asserting cruelty was dismissed as not being proved, custody of the boy was awarded to the husband, and there was an order for reasonable access to be given to the wife. That order was interpreted by the parties as being an order which could be fulfilled by visiting access twice a week. Subsequently it was reduced by agreement to once a week. According to the wife the access worked reasonably well for a time, but from September 1970 at any rate it was never successful. There was considerable friction between the parties, much of which existed over the place at which access was to occur. In October 1970 each party began to commit adultery. In April 1971 the wife became pregnant as a result of her liaison with a married man, and from that time onwards the husband refused to allow the boy to be visited by the wife. The husband at that time, and at all material times subsequently, was living in adultery with another woman. Since June 1971 the wife had not seen the boy at all. In November 1971 the wife gave birth to the child she was expecting. Recently the wife had obtained a secure and permanent home where she lived with that child, and it was contended that one of the causes of friction had been removed. It was not suggested that the wife was not a fit person to be brought into contact with the child at all. There was evidence that when access was taking place the boy was withdrawn and unsettled and that when it came to an end his general development greatly improved. The wife applied for a further definition of reasonable access under the previous order; the husband cross-applied that the access should be deleted from the order, at least for the time being. The justices held that it was in the boy's interests that access should be discontinued completely 'at the present time'. The wife appealed.

Held – (i) No court should deprive a child of access to either parent unless it was wholly satisfied that it was in the interests of that child that access should cease, and that was a conclusion at which the court should be extremely slow to arrive. Access was to be regarded as a basic right of the child rather than a basic right of the parent. Save in exceptional circumstances to deprive a parent of access was to deprive a child of an important contribution to his emotional and material growing up in the long term. There was no distinction to be drawn between a natural parent and an adoptive one (see p 82 g, p 85 f to h, p 88 a and h and p 89 b, post).

(ii) Since the justices had clearly placed before themselves the rule that the welfare of the child was the paramount consideration, on the material before them they were fully entitled to conclude that the welfare of the child would not be promoted by the continuation of access and would be promoted by its cessation. The appeal would therefore be dismissed (see p 86 c and d, p 87 d and h and p 88 j to p 89 b, post).

B v B [1971] 3 All ER 682 applied.

Dictum of Willmer LJ in *S v S and P* [1962] 2 All ER at 3, 4 explained.

Notes

For power of court as to access, see 21 Halsbury's Laws (3rd Edn) 193, 194, paras 428, 429, and for cases on the subject, see 28 (2) Digest (Reissue) 813, 814, 1291-1297. a

For orders as to access in divorce proceedings, see 12 Halsbury's Laws (3rd Edn) 393, 394, para 873, and for cases on the subject, see 27 (2) Digest (Reissue) 911-914, 7296-7316.

Cases referred to in judgments b

B v B [1971] 3 All ER 682, [1971] 1 WLR 1486, CA.

C v C (1971) The Times, 28th May, 115 Sol Jo 467, CA.

S v S and P [1962] 2 All ER 1; sub nom *S v S* [1962] 1 WLR 445, CA, Digest (Cont Vol A) 805, 6327a.

Appeal c

This was an appeal by the mother against an order made by the justices for the petty sessional division of Leicester on 1st June 1972, whereby they refused to define reasonable access to the adopted child of the family, previously granted to the mother on 26th June 1970, and revoked that access on the cross-complaint of the father. The facts are set out in the judgment of Wrangham J. d

Victor E Hall for the mother.

W C Woodward for the father.

WRANGHAM J. This is an appeal by the mother of a little boy of seven against the decision of the Leicester county justices on 1st June 1972. On that date they had before them a complaint or an application by the mother, the appellant, for a further definition of 'reasonable access', which had been granted under a previous order of that court, and a cross-complaint or application by the father that access should be deleted from the order and that at any rate for a time there should be no access granted to this mother. e

The facts of the matter are comparatively short. The parties were married in 1956. On 24th October 1966 they adopted this little boy, now seven, and therefore at that stage a small baby. The fact that this child is adopted and is not the natural child of the parties is in my judgment a fact which is wholly irrelevant to any of the issues to be considered by this court. Indeed there is no indication that it was treated as anything but wholly irrelevant by the Leicester justices. I say no more about that point. f

What happened between 1966 and 1969 was not the subject of any evidence which was laid before us, either in the court welfare officer's report or in the clerk's notes. We were given some information about the matter by the learned counsel who appeared for the mother, but I think it is better that we should treat that period as being one of which all we really know is this, that it was only for a comparatively limited time that the mother was able to give this little boy the full maternal care which a mother ordinarily gives to a son. That is stated by the justices to have been not the matter of dispute in their court. In April 1969, however, it is agreed by counsel for both parties that there was an order made that this little boy should be under the supervision of the local authority. He came in that capacity into the care of a Mr Straker, the senior probation officer, who subsequently made a report acting as a court welfare officer. g

On 4th April 1970 the marriage came to an end. The mother left the home. She left the boy with the father. On 26th June she went to the justices complaining that her husband had treated her with persistent cruelty and asked for the custody of the boy. She was not successful. The summons asserting cruelty was dismissed as not being proved, custody was awarded to the father, and there was an order for h

a reasonable access to be given to the mother. That was interpreted by the parties as being an order which could be fulfilled by visiting access twice a week. The parties lived at that stage quite close to one another. Subsequently it was reduced by agreement to once a week. According to the mother (and hers indeed is the only sworn evidence on this particular topic) the access worked reasonably well for a time; but from September 1970 onwards at any rate it was never successful. There was continual trouble about it. According to the court welfare officer (and on this matter the justices accepted the explanation that the court welfare officer gave) those troubles were due to the attitude which the mother and the father had towards each other. That is indeed a lamentable story. The picture is painted in Mr Straker's report when he says:

c 'Access has never run smoothly from the day of the order. [The mother's evidence is not in accordance with what Mr Straker's report says.] The basic reason for the parties' inability to agree stems from the bitterness of the marriage. The friction has never abated and the very thought of access by either party inflames the feelings of resentment, blame, guilt and anger that they each still feel towards each other.'

d It is to be noted that at that point in his report he makes no distinction between the attitude of the mother to the father and the attitude of the father to the mother. Each was plainly using this unfortunate little boy as a tool to vent the rancour which each felt towards the other.

e In October 1970 each party began to commit adultery. The mother had a liaison with a married man which resulted in her conceiving a child in April 1971. From that time onwards it seems that the father refused to allow the boy to be visited by the mother because she was pregnant, a stern moral attitude which contrasts rather markedly with his own practice, for he was at that time living in adultery with a woman with whom he is still living. In November 1971 the child was born. These summonses were taken out, or complaints were lodged in April and May 1972.

f From June 1971 the mother has not seen the little boy at all.

That is a summary of the facts which came before the justices. They heard of course the evidence of the mother and of the father, they had before them the report of the court welfare officer who in addition gave evidence to them, and they also had a report from the boy's schoolmistress, who reported that on the days when access had been taking place the teacher had noticed that after access the little boy was withdrawn and unsettled and that his general development had greatly improved since access came to an end. The natural inference from that is that whether the fault lie with the mother or the father or with both, the fact was that access in the conditions which the parents imposed had exercised a most unhappy effect on the child, and indeed had operated wholly or nearly wholly to his disadvantage.

h The justices, having found, as I have recited, that the difficulties in access had been due to the attitude of the parties to each other, accepted the probation officer's evidence that the child's teacher had noticed that he was disturbed after the meetings with his mother and that these periods of disturbance had ceased after access had ceased. They said that they believed that these disturbances were detrimental in their effect on the child and they were caused by his meetings with his mother.

j That finding of course was amply supported by the material that they had before them. They continued to express some doubt as to the genuineness of the mother's professed wish to have access to her child, and indeed even doubted the sincerity of her promise to see that this child was brought up in the Roman Catholic faith in accordance with the undertaking which both she and the father had given at the time of the adoption. So far as this second point is concerned it is perhaps sufficient to say that I for my part can see no vestige of ground in the evidence for doubting the

sincerity of the mother on that particular point. It may be that the unsatisfactory impression that the mother evidently made on the justices from other points of view led them to entertain this doubt without any real justification for doing so. They continued:

'In this case we felt the welfare of the child to be paramount. We considered that a secure, stable and emotionally satisfying environment had been provided by [the father] for [the child]. The child had already suffered several disturbances through adoption and through the breakdown of his first family and we felt that he must be given a chance to integrate and develop in his present family with a minimum of emotionally disturbing factors. In particular, he should no longer be the source of, or excuse for an emotional struggle between [the father and the mother].'

This decision is attacked by the learned counsel who put forward the mother's case with great care and persuasiveness, first on the very substantial ground that the justices, although they were referred to the well-known authority of *S v S and P*¹, did not refer to that authority and, as was contended, acted in direct defiance of it. In *S v S and P*, which I think we must consider with a little care, a mother, who had left her children with the father, had gone off with another man, and against whom there were substantial grounds for criticism, applied to his Honour Judge Robson, sitting as Special Commissioner at Leicester, for access. That application was dismissed by the commissioner, who presumably saw the witnesses in the case, and then the matter was taken to the Court of Appeal. The Court of Appeal reversed his finding and made an order that access should be granted to the mother. Of course the facts of that case are not the same as the facts of this case but it is important to see the way in which the problem was approached by the learned Lords Justices on that occasion. In particular counsel for the mother relies on the judgment of Willmer LJ. I think I should quote some of what Willmer LJ says²:

'Here the wife is asking for no more than periodical access to her own children. In the ordinary way that would be no more than the basic right of any parent. I agree with the view expressed by the commissioner that to deprive a mother altogether of access to her own children, particularly to two small daughters, is "a very strong thing to do". I should be disposed to go so far as to say that the court should not take that step unless satisfied that she is not a fit and proper person to be brought into contact with the children at all. [And then he gives an example.] Such a situation might arise, for instance, if she were a person with a criminal record, or one disposed to act with cruelty against children, or something of that sort. To say of a woman that she is a bad wife or mother may be an excellent reason for not giving her care and control, but, in my view, is not sufficient ground for depriving her of any kind of access.'

On the face of it, if one follows the words of Willmer LJ without regard to subsequent cases, there is a very strong argument to be made for the mother. No one has suggested that this mother is a woman who was not a fit and proper person to be brought into contact with the child at all, she has not got a criminal record, and there is not the smallest reason to suppose that she was disposed to act with cruelty towards this child. But since *S v S and P*¹ was decided there have been other decisions of the Court of Appeal. One is *C v C*³. The only report before me is the report in the Times newspaper of 28th May 1971. In that case Dunn J had refused access to a mother in the

¹ [1962] 2 All ER 1, [1962] 1 WLR 445

² [1962] 2 All ER at 3, 4, [1962] 1 WLR at 448, 449

³ (1971) The Times, 28th May, 115 Sol Jo 467

a circumstances set out in that report. Again the facts do not bear the smallest resemblance to the facts in this case and are therefore of no importance here. But what is of importance is that Davies LJ in giving his judgment said:

‘In such cases as the present the welfare of the children was the paramount consideration. Access, custody and care were not to be given as rewards for one parent or taken away as punishment for another.’

b He adds that he agrees with the learned trial judge and emphasises that the children were living in a happy, secure and serene household.

He does not there deal with the argument which must have been put before the Court of Appeal based on the words of Willmer LJ in *S v S and P*¹. *S v S and P*¹ was in fact dealt with in *B v B*². That happens to have been an appeal from a case which I

c tried at first instance and once again the facts bear not the remotest resemblance to the facts in this case and I therefore do not refer to them. But Davies LJ³ comes to deal with the argument based on *S v S and P*¹ and he recites the words of Willmer LJ⁴, that normally it is the basic right of every parent to have access to the child or children. He says: ‘That of course is true. But there are exceptions to every rule . . .’ The importance of the exception in this case was that on the finding that I had made at first

d instance there was no real criticism to be made of the father at all, merely a situation had been reached in which, as I then thought, no good could come to the child from companionship with his father, largely no doubt because of the attitude that the mother, who had care and control of the boy, had taken up during the years in which she had been looking after him. The Court of Appeal upheld the order that access should cease on the ground that even though there was no real criticism to be made of the father the paramount consideration was the welfare of the child, and the welfare

e of the child would not be promoted by access to the father. It seems to me that the only way which one can really reconcile *S v S and P*¹ with the cases that followed, *C v C*⁵ and still more *B v B*², is to say that what Willmer LJ meant was that the companionship of a parent is in any ordinary circumstances of such immense value to the child that there is a basic right in him to such companionship.

f I for my part would prefer to call it a basic right in the child rather than a basic right in the parent. That only means this, that no court should deprive a child of access to either parent unless it is wholly satisfied that it is in the interests of that child that access should cease, and that is a conclusion at which a court should be extremely slow to arrive. It is not without significance that Edmund Davies LJ in *B v B*⁶ said:

g ‘For a court to deprive a good parent completely of access to his child is to make a dreadful order. That is what has been done here, and the impact on both parent and child must have lifelong consequences. Very seldom can the court bring itself to make so Draconian an order, and rarely is it necessary.’

I should add that in that case the boy was in his teens, so that there was little prospect of making a change in the access arrangements later. The order cutting off access could only in the circumstances of that case be regarded as effectively final, whereas

h of course in many cases, and this is one, there would be no reason for supposing that the cessation of access need be final. I think before parting with *B v B*² one should also note that the members of the Court of Appeal criticised very strongly the mother who had had the care and control of this boy during the years in which he grew up and had used it to alienate him from his father. I cite the words of Edmund Davies LJ, who quoted the report of the

j
1 [1962] 2 All ER 1, [1962] 1 WLR 445
2 [1971] 3 All ER 682, [1971] 1 WLR 1486
3 [1971] 3 All ER at 687, [1971] 1 WLR at 1492
4 [1962] 2 All ER at 4, [1962] 1 WLR at 449
5 (1971) The Times, 28th May, 115 Sol Jo 467
6 [1971] 3 All ER at 688, [1971] 1 WLR at 1493

Official Solicitor, who said he did not suggest that the mother had wilfully attempted to turn the boy against his father, but, because she honestly believed it was not in the interests of the boy for there to be access, she had done nothing towards creating an atmosphere in which the boy would willingly go to the father for access. Edmund Davies LJ's comment was this¹:

'In general, one parent who takes that attitude in relation to the other parent is undertaking a tremendous responsibility and discharging it thoroughly badly. Again speaking generally, it is the duty of parents, whatever their personal differences may be, to seek to inculcate in the child a proper attitude of respect for the other parent.'

For these reasons I do not think it can be said that the justices, in reaching the conclusion which they did, were acting contrary to the law as laid down by the Court of Appeal. Quite clearly they placed before themselves the rule that the welfare of the child is the paramount consideration; they say so in terms; and they came to their conclusion on the ground that the welfare of the child would not be promoted by the continuance of access and would be promoted by the cessation of access. That was a conclusion which was certainly open to them after the qualifications on *S v S* and *P²* which appear from the two subsequent decisions.

The next point that was made by counsel for the mother was that the justices had paid too much attention to the friction that existed between the parties. That there had been great friction, that the difficulties of access had been very great and had been, at least in part, probably on the evidence in large part, due to the mother was quite plain. It does not seem to me that any service to either party would be rendered by considering to what extent each contributed to the friction that existed. Davies LJ in *C v C*³ said: 'Access, custody and care were not to be given as rewards for one parent or taken away as punishment for another.' The fact is that friction did exist; it is clear that it was contributed to by both of them; and it is clear that that friction did a great deal of harm to the unfortunate boy who was the occasion for it arising. Much of the friction existed over the place in which access was to occur. It is contended that at least that occasion for friction has been removed because, as the mother told the justices at the very outset of her evidence, she had just obtained a secure and permanent home, a council house in a council housing estate on the outskirts of Leicester. The justices considered that point, and they came to the conclusion that the wife's having a fixed address in the near future would not make any improvement. They were of opinion that if access continued similar difficulties would occur in the future. That was a conclusion at which they had arrived after seeing the two parties in the witness box and having some opportunity of assessing their respective personalities, and it seems to me it was a conclusion at which they were fully entitled to arrive.

Then it was contended that the justices had taken what on any view was a very strong step in spite of passages to be found in the court welfare officer's report. The court welfare officer said in terms that 'some contact for [the child] with his mother may prove of help to the boy in the years to come', and added: 'However, there is little doubt that the short term disturbances are not in his interests and indeed are detrimental.' He continued with a paragraph suggesting how access might be altered if it is to be continued. It was said that the way in which that was expressed showed that the court welfare officer did not really think that it ought to cease now. I do not think that it so. I think that the court welfare officer was abstaining from recommending either that it should now continue or that it should not and that he was dealing

1 [1971] 3 All ER at 688, [1971] 1 WLR at 1494

2 [1962] 2 All ER 1, [1962] 1 WLR 445

3 (1971) *The Times*, 28th May, 115 Sol Jo at 468

a with one possibility, namely that it should continue, and making his recommendations on that basis, without indicating his own view whether it should continue or not.

b In these circumstances, the justices who saw these parties came to the conclusion that the access which had been ordered and had for a time taken place was not in the interests of this child and that the paramount consideration, namely the welfare of the child, demanded that this access should cease. That was, however, not the end of the story, for they had then to consider whether that form of access should be replaced by some other form of access or whether it should cease altogether. There does not appear in the documents that we have any indication that an argument was placed before them to the effect that a quite different form of access might avoid the disadvantages which had attended the form of access which had taken place up to that time. But the justices did have before them the indications of a possible change of access c in the probation officer's report, and they indeed in their last paragraph directed their minds to that question and came to a conclusion in these terms:

'The Probation Officer recommended that access if granted should not be at frequent intervals but we concluded that it was in the child's best interests that access should be discontinued completely at the present time.'

d Those words are very important.

I have come to the conclusion that the justices were fully entitled to take that view on the material before them and that this court is in no position to say that they were wrong. I add a few words for the future. This marriage is shortly to be the subject of divorce proceedings, the sooner one would think the better. In those divorce e proceedings it will be necessary for the trial judge to make up his mind whether the arrangements for the welfare of this child are satisfactory. He should, I think, be supplied with far more up-to-date information than we possess. The circumstances themselves may have altered. The mother in her new home where she lives with her baby may have acquired a greater stability of temperament. Proposals for a form of access different from that which has taken place in the past may be made. The whole f situation should be, I think, reviewed carefully and in detail by the trial judge when this marriage comes to an end. What conclusion he reaches is of course a matter for him and a matter on which I would not for a moment speculate, but it is to be remembered, as has been pointed out by the members of the Court of Appeal in several of these cases, that access orders are not permanent in the case of a small child. They may well be altered as circumstances change. It is to be hoped that the father, who g retains care and control of this boy, will fundamentally change the unattractive attitude which he has adopted up to this time and will take to heart words such as those of Edmund Davies LJ¹ to which I have already referred.

h Whatever the future may hold, I have come to the conclusion that no satisfactory ground has been given to us for interfering with the decision to which the justices came on 1st June 1972, and I would therefore propose that this appeal should be dismissed.

j **LATEY J.** I wholly agree and add some remarks only because the case in itself is far from being an easy or straightforward one and, with Wrangham J, I think it raises some questions of some general importance. Wrangham J has reviewed the evidence, the factors and the approach of the justices and I have nothing to add about those matters.

The appeal does, I think, underline some of the difficult problems which face both the court at first instance and an appellate court. The first of them is this: in what sense is there a basic right, as it has sometimes been described, in a parent to access

1 In *B v B* [1971] 3 All ER at 688, [1971] 1 WLR at 1494

to his or her child? For this purpose I agree wholly with Wrangham J that there is no distinction to be drawn between a natural parent and an adoptive one. In this case, for example, the adoptive parents brought up this boy as their own after he was a few months old and loved him as much as if he were their own natural child, and this is so in the case of the vast majority of adopted children. Just as he belongs to them so they belong to him, and those are just as much facts of nature as if he were their natural child. So what is this basic right in a parent to access to his or her child? It is I believe no more and no less than a fact of human experience and of common sense, and I wish to express the strongest agreement in my power with what Wrangham J has said about it.

If one goes back in history there was a time when an adulterous mother not only had no chance at all of keeping or of having the care of her child but she had little chance of having access to it and so of keeping contact with it and giving it some companionship. That is the same thing as saying that in those days the child had no chance of being looked after by his mother who had committed adultery and little chance of keeping contact with her. That has all changed. Why has it all changed? Because medical and other expert discovery has shown that that approach, believed right at the time, was in fact wholly wrong. Wrong not necessarily if one looked at the pros and cons between the parents themselves, but wrong from the point of view of what was best for the children. That resulted in the major breakthrough brought about by the Guardianship of Infants Acts which said in emphatic terms that what was paramount was the interest of the children and that the interest of the contestant parents was secondary or subsidiary.

When a court has to consider whether the parent not having the care of the child should have access to the child, should there be any difference in principle? I cannot for the life of me see any reason at all why there should be any such difference, and I do not believe that there is. Where one finds, as one does for example in *S v S and P¹*, a reference to the basic right of a parent to access to the child, I do not accept that the meaning conveyed is that a parent should have access to the child although such access is contrary to the child's interests, and when one reads *S v S and P¹* in conjunction with the more recent decisions of the Court of Appeal², to which Wrangham J has referred, I agree entirely, and as emphatically as I can, that what is meant is this: where the parents have separated and one has the care of the child, access by the other often results in some upset in the child. Those upsets are usually minor and superficial. They are heavily outweighed by the long term advantages to the child of keeping in touch with the parent concerned so that they do not become strangers, so that the child later in life does not resent the deprivation and turn against the parent who the child thinks, rightly or wrongly, has deprived him, and so that the deprived parent loses interest in the child and therefore does not make the material and emotional contribution to the child's development which that parent by its companionship and otherwise would make.

So viewed the cases which speak of the basic right to access of the non-custodian parent are to my mind, as Wrangham J has said, reconcilable and make sense. I do not believe that in modern times they were meant to convey any other meaning. They mean and are meant to mean not that a parent has any proprietary right to access but that save in exceptional circumstances to deprive a parent of access is to deprive a child of an important contribution to his emotional and material growing up in the long term.

Having said that I think it is only necessary for me to add that I entirely agree, for the reasons given by Wrangham J, that there was ample material to justify the

¹ [1962] 2 All ER 1, [1962] 1 WLR 445

² *I v B v B* [1971] 3 All ER 682, [1971] 1 WLR 1486 and *C v C* (1971) *The Times*, 28th May, 115 Sol Jo 467

a justices in coming to the conclusion that they did, namely that 'at the present time', as they put it in their reasons, which I take as being synonymous with 'for the time being', access should cease in the interest of this small boy, and therefore I agree that this appeal should be dismissed.

b **DUNN J.** I also agree, and I do not wish to add anything.

Appeal dismissed.

Solicitors: *Knapp-Fishers*, agents for *C D Geach*, Leicester (for the wife); *Bower, Cotton & Bower*, agents for *Stone & Co*, Leicester (for the husband).

c Mary Rose Plummer Barrister.

R v Bingham

d COURT OF APPEAL, CRIMINAL DIVISION
LORD WIDGERY CJ, PARK AND MAY JJ
12th FEBRUARY 1973

e *Criminal law – Official secrets – Act preparatory to the commission of an offence under the Official Secrets Act 1911 – Offence – Ingredients of offence – Mens rea – What must be proved – Official Secrets Act 1920, s 7.*

B, a lieutenant in the Royal Navy, was convicted, inter alia, of communicating to a foreign power, for a purpose prejudicial to the safety or interests of the state, information that was calculated to be or might be or was intended to be directly or indirectly useful to an enemy, contrary to s 1^a of the Official Secrets Act 1911. After the conviction, his wife, M, stated publicly that it was she who had initially approached the foreign power with a view to getting them to pay money to her husband for information. She was charged with doing an act preparatory to the commission of an offence under the 1911 Act, contrary to s 7^b of the Official Secrets Act 1920. Her defence was that she had not intended that any information prejudicial to the state should in fact be transmitted; she and her husband had been in acute financial difficulties and her purpose was to trick the foreign power into buying information of a wholly unimportant and unprejudicial nature. The trial judge directed the jury that it was sufficient to establish M's guilt if it was shown that she must have realised that the transmission of prejudicial information was a possibility. She was convicted. On her application for leave to appeal,

h **Held** – For a person to be convicted under s 7 of the 1920 Act of doing an act preparatory to the commission of an offence under the 1911 Act, it had to be shown that the act was done with the commission of an offence under the 1911 Act in mind; to establish guilt the prosecution only had to show that at the time of doing the act the accused realised that the transmission of prejudicial information was possible; they did not have to prove that he realised that it was probable. Accordingly, the trial judge's direction to the jury had been a proper one and M's application would be refused (see p 92 b e h and j, post).

a Section 1, so far as material, is set out at p 91 e, post

b Section 7, so far as material, is set out at p 91 h, post

Notes

For acts preparatory to commission of an offence under the Official Secrets Act 1911, see 10 Halsbury's Laws (3rd Edn) 610, para 1140, and for a case on the subject, see Digest (Cont Vol A) 413, 7655a.

For the Official Secrets Act 1911, s 1, see 8 Halsbury's Statutes (3rd Edn) 250, and for the Official Secrets Act 1920, s 7, see *ibid* 300.

Cases referred to in judgment

R v Oakes [1959] 2 All ER 92, [1959] 2 QB 350, [1959] 2 WLR 694, 123 JP 290, 43 Cr App Rep 114, CCA, Digest (Cont Vol A) 413, 7655a.

Applications

On 11th October 1972 in the Crown Court at Winchester before Shaw J and a jury Maureen Grace Bingham was convicted of doing an act preparatory to the commission of an offence under the Official Secrets Act 1911, contrary to s 7 of the Official Secrets Act 1920. She was sentenced to 2½ years' imprisonment. She applied for leave to appeal against conviction and sentence. The facts are set out in the judgment of the court.

Sir Elwyn Jones QC and *J Thomas* for Mrs Bingham.

Sir Joseph Molony QC and *D C Calcutt QC* for the Crown.

LORD WIDGERY CJ delivered the judgment of the court. On 11th October 1972 at the Winchester Crown Court, before Shaw J and a jury, this applicant, Maureen Grace Bingham, was convicted of a somewhat unusual offence laid under s 7 of the Official Secrets Act 1920, which was described as doing an act preparatory to the commission of an offence under the Official Secrets Act 1911. Having been convicted of the offence, she was sentenced to 2½ years' imprisonment, and she now seeks leave to appeal against conviction and sentence.

The background of this case has attracted enormous public interest, and the facts are almost so well known that it is unnecessary to say any more about them at this stage, but I must deal with them in broad outline. Mrs Bingham is the wife of a lieutenant in the Royal Navy who pleaded guilty in March 1972 to 12 offences under the Official Secrets Act 1911. The substance of the charges to which Bingham himself pleaded guilty were six charges of recording information contrary to the Official Secrets Act 1911, and six charges of communicating the information which he had recorded. Following on his plea of guilty he was sentenced to 21 years' imprisonment and his application for leave to appeal against that sentence was dismissed in this court.

As soon as the guilt of Bingham was established, Mrs Bingham proceeded to give a very large number of interviews to newspapers, television and the like. She told a number of conflicting stories, many of them extremely highly coloured, about the manner in which her husband had been set on the course of spying to which he pleaded guilty, and again, to put the matter in the briefest possible terms, she told those who interviewed her in the course of these matters a number of stories, but there was, after the very early interviews, a fairly consistent version of the affair from Mrs Bingham to this extent, that she said that the whole background of her husband's fall from grace was due to some acute financial embarrassment from which she and her husband were suffering, and that she had hit on the idea of getting into touch with the Russian Embassy with a view to offering, on behalf of her husband, the communication of secret information to the Russians.

It is the keystone of her defence in the course of the proceedings now under review that her motive, according to her, was not that any information, the transmission of

a which would be prejudicial to the state, should in fact be transmitted. She says that she approached this matter with perfectly patriotic motives in mind, but she thought the Russians could be 'conned', an expression she used on one occasion, or induced to provide money which would help the Bingham's out of their financial difficulties, in return for information which Mrs Bingham should supply, or the supply of which she should organise, of a wholly unimportant and unprejudicial character.

b It is very important to appreciate right from the beginning that having eventually admitted, as she clearly did, that she had approached officials of the Russian Embassy with a view to their paying money to her husband for information, that she said she believed and intended and thought that her control over her husband would be such that the information supplied would be innocuous information which would do no harm to this country, and that the only losers would be the Russians, who would be effectively gulled into supplying funds for innocuous information of this kind.

c That this was an extremely hazardous course for her to undertake, no one now in the light of events could doubt, but the question raised before us today does raise an important question as to the proper construction of the section creating this offence, and also questions as to precisely what it is which has to be proved in order to establish guilt under the section.

d One must have a look first of all at the principal Act, which is the Official Secrets Act 1911. Section 1 of that Act deals with penalties for spying, and provides as follows—
—I leave out the words not strictly relevant to the present case:

e 'If any person for any purpose prejudicial to the safety or interests of the State . . . (c) . . . communicates to any other person any secret official code word, or pass word, or any sketch, plan, model, article, or note, or other document or information which is calculated to be or might be or is intended to be directly or indirectly useful to an enemy; he shall be guilty of [an offence].'

f The substantive offence of communicating, to which Bingham pleaded guilty, and incidentally of which the present applicant was acquitted, involved the communication by a person for a purpose prejudicial to the interests of the state of matter described by the section which was intended to or might be or was intended to be directly or indirectly useful to an enemy. Subsection (2) of the same section contains extensive provisions enlarging the manner of the method of proof of the purpose which is, of course, an essential part of the substantive offence.

g Then one comes to s 7 of the Official Secrets Act 1920, which is the section under which the remaining charge, that of which Mrs Bingham was convicted, was laid. That provides:

h 'Any person who attempts to commit any offence under the principal Act or this Act, or solicits or incites or endeavours to persuade another person to commit an offence, or aids or abets *and* does any act preparatory to the commission of an offence under the principal Act or this Act, shall be guilty of [an offence].'

i It was decided in 1959 in the Court of Criminal Appeal¹ that the word 'and' in the context to which I have referred should be read as 'or'; accordingly it suffices to establish guilt if it can be shown that the accused does any act preparatory to the commission of an offence under the principal Act. It is in the end on the construction of those words that the whole argument has turned.

j We do not find it necessary to go into great detail in expressing our opinion on the controversy that appears before us. It is common ground on all sides that an act which is in fact preparatory to the commission of an offence in the sense that it does

open the door to the commission of an offence, is not itself an offence under the section in the absence of appropriate mens rea, and no one doubts that if the jury thought that Mrs Bingham was or might be telling the truth when she confidently asserted that no prejudicial information was going to be transmitted, and that only rubbish was going to be passed to the Russians, she would be entitled to be acquitted. The act preparatory to the commission of an offence mentioned in the section is an act which is, as counsel for the Crown very conveniently put it, an act done by the accused with the commission of an offence under the principal Act in mind; in other words, unless, when the act complained of is done, the accused has the subsequent commission of an offence under the principal Act in mind, then there can be no question of the presence of the mens rea required for the present purposes.

But what is meant by 'in mind'? One must somewhat further refine the true effect of that phrase, and in the end as it seems to us the controversy in this case turns on this: is it sufficient to convict Mrs Bingham that when she did the act complained of by approaching the Soviet Embassy, she must have realised that the transmission of prejudicial material might follow; in other words is it sufficient that she recognised as a possibility that the transmission of prejudicial information might follow, or is it necessary to show that the transmission of prejudicial information was probably to follow? The difference is an extremely narrow one when one comes to the final analysis, but it is on narrow distinctions of this kind that many of the most important decisions in the criminal law have depended.

Counsel for Mrs Bingham contends that it is necessary for her to have been shown to have realised that the transmission of prejudicial information was probable; counsel for the Crown contends that it is sufficient if it be shown that the transmission of prejudicial information was possible.

Which is right? In our judgment the submission of the Crown is in this case the right submission, and in coming to that conclusion one must bear in mind, as again counsel for the Crown has drawn to our attention, that this is a very special kind of offence based on a section which was passed no doubt by Parliament to fill what was otherwise a gap in the law. It contemplates something which is even more remote from the substantive offence than an attempt to commit it; it contemplates doing an act when the commission or the non-commission of the substantive offence is something entirely in the future, and as the learned judge put it in the summing-up, no one can be a prophet in this regard. It is clearly not necessary to establish the offence, that any substantive offence should actually follow. It is clearly sufficient by the terms of this argument that if the commission of a substantive offence is likely, a conviction can be sustained, and we see no reason why the construction of the section should be given such a narrow scope as to provide that the possibility of the passing of prejudicial information should be insufficient to support the charge.

Having reached that conclusion, it is not necessary to go in detail into the references in the summing-up which have been made in the course of the submissions, because it is abundantly clear that the jury were instructed on the basis that it was sufficient if Mrs Bingham must have realised that the transmission of prejudicial information was a possibility. We think that that was a proper direction, and that really takes all the force out of the argument which has been addressed to us on her behalf. We think it right to add that even if we had taken the other view on the construction of the section, and had come to the conclusion that it was necessary to show that Mrs Bingham recognised as a probability that prejudicial information would be passed, that we should have thought that this was a case to apply the proviso to s 2 of the Criminal Appeal Act 1968, because one can hardly think of a case in which the probability of prejudice was stronger than in this case, and it is extremely difficult to see how the jury could possibly have come to a different conclusion, even if probability had been the test, and even if they had technically been misdirected in this case.

Our conclusion is that they were not misdirected, the conviction is a valid one, and the application for leave to appeal against conviction is therefore refused.

a It is suggested to me that perhaps the proper view of this matter is that the case falling to be heard in this court raises a point of law alone and therefore technically it is a matter of appeal and not an application for leave. To guard against that possibility and to ensure that every possibility is covered, I think we ought to say that, if the proper view is that it is a matter of appeal, the appeal is dismissed.

b [His Lordship then went on to deal with the application for leave to appeal against sentence. The court decided, on reviewing the evidence, that the application should be refused.]

Applications dismissed.

Solicitors: *L S de Meza, Jonas & Partners* (for Mrs Bingham); *Director of Public Prosecutions*.

c Ilyas Khan Esq Barrister.

Re W R Willcocks & Co Ltd

CHANCERY DIVISION

d PLOWMAN J

19th, 20th FEBRUARY 1973

Company – Winding up – Compulsory winding-up – Petition – Striking out – Contributory's petition – Petition alleging deadlock between company's two directors and equal shareholders – No particulars given of allegations in petition – Petition supported by short affidavit in statutory form – Whether petition in conjunction with affidavit should be struck out as embarrassing.

e A, one of the two equal shareholders and sole directors of a company, presented a petition to wind up the company, alleging in para 6 thereof that, on a winding-up, there would be a considerable surplus for the two shareholders and, in para 7, that differences had arisen between them as to the mode of conducting the business of the company which they found impossible to settle and, as neither director had a casting
f vote under the articles, there was deadlock between them. The petition was supported by a very short affidavit which was nothing more than the statutory affidavit and the memorandum and articles of association of the company. No particulars of the allegations in para 7 were given, and it was not proposed to file any further evidence. D, the other shareholder and director, applied to the court to strike out the petition on the ground that the allegation in para 6 was not enough without further evidence to support it, and the petition, read in conjunction with the affidavit, was embarrassing within RSC Ord 18, r 19.

g **Held** – (i) Since A was one of the two shareholders and directors of the company para 6 of her petition, read in conjunction with the affidavit, was sufficient prima facie evidence that there would be a surplus for the members on a winding-up (see p 95 h, post); *Re Rica Gold Washing Co* (1879) 11 Ch D 36 distinguished.

h (ii) However, since the allegations in para 7 of the petition, which were part of A's case, were wholly unparticularised, and D had not been informed of the precise nature of the case which he had to meet, he had no means of knowing what evidence he ought to file in order to meet it. The petition was therefore embarrassing and D was entitled to have it struck out (see p 96 b c and f, post); dictum of James LJ in *Davy v Garrett* (1878) 7 Ch D at 483 applied.

Notes

For jurisdiction to strike out pleadings, see 30 Halsbury's Laws (3rd Edn) 36-39, paras 75-78, and *ibid* 407, para 767, and for cases on the subject, see 50 Digest (Repl) 77, 624-636.

For the form and contents of a petition for winding-up, see 6 Halsbury's Laws (3rd Edn) 543, 544, para 1046.

Cases referred to in judgment

Davis Investments (East Ham) Ltd, Re [1961] 3 All ER 926, [1961] 1 WLR 1396, CA, Digest *a*
(Cont Vol A) 184, 5684a.

Davy v Garrett (1878) 7 Ch D 473, 47 LJCh 218, 38 LT 77, CA, 50 Digest (Repl) 77, 628.
Rica Gold Washing Co, Re (1879) 11 Ch D 36, 40 LT 531, CA, 10 Digest (Repl) 876, 5796.

Cases also cited

A B C Coupler and Engineering Co Ltd (No 2), Re [1962] 3 All ER 68, [1962] 1 WLR 1236. *b*

A & N Thermo Products Ltd, Re [1963] 3 All ER 721, [1963] 1 WLR 1341.

Charles Forte Investments Ltd v Amanda [1963] 2 All ER 940, [1964] Ch 240, CA.

Featherstone v Cooke (1873) LR 16 Eq 298.

Ferguson v Wilson (1866) 2 Ch App 77.

Hawken (S A) Ltd, Re [1950] 2 All ER 408. *c*

Motion

On 23rd January 1973 Joy Anne Green, one of the two sole shareholders and directors of W R Willcocks & Co Ltd, presented a petition to wind up the company on the ground of alleged deadlock. By notice of motion dated 13th February 1973 Joseph Eric Dutch, the other shareholder and director, applied for an order under RSC Ord 18, r 19, or alternatively under the inherent jurisdiction of the court, striking out the petition. The facts are set out in the judgment. *d*

W F Stubbs for Mr Dutch.

Allan Heyman QC and *Eben Hamilton* for the petitioner.

PLOWMAN J. This is a motion to strike out a winding-up petition under RSC Ord 18, r 19, or alternatively under the general jurisdiction on the ground that the petition and/or the affidavit in support of it— *e*

‘disclose(s) no reasonable cause of action and/or is/are frivolous or vexatious and/or will or may prejudice and/or embarrass and/or delay the fair trial of the said Petition and/or is/are otherwise an abuse of the process of this Honourable Court.’ *f*

The petition was presented on 23rd January 1973. It is a contributory’s petition based on alleged deadlock, and it is supported by one very short affidavit which I will read. The petitioner, Mrs Green, makes oath and says:

‘1. That such of the statements in the Petition now produced and shown to me and marked with the letter “A” as relate to my own acts and deeds are true and such of the said statements as relate to the acts and deeds of any other person or persons I believe to be true. *g*

‘2. That the Memorandum and Articles of Association now produced and shown to me and marked with the letter “B” is a true copy of the Memorandum and Articles of Association of the above named Company [being W R Willcocks & Co Ltd].’ *h*

That short affidavit is really nothing more than the statutory affidavit, plus the memorandum and articles of association of the company.

The question which I have to decide comes down to this, namely, whether the petition, read in conjunction with that affidavit, is embarrassing within the rule. Paragraphs 1 to 4 of the petition are purely formal. Paragraph 1 states the date of incorporation of the company. Paragraph 2 states the situation of its registered office. Paragraph 3 states: ‘The capital of the Company is £1,000 divided into 1,000 shares of £1. each, all of which have been issued and are fully paid up.’ Paragraph 4 states the objects for which the company was established, namely, ‘to carry on the business of builders, decorators and contractors’. Paragraph 5 of the petition reads as follows: *i*

a 'Prior to the death of your Petitioner's mother, Mrs. W. C. Willcocks, in November 1971 there were three directors of the Company, namely the said Mrs. Willcocks, one Joseph Eric Dutch ("Mr. Dutch") and your Petitioner. At the time of her death Mrs. Willcocks was the Chairman of the Company's board of directors. Since Mrs. Willcocks' death no new directors have been appointed to the board of the Company and Mr. Dutch and your Petitioner remain the sole directors of the Company. In addition Mr. Dutch and your Petitioner are the sole shareholders of the Company, each owning 500 of the issued shares. Your Petitioner has held all of such 500 shares since March 1972.'

b Then para 6 reads:

'The business of the Company has been reasonably successful and in a winding up there would be a considerable surplus for the two shareholders.'

c Paragraph 7—and this is the important paragraph for my purposes—reads:

d 'Regrettably since the death of your Petitioner's mother differences have arisen between your Petitioner and Mr. Dutch as to the mode of conducting the business of the Company and your Petitioner and Mr. Dutch have found it impossible to settle such differences and to agree upon the future course of the Company's business. Since the death of Mrs. Willcocks aforesaid neither Mr. Dutch nor your Petitioner has been appointed Chairman of the board of directors of the Company with the result that neither of them has a casting vote in accordance with regulation 81 of the first schedule, Table A, of the Companies Act 1929 which is incorporated into the Articles of Association of the Company. In the circumstances there is deadlock between the two directors of the Company and it has therefore become impossible to conduct the business of the Company.'

e Paragraph 8 reads: 'In the circumstances it is just and equitable that the Company should be wound up.' The motion which is before me is a motion by Mr Dutch, who is referred to in that petition.

f Let me first of all dispose of one point which was submitted by counsel for Mr Dutch, namely, that the allegation in para 6 of the petition, that 'in a winding up there would be a considerable surplus for the two shareholders', is not enough without further evidence to support it. Counsel referred me to what was said by Sir George Jessel MR in the Court of Appeal in *Re Rica Gold Washing Co*¹:

g 'That being his position, and the rule being that the Petitioner must succeed upon allegations which are proved, of course the Petitioner must shew the Court by sufficient allegation that he has a sufficient interest to entitle him to ask for the winding-up of the company. I say "a sufficient interest," for the mere allegation of a surplus or of a probable surplus will not be sufficient.'

h Counsel for Mr Dutch submits that is all there is here. The petition with which the court was concerned in that case was a petition by a shareholder who was not a director of the company. The petition in the present case is by someone who is one of the two shareholders and one of the only two directors. It is, therefore, different from the position which prevailed in the *Rica* case², and I think that para 6 of the petition, read in conjunction with the affidavit, to which I have already referred, is sufficient prima facie evidence that there would be a surplus for the members in a winding up.

i The principal point of counsel for Mr Dutch was that the vague and generalised allegations in para 7 of the petition, which are in no way particularised, are embarrassing. In the first place, it is part of the petitioner's case on the petition that differences have arisen between her and Mr Dutch in relation to the mode of conducting the company's business. I say it is part of her case for two reasons. First of all, because

1 (1879) 11 Ch D 36 at 43

2 (1879) 11 Ch D 36

if it were not part of her case there would be no point in alleging it, and secondly, because as a matter of the construction of para 8 of the petition, which says 'In the circumstances it is just and equitable that the Company should be wound up', the allegation is part of 'the circumstances' referred to. Similarly, it is part of the petitioner's case that the petitioner and Mr Dutch have found it impossible to settle their differences and to agree on the future course of the company's business. Similarly, too, it is part of the petitioner's case that it has become impossible to conduct the business of the company. But these allegations, which, as I say, are part of the petitioner's case, are wholly unparticularised. Mr Dutch is not informed of the precise nature of the case which he has to meet and he has no means of knowing what evidence he ought to file in order to meet it. For example, if he knew the precise nature of the allegations made against him, he might want to confess and avoid rather than deny the allegations. He might, for all I know, want to say that the differences to which the petitioner refers, or the fact that it is impossible to settle them, were due entirely to the petitioner's intransigence and that in those circumstances it would be neither just nor equitable to make a winding-up order.

It may well be that if the affidavit had condescended to particulars of the allegations in para 7 of the petition, the deficiencies in that paragraph would have been made good. But before this motion was launched Mr Dutch's solicitors were informed by the petitioner's solicitors that it was not proposed to file any further evidence. In those circumstances, in my judgment, Mr Dutch is entitled to have this petition struck out.

Counsel for Mr Dutch referred me to *Davy v Garrett*¹, where James LJ in the Court of Appeal said²:

'I am of opinion that the Appellant is entitled to the order which he asks. The old practice of the Court of Chancery as to exceptions for impertinence has not been continued, but under the practice which has been substituted for it, if the Defendant is embarrassed by the Plaintiff's mode of stating his case he is entitled to be relieved from his difficulty. Now nothing is more embarrassing to a Defendant than a number of statements which may be irrelevant, and with which he therefore does not know what to do.'

Similarly, in my judgment, Mr Dutch is entitled to be relieved of his difficulty.

Counsel for the petitioner submitted that since in the present case there were only two shareholders who were the only two directors of the company, and since no casting vote was available, there was deadlock and a winding-up order was inevitable. A somewhat similar argument was urged before the Court of Appeal in *Re Davis Investments (East Ham) Ltd*³. In that case Donovan LJ said⁴:

'Counsel for the petitioner's argument goes to this length: that in a case of a two-man company, if the shareholders, being equal in their shareholding, fall out, one of them alleging that further co-operation is impossible, then the court, in the absence of a reply from the other shareholder, must at once treat them as though they were partners, and order a winding-up, as it would, in a partnership case, order a dissolution. I do not think that is the law.'

In the result, I propose to make an order striking out the petition.

Order accordingly.

Solicitors: Meredith & Co (for Mr Dutch); Wedlake Bell, agents for Geoffrey & Green, Beaconsfield (for the petitioner).

Jacqueline Metcalfe Barrister.

¹ (1878) 7 Ch D 473

² (1878) 7 Ch D at 483

³ [1961] 3 All ER 926, [1961] 1 WLR 1396

⁴ [1961] 3 All ER at 929, [1961] 1 WLR at 1399

Reid v Commissioner of Police of the Metropolis and another

COURT OF APPEAL, CIVIL DIVISION

LORD DENNING MR, PHILLIMORE AND SCARMAN LJJ
7th, 8th, 26th FEBRUARY 1973

Sale of goods – Market overt – Sale in market overt – Buyer acquiring good title – Necessity of showing that sale took place between sunrise and sunset – Sale of Goods Act 1893, s 22 (1).

In order to establish that a sale of goods has taken place in market overt, so as to convey a good title to the goods even against the true owner, in accordance with s 22 (1)^a of the Sale of Goods Act 1893, it must be shown that the goods were sold between sunrise and sunset (see p 100 c to g, p 101 a and b, p 103 g and h, and p 104 c, post).

Notes

For title by sale of goods in market overt, see 25 Halsbury's Laws (3rd Edn) 392, 393, paras 760-763, and for cases on the subject, see 33 Digest (Repl) 489-491, 434-482.

For the Sale of Goods Act 1893, s 22, see 30 Halsbury's Statutes (3rd Edn) 21.

Cases referred to in judgments

Bishopsgate Motor Finance Corp'n Ltd v Transport Brakes Ltd [1949] 1 All ER 37, [1949] 1 KB 322, [1949] LJR 741, CA, 33 Digest (Repl) 489, 441.

Clayton v Le Roy [1911] 2 KB 1031, 81 LJKB 49, 104 LT 419, 75 JP 229; *rvsd on other grounds* [1911-13] All ER Rep 284, 105 LT 430, 75 JP 521, CA, 33 Digest (Repl) 491, 470.

Market-Overt Case (1596) 5 Co Rep 83b, 77 ER 180, sub nom *Bishop of Worcester's Case* Moore KB 360, 72 ER 629, sub nom *Palmer v Wolley Cro Eliz* 454, 78 ER 693, sub nom

Anon Poph 84, 1 And 344, 79 ER 1196, 33 Digest (Repl) 491, 467.

Tutton v Darke, Nixon v Freeman (1860) 5 H & N 647, 29 LJEx 271, 21 LT 361, 6 Jur NS 983, 157 ER 1338, 18 Digest (Repl) 300, 462.

Cases and authorities also cited

Burch v Scory (1699) 12 Mod Rep 309, 88 ER 1341.

Ganby v Ledwidge (1876) IR 10 CL 33.

Lee v Bayes (1856) 18 CB 599, 139 ER 1504.

Lyons v De Pass (1840) 11 Ad & El 326, 113 ER 439.

Taylor v Chambers (1605) Cro Jac 68, 79 ER 58.

Benjamin on the Law of Sale of Personal Property (8th Edn, 1950), p 20.

Crossley Vaines on Personal Property (4th Edn, 1967), p 167.

Tudor's Leading Cases on Mercantile and Maritime Law (3rd Edn, 1884), p 274.

(1915) 31 Law Quarterly Review 226.

Appeal

This was an appeal by the plaintiff, Desmond Alexander Reid, against the judgment of his Honour Deputy Judge Rice given in the trial of the action on 1st May 1972 at Westminster County Court in favour of the second defendant, Norman Hendry Cocks, ordering the first defendant, the Commissioner of Police of the Metropolis, to

^a Section 22 (1) provides: 'Where goods are sold in market overt, according to the usage of the market, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of any defect or want of title on the part of the seller.'

return a pair of Adam two light candelabra (of a value in excess of £600) to the second defendant. The facts are set out in the judgment of Lord Denning MR.

Michael Ogden QC and M Dean for the plaintiff.

K H Zucker for the second defendant.

The first defendant did not appear and was not represented.

Cur adv vult

26th February. The following judgments were read.

LORD DENNING MR. The centrepiece of this story is a pair of candelabra, made of well-cut glass, each supporting two candles with sparkling pear drops all about. They were made by Robert Adam, a master of the art of interior decoration, in about 1790. In December 1969 this lovely pair of candelabra stood on the table of Mr Reid, a member of Lloyd's, in his dining-room in Old Church Street, Chelsea. He had bought them for £450 many years ago. He and his wife went away for the weekend. During their absence thieves broke in and ransacked the house. They took many things. In their haul they stole the pair of Adam candelabra.

The next we hear of them is two months later. This time is at the New Caledonian Market in Southwark. That market is open every Friday from 7.00 a.m. onwards. But dealers go there before that time so as to get the best prices. It is the early bird that catches the worm. On Friday, 13th February 1970, Norman Cocks, an art dealer, went early to the market. It was still only half-light. The sun had not risen. He saw a man putting up a stall. Mr Cocks had never seen the man before. Nor has he seen him since. Mr Cocks was interested in his wares. On the stall there was a cardboard box. Mr Cocks examined it and its contents. Wrapped up in a newspaper there were the main parts of a pair of candelabra. Loose in the box were glass pear drops. All in pieces. He did not put the candelabra together. He did not ask the man where he got them from. No one ever asks questions of that kind in the market. Nor did he ask the man his name or address. All that Mr Cocks asked was: 'How much do you want for these?' The man said: '£220'. Mr Cocks said: 'I'll give you £200.' The man agreed. So Mr Cocks took out his money. He had in his pocket £1,000 in notes. That is what he usually takes to the market. He counted out £200. He gave the notes to the man and received in exchange the cardboard box with the pieces of candelabra inside. He did not ask for a receipt for the £200. No one asks for receipts in the market. But Mr Cocks did make an entry in his purchase book showing that he had bought the candelabra for £200.

Mr Cocks was pleased with his purchase. He thought it was a good buy. He straight-away went and showed it to two of his dealer friends who were in the market that morning. One of them—a Mr Lloyd—was very knowledgeable about glass antiques. He offered Mr Cocks £675 for the candelabra. But Mr Cocks did not accept it then and there. Instead he let Mr Lloyd take the box with its contents so that he might resell them. When Mr Lloyd got back to his own shop, he put the pieces together. He was then sure that it was a genuine Adam candelabra. He put it on show in his own shop. He hoped to get £800 for it.

Mr Lloyd's shop was called 'Lloyd's Antiques' in Motcomb Street, Belgravia, where antique dealers thrive. The knowledge of this pair of Adam candelabra soon went through the trade. Three or four weeks later the true owner, Mr Reid, was telling a dealer in Camden Hill about his loss. That dealer said: 'I think I know where you can find your candelabra. Go to Lloyd's Antiques in Motcomb Street.' Mr Reid at once went there. He saw the candelabra. He was sure they were his. He told the police. They came and took the pair of candelabra into their custody. Mr Lloyd told the police that he had got them from Mr Cocks. The police saw Mr Cocks. He explained how he had bought the pair of candelabra for £200 in the market. He had no idea, he said, that they were stolen. He said that the pair of candelabra were his, and he claimed them.

a In view of this claim by Mr Cocks, the police did not hand the candelabra to Mr Reid. So Mr Reid sued the police to recover them. The police brought in Mr Cocks as third party. By agreement the police then dropped out and the action continued as a straight action between Mr Reid and Mr Cocks.

b Prima facie Mr Reid was entitled to the candelabra because he was the true owner of them. But Mr Cocks claimed that he had acquired a good title to them because he had bought them in an open market, or as lawyers put it, in market overt. He had bought them in good faith, he said, and without notice of defect or want of title on the part of the seller. So he acquired a good title under s 22 (1) of the Sale of Goods Act 1893.

c The county court judge held that Mr Cocks had a good title to the pair of candelabra. He held that the New Caledonian Market, constituted under statute, was a market overt: see *Bishopsgate Motor Finance Corp'n Ltd v Transport Brakes Ltd*¹. He also found that the sale was 'during the permitted hours of the market'. Further, he said: 'I am satisfied that the defendant was a purchaser in good faith.'

d The plaintiff felt it would be difficult to upset those findings. So he attacked the judgment on another ground altogether—a ground which he dug up from the recesses of the past. He said that a sale in market overt did not destroy the title of the true owner unless it was made between sunrise and sunset. And here it was before sunrise. It was in the half-light before the sun's rim rose above the horizon.

To solve this question we have to go back to the works of Sir Edward Coke. In 1596 there was an important case about market overt²; Coke reported it. He afterwards expounded the law of market overt in his Institutes³. He first stated the rule of the common law which was, he said:

e '... that all sales and contracts of any thing vendible in Faires or Markets overt, should not be good onely between the parties, but should bind those that right had thereunto. But this rule hath many exceptions.'

Coke then set out 12 exceptions. The only one material for our purpose is no 11, which says:

f 'The sale must not be in the night, but between the rising of the Sun, and the going downe of the same: for he that hath a Faire or Market, either by grant or prescription, hath power to hold it per unum diem, seu duos, vel tres dies, &c., where (dies) is taken for dies solaris; for if it should be taken for dies naturalis, then might the sale be made at midnight. And yet the sale that is made in the night is good between the parties, but not to bind a stranger that right hath.'

g Counsel sought to suggest that this exception was based on the interpretation of the word 'dies' in a grant of a franchise of a market. He argued that, when there was a statutory or other market, the sale was good as against the true owner if it was made in the usual hours, but bad if it was made 'not at the usual hours'. He quoted Sir William Blackstone in his Commentaries⁴ for that proposition.

h I think we should follow the words of Sir Edward Coke rather than those of Sir William Blackstone. In the first place, Coke is supported by very good authority. He himself refers in the margin to the *Entrees* of William Rastell. These were printed in 1596 and were based on 'good Presidents' (sic). Under the heading 'Feires &c Markets' William Rastell says⁵ that a sale in open market, in order to bind the true owner, must be made 'ab ortu solis usque ad eius occasu', that is, between the rising of the sun and the going down of the same. In the second place, in the *Market-Overt Case*⁶ the judges laid emphasis on the need for the goods to be openly on sale in

1 [1949] 1 All ER 37, [1949] 1 KB 322

2 *Market-Overt Case* (1596) 5 Co Rep 83b

3 (1642) vol 2, pp 713, 714

4 (1766) vol 2, p 450

5 At p 347

6 (1596) 5 Co Rep 83b

a place where those who stand or pass by can see them. Thus, when a thief stole a silver basin and ewer belonging to the Bishop of Worcester and they afterwards appeared on sale in a scrivener's shop in London, the purchaser got no title: because people go to a scrivener's shop for pen and paper, not for gold or silver plate. Sir Edward Coke said¹:

'But if the sale had been openly in a goldsmith's shop in London, so that any one who stood or passed by the shop might see it, there it would change the property. But if the sale be in the shop of a goldsmith, either behind a hanging, or behind a cupboard upon which his plate stands, so that one that stood or passed by the shop could not see it, it would not change the property: so if the sale be not in the shop, but in the warehouse, or other place of the house, it would not change the property, for that is not in market-overt, and none would search there for his goods.'

If such be the requirement as to place, a similar requirement may be expected as to time. The goods should be openly on sale at a time when those who stand or pass by can see them. Thus it must be in the day time when all can see what is for sale; and not in the night time when no one can be sure what is going on. And if in the day time, what better test can you have than between sunrise and sunset? No half-light then, but full daylight. Just as a distress, to be valid, must be made between sunrise and sunset (see *Tutton v Darke*²), so a sale in market overt, to be valid, must be between sunrise and sunset.

Seeing that this sale was made before sunrise, Mr Cocks did not get a good title. Mr Reid, the true owner, is entitled to have the pair of Adam candelabra returned to him. I would allow the appeal, and order their return accordingly.

PHILLIMORE LJ. I agree. The phrase market overt has two meanings, first the literal meaning namely 'open market' and, secondly a meaning well understood by lawyers, namely, the circumstances in which a sale in a market conveys a good title to the purchaser even against the true owner. At common law title could only be conveyed as against the true owner subject to various safeguards. These are clearly stated in Coke's Institutes³. The vital exception for the purposes of the present case is no 11 which stipulates, inter alia, that the sale can only convey title against the true owner if it takes place between sunrise and sunset.

In *Bishopsgate Motor Finance Corp'n Ltd v Transport Brakes Ltd*⁴, this court held that the doctrine of market overt applies to a market created by statute just as it has always done at common law to markets established by grant of a charter or by prescription. It is, I think, quite clear that the court intended that if title was to pass as against the true owner the transaction must be subject to the same safeguards as are described by Coke; thus Bucknill LJ said⁵:

'If one considers the reason for protecting people who buy with the honest belief that the vendor has a good title to sell, provided the necessary safeguards are taken of selling in the market in the day time and exposing the article for sale, there does not seem to me to be any reason in principle why a sale should not be equally good if made by the possessor himself, as it admittedly would be in this case if the motor car had been sold by auction.'

Indeed to suggest otherwise would create a ridiculous situation since the safeguards would still apply to all the old markets whereas in the case of the statutory markets there would be none. It would not be long before they were indeed thieves kitchens.

1 (1596) 5 Co Rep 83b

2 (1860) 5 H & N 647

3 (1642) vol 2, pp 713, 714

4 [1949] 1 All ER 37, [1949] 1 KB 322

5 [1949] 1 KB at 331, cf [1949] 1 All ER at 42

a Here the learned judge has fallen into the error of confusing the two meanings of the phrase, and since the market was open when the transaction took place, he has said that it took place in market overt, and a good title was conveyed against the true owner although it took place before sunrise.

b In my judgment this was not in the legal sense a sale in market overt and the plaintiff is entitled to recover his goods. I confess that this seems to me to fit the merits of the case, since despite the findings of the learned judge and their acceptance by counsel for the plaintiff, the circumstances disclosed in the evidence satisfy me that this was a thoroughly unsatisfactory transaction and that the strong probability is that the defendant's purchase was not made bona fide or in good faith.

c **SCARMAN LJ.** I also agree that this appeal should be allowed. The appeal raises a question as to the extent of the rule protecting the title of one who buys in market overt. The rule is retained in our law by s 22 (1) of the Sale of Goods Act 1893.

d On the night of 13th December 1969 thieves broke into the house of Mr Reid and stole a quantity of his property including a pair of Adam candelabra worth today about £800. In March 1970 he found the candelabra in an antique dealer's shop in Motcomb Street, which is in the City of Westminster. The police took charge of them, and Mr Reid commenced proceedings in the county court to recover them.

e Not surprisingly, the career of the candelabra from Mr Reid's house to the West End shop where he found them remains something of a mystery. But we do know that Mr Cocks, himself an antique dealer, acquired them in the New Caledonian Market, Bermondsey, and placed them in the Motcomb Street shop, with the consent of the shopowner, for the purpose of sale. The New Caledonian Market is a market established by the Bermondsey Borough Council under powers conferred by the London County Council (General Powers) Act 1903. In *Bishopsgate Motor Finance Co Ltd v Transport Brakes Ltd*¹, this court held that the market overt rule extended to statutory markets. Mr Cocks has, therefore, intervened in the action, claiming that he bought in market overt and so has a good title to the candelabra. The deputy county court judge upheld his contention, and Mr Reid, who is admittedly their owner if Mr Cocks's claim should fail, now appeals to this court.

f The transaction, which Mr Cocks claims was a sale in market overt, has a strangely secretive air about it; our predecessors in the law merchant, from which the doctrine of market overt derives, would, I suspect, have been surprised at such a claim, had the transaction occurred in their time. Mr Cocks, whom the judge found to have acted honestly and to have bought in good faith, went, as was his wont, to the market early in the morning of Friday, 13th February 1970, where he saw a man setting up a stall. This man had with him the two candelabra, dismantled and in a box. After a short hagggle, Mr Cocks paid him £200 in cash and took the candelabra. He did not ask for a receipt; he did not then, and does not now, know who the vendor was. The transaction took place early in the 'semi-light' (as one witness described conditions after the sale); the judge found that the transaction took place after 7.00 a.m., the hour at which the market opened, but before sunrise which that day was at 8.19 a.m. The vendor was not a regular stall-holder; he displayed neither name nor licence; and has not been seen or heard of since. Because the transaction occurred within the permitted hours of trading in the market the judge held that it was a sale in market overt. But Mr Reid contends that a market sale confers on the purchaser a good title only if it occurs in business hours between sunrise and sunset.

j The reason why the law permitted a sale in market overt to confer a good title on the bona fide purchaser was the openness of the transaction: see the judgment of Scrutton J in *Clayton v Le Roy*². When shops were scarce, the market was the place, and market day the occasion for the public to buy and sell. The market was regulated

1 [1949] 1 All ER 37, [1949] 1 KB 322

2 [1911] KB 1031

by the franchise-holder; the place, the day, and the hours of business were established under the authority of the franchise and were well known. Thus any person whose goods had been stolen would know where and when the thief was likely to seek to dispose of them, and would have an opportunity of finding and recovering them before they were sold in the open market. Blackstone¹ describes the ancient safeguards for the true owner (including in Saxon times 'the presence of credible witnesses') and says²:

'By which wise regulations the common law has secured the right of the proprietor in personal chattels from being divested, so far as was consistent with that other necessary policy, that purchasers, *bona fide*, in a fair, open, and regular manner, should not be afterwards put to difficulties by reason of the previous knavery of the seller.'

Safeguards, such as Blackstone describes, were notably absent in this case. Instead of the 'credible witnesses' of ancient time, there was no witness, no clue as to the identity of the seller, very little exposure of the goods for sale, but a transaction effected in the 'semi-light' before dawn, and before the vendor's stall was erected. The only attributes of openness were the place and the fact that the transaction was effected within permitted hours of trading. Any chance of the true owner intervening before the candelabra were sold was minimal.

An examination of the doctrine of market overt necessarily begins with the well-known passage in Coke's Institutes. Sir Edward Coke, who had some years previously certified the custom of the City of London in the *Market-Overt Case*³, wrote⁴:

'... that all sales and contracts of any thing vendible in Faires or Markets overt, should not be good onely between the parties, but should bind those that right had thereunto. But this rule hath many exceptions.'

He then listed 12 exceptions, of which the 11th was stated to be:

'The sale must not be in the night, but between the rising of the Sun, and the going downe of the same: for he that hath a Faire or Market, either by grant or prescription, hath power to hold it per unum diem, seu duos, vel tres dies, &c., where (dies) is taken for dies solaris; for if it should be taken for dies naturalis, then might the sale be made at midnight. And yet the sale that is made in the night is good between the parties, but not to bind a stranger that right hath.'

Assuming, as I think it is right to do, that Sir Edward Coke's description of the rule and the exception represented the law as it was at the beginning of the 17th century, what is its modern application? Does a purchaser gain the protection of the rule if he buys within permitted market hours, albeit before dawn or after sunset? Or is there a substantive rule of the common law confining a purchaser's protection to transactions 'between the rising of the sun, and the going down of the same'? It is probable that in Coke's time all fairs and markets, properly so-called, owed their origin to a grant (prescription assumed a lost grant). The grant would be a franchise conferred by charter from the Crown acting either under the prerogative or with the consent of Parliament: see the Minutes of Evidence taken in 1887 by the Royal Commission on Market Rights and Tolls⁵. Thus it is possible, and counsel for Mr Cocks invited us, to read the exception as a rule of construction applicable to all instruments of grant establishing fairs and markets. Since these instruments specified the market day or days, and since day was interpreted as meaning 'dies solaris', the

¹ Commentaries (1766), vol 2, p 449

² Ibid, p 450

³ (1596) 5 Co Rep 83b

⁴ (1642) vol 2, pp 713, 714

⁵ See the First Report of the Royal Commission on Markets and Tolls (1888), vol II (C 5550-1), p 19, qq 358 et seq

a exception, it was submitted, was concerned primarily with permitted market hours, and only incidentally with the hours of daylight. If this submission be correct, it follows that, when, long after Coke's day, Parliament by statute empowered local authorities to establish markets and to prescribe market hours, the protection of market overt would be available during permitted market hours, even when those hours extend to a period before sunrise or after sunset.

b Authority is lacking as to the proper interpretation of Coke's words. Blackstone¹ and Chalmers² appear to have read them as referring to ordinary business hours, i.e. the permitted or usual hours of trading. Others have treated them as confining the protection of market overt to the hours of daylight: e.g. Pease and Chitty, 'The Law Relating to Markets and Fairs'³, Halsbury's Laws of England⁴, and Bucknill LJ in *Bishopsgate Motor Finance Corp'n Ltd v Transport Brakes Ltd*⁵. I have come to the conclusion that the rule covers only sales that occur between sunrise and sunset. My reasons are these.

c First, a point of construction. I read the words of Coke's 11th exception as first stating the exception and then illustrating it. If this be right, the exception is that 'the sale must not be in the night', while the references that follow to the meaning of 'dies' in grants of market, and to the validity inter partes of sales at night, illustrate the scope of the exception.

d Secondly, although with diffidence (for I can make no claim to have done any historical research), I doubt the accuracy of the proposition advanced by counsel for Mr Cocks that in Sir Edward Coke's time no regular markets opened before sunrise, and that their permitted hours were limited to the 'dies solaris'. In his description e both of the rule and of the exception Coke, when drawing a distinction between sales which bind only the parties and those which bind even 'those that right had thereunto', does not expressly assert that the former are not market sales: indeed I think he is indicating the contrary, that sales may occur in a regular market which, because they occur before sunrise or after sunset, do not confer on the purchaser the benefit of the rule of market overt, although valid in all other respects.

f It is certain that shortly after Coke's time lawful trading in regular markets took place before dawn. The City Remembrancer, giving evidence in 1887 to the Royal Commission on Market Rights and Tolls, described the growth of the Covent Garden fruit and vegetable market, and said, in the course of his evidence⁶: '... people coming into London with vegetables, and so on, used to come early in the morning, probably before the gates of the City were opened...' Admittedly, in Coke's time, g Covent Garden was an irregular market; but the Duke of Bedford obtained a franchise in 1661 and his agent told the Royal Commission⁷ that the market's trading hours were 4.00 a.m. to 9.00 a.m.

h But, whatever the history of market trading be, I think that Coke's words draw a distinction between lawful trading in a regular market that attracts the benefit of the rule of sale in market overt, and lawful market trading that does not, and that the distinction is between trading that takes place between sunrise and sunset and trading which takes place outside that period. Moreover—and this is my third reason—I think this view of the law makes sense in modern conditions.

The policy of the rule is to encourage commerce while offering certain safeguards to property owners. Thus, when Denning LJ in the *Bishopsgate* case⁸ described it as

j 1 Loc cit

2 Sale of Goods (16th Edn, 1971), p 136

3 (1899), p 122

4 (3rd Edn), vol 25, p 392

5 [1949] 1 All ER at 42, [1949] 1 KB at 331

6 See the First Report of the Royal Commission on Markets and Tolls (1888), vol II (C5550-1), p 24, q 415

7 Loc cit, p 127, q 2610

8 [1949] 1 All ER at 46, [1949] 1 KB at 337

'this beneficial rule of the common law', he was saying nothing inconsistent with the warning given by Scrutton J in *Clayton v Le Roy*¹ where the judge said:

'A custom which takes away one man's property and gives it to another must, in my view, be carefully watched, especially when it is not a universal custom, but limited to certain favoured localities.'

The basic safeguard offered by the law to the owner is the opportunity to recover his property before it is sold. If stolen goods are sold outside either the City of London or any franchise or statutory market, the owner can recover them. If they are sold in the City of London or any regularly established market, he may be defeated by a sale in market overt. His safeguard must be the openness of the transaction. If the protection of title given to market purchaser arises only if the sale be effected during the hours of daylight, the owner knows at the very least that he cannot be defeated save by a transaction done in day time.

Accordingly, in my opinion, the protection of title afforded by the law to a purchaser in market overt is available only if the sale takes place between sunrise and sunset. I would, therefore, allow the appeal.

Appeal allowed.

Solicitors: *Reynolds, Porter, Chamberlain & Co* (for the plaintiff); *Offenbach & Co* (for the second defendant).

L J Kovats Esq Barrister.

R v Secretary of State for Social Services ex parte Khan

COURT OF APPEAL, CIVIL DIVISION

LORD DENNING MR, KARMINSKI AND BUCKLEY LJJ

20th DECEMBER 1972

National Health Service – Hospital – Staff – Terms and conditions of service – Dismissal – Hospital medical and dental staff – Representations against dismissal – Member of staff considering that employment being unfairly terminated – Terminated – Medical assistant – Appointment for two year period renewable, subject to confirmation, indefinitely – Medical assistant's appointment not confirmed – Whether appointment being 'terminated' – Terms and Conditions of Service of Hospital Medical and Dental Staff (England and Wales) and Administrative Medical Staff of Regional Hospital Boards (England and Wales) (January 1971), para 190.

In July 1970 the applicant was appointed medical assistant in geriatrics to a group of hospitals. The appointment was for a two year period 'renewable, subject to confirmation, for an indefinite period'. On 21st April 1972 the secretary of the board wrote to the applicant informing him that the board had decided that his appointment 'should not be confirmed at the end of your two years' service...'. The applicant claimed to be entitled to make representations against his dismissal under para 190^a of the Terms and Conditions of Service of Hospital Medical and Dental Staff (England and Wales) on the ground that he considered that his appointment was 'being unfairly terminated' within para 190.

Held – The applicant was not entitled to make representations under para 190. The words 'being terminated' postulated some positive action by the board bringing the appointment to an end, e.g. by notice. The applicant's appointment was not

¹ [1911] 2 KB at 1044

^a Paragraph 190, so far as material, is set out at p 106 d to f, post

- a 'being terminated' in that sense; it was merely coming to an end by effluxion of time (see p 106 g and p 107 c and f to h, post).

Note

For the remuneration and conditions of service of hospital officers, see 27 Halsbury's Laws (3rd Edn) 545, 546, para 1053.

b Cases cited

Allied Ironfounders Ltd v John Smedley Ltd [1952] 1 All ER 1344.

Brindle v H W Smith (Cabinets) Ltd [1973] 1 All ER 230, [1972] 1 WLR 1653, CA.

Hill v C A Parsons & Co Ltd [1971] 3 All ER 1345, [1972] Ch 305, CA.

Orman Brothers Ltd v Greenbaum [1954] 3 All ER 731, [1954] 1 WLR 1520; *affd* [1955] 1 All ER 610, [1955] 1 WLR 248, CA.

c Motion

By notice of motion dated 22nd November 1972 the applicant, Mohammed Amanullah Khan, a bachelor of medicine and a bachelor of surgery, holding the Diploma of Tropical Medicine and Hygiene and a registered medical practitioner, applied to the Divisional Court of the Queen's Bench Division for leave to apply for an order of mandamus directed to the Secretary of State for Social Services requiring him, pursuant to para 190 of the Terms and Conditions of Service of Hospital Medical and Dental Staff (England and Wales) and Administrative Medical Staff of Regional Hospital Boards (England and Wales) made on 4th January 1971, to place the applicant's case before a professional committee consisting of representatives of the Secretary of State and representatives of the profession under the chairmanship of the Chief Medical Officer or if he was unable to act, the Deputy Chief Medical Officer, for their advice, and further directing the Secretary of State in the light of their advice to confirm the termination of his service with the North East Metropolitan Hospital Board, or direct that his employment should continue. Relief was sought on the grounds that the Secretary of State for Social Services had refused despite requests made by the applicant who considered that his appointment as medical assistant to a consultant in geriatrics at the Rochford Hospital, Rochford, Essex, had been unfairly terminated, to place the case before a professional committee and to act thereafter as set out in para 190 of the terms and conditions and as required by law. The Divisional Court refused leave but, on 13th November 1972, the Court of Appeal gave leave to move that court for the order sought. The facts are set out in the judgment of Lord Denning MR.

- g *Jeffrey Burke* for the applicant. (at 101)
Gordon Slynn for the Secretary of State.

LORD DENNING MR. Dr Mohammed Amanullah Khan is a bachelor of medicine and a bachelor of surgery. He held an appointment at the Rochford Hospital, Rochford, in Essex, as a medical assistant to a consultant in geriatrics. His appointment was made by letters. On 22nd July 1970 he was told: 'The appointment is for two years in the first instance, and will be renewable, subject to confirmation, for an indefinite period'. On 19th October 1970 the secretary to the hospital board wrote:

- i 'I am instructed by the North East Metropolitan Regional Hospital Board to offer you an appointment of whole-time Assistant in Geriatrics to Southend-on-Sea Group of Hospitals from 26 July 1970, subject to the terms and conditions of service of hospital medical/dental staff and to the provisions as to superannuation from time to time in force. The appointment is for a period of two years in the first instance, renewable, subject to confirmation, for an indefinite period.'

Dr Khan accepted the appointment offered in that letter.

Dr Khan entered on his work as medical assistant to the consultant in geriatrics.

He says his service there was happy and unmarked by conflicts until 29th September 1971. The consultant then told him that he was recommending the hospital board not to renew his contract in July 1972, when his two years would be up. On 21st April 1972 the secretary to the hospital board wrote to Dr Khan saying:

'I have to inform you that the Board at their meeting on 19 April 1972 decided that your appointment as Medical Assistant in Geriatrics to the Southend-on-Sea Group of Hospitals should not be confirmed at the end of your two years' service on 25 July 1972.'

So there it was. On 25th July 1972 his employment came to an end. It was not renewed. Dr Khan considers that he has been unfairly treated. He seeks an opportunity to put his case before a professional committee. He relies on para 190 of the terms and conditions of his service. Those terms were incorporated into his contract. There is a group of paragraphs headed: 'Tenure of post and period of notice of termination.' Then there is a sub-heading: 'Representations against dismissal'. Then this paragraph:

'190. Where a consultant, senior hospital medical officer, senior hospital dental officer, medical assistant [that is what Dr Khan was] or assistant dental surgeon considers that his appointment is being unfairly terminated, he shall be entitled to send a full statement of the facts to the Secretary of State who will obtain the written views of the Board concerned and place the case before a professional committee... for their advice. The committee shall have discretion to interview both parties if they think fit. In the light of their advice the Secretary of State may confirm the termination of services, or direct that the practitioner's employment should continue, or arrange some third solution agreeable to the parties concerned such as re-employment in a different post. This procedure shall be completed before the Board's decision to terminate the appointment is carried into effect; and where the Secretary of State's decision cannot be given before the expiry of the notice given, such notice shall be extended for a month or longer period by the Board, until the Secretary of State's decision is given.'

The contest on that paragraph is this. Dr Khan says that his appointment was 'being unfairly terminated'. But the hospital board say, No, it was not being terminated at all. It came to an automatic end when his two years' appointment came to an end.

The rival arguments are nicely balanced. I think that the word 'terminate' or 'termination' is by itself ambiguous. It can refer to either of two things—either to termination by notice or to termination by effluxion of time. It is often used in that dual sense in landlord and tenant and in master and servant cases. But there are several indications in this paragraph to show that it refers here only to termination by notice. (1) The main heading speaks of 'Notice of Termination'. (2) The cross-heading is 'Representations against dismissal'. (3) The words '*is being unfairly terminated*' point to some positive action on the part of the board by way of termination, such as by giving notice or shutting him out, as distinct altogether from an automatic coming to an end. (4) The words '*the Board's decision to terminate the appointment*' are to the same effect. (5) The words '*before the expiry of the notice given*' contemplate that the employment will be terminated by notice, and not by an automatic ending.

Next I would refer back to para 15 of the terms and conditions of service. It says: 'Appointments shall be for two years in the first instance and if then confirmed shall be for an indefinite period.' It seems to me clear that the appointment comes to an end at the end of two years unless it is confirmed. If it was intended to cover such cases, para 190 should have been framed so as to say: 'If the medical assistant considers that his appointment is being unfairly terminated, or is unfairly not confirmed' etc. Paragraph 190 contains no such words.

a But counsel for Dr Khan in his sustained argument points to para 192. That paragraph applies to such cases as those where a medical man here is going overseas to take up a post for two or three years and with a standby to come and take his place for a limited period. It says:

b 'Paragraphs 190 and 191 shall not apply to a practitioner appointed for a limited period in these circumstances in respect of the termination of his appointment at the end of that period. The procedure set out in paragraph 190 shall, however, apply if his appointment is being terminated in other circumstances.'

c I do not think that paragraph helps. It shows that the word 'termination' is there used to denote termination by effluxion of time at the end of a limited period. But it also shows that para 190 only applies when his appointment is 'being terminated in other circumstances', that is, by some positive action by the board, such as by notice.

I come back to this. Dr Khan's appointment came automatically to an end at the expiry of two years, unless it was confirmed. It was never confirmed. The terms and conditions of service do not provide for any appeal for a man whose appointment is not confirmed; but only for a man whose appointment is being terminated.

d During the course of the argument, I referred to the Industrial Relations Act 1971. It is interesting to see that a claim for unfair dismissal only applies when a man has been more than two years at his work. It is quite common for probationary periods in various employments to be for two years. When such a probationary period of two years comes to an end (and is not confirmed and renewed) the person appointed just has to leave; he cannot complain; he has not survived his probationary period. I confess that I tried to find some way of letting Dr Khan in; but I do not think it

e can be done.
I would dismiss the appeal.

KARMINSKI LJ. I agree with the judgment which has just been delivered by Lord Denning MR. Although this is a matter of very considerable public importance, especially to the medical profession and those who have the duty of organising
f and running hospitals, I can find nothing to add to what Lord Denning MR has said.

BUCKLEY LJ. I also agree. It seems to me that the admirable argument of counsel for the applicant would really lead to this conclusion, that the words 'considers that his appointment is being unfairly terminated' in para 190 of the Terms
g and Conditions of Service of Hospital Medical and Dental Staff ought to be construed as though they read 'considers that his appointment is being unfairly terminated or ought fairly to be confirmed'. In my judgment the words are not capable of bearing that meaning. As counsel for the Secretary of State has pointed out, the verb 'terminate' can be used either transitively or intransitively. A contract may be said to terminate when it comes to an end by effluxion of time, or it may be said to be
h terminated when it is determined at notice or otherwise by some act of one of the parties. Here in my judgment the word 'terminated' is used in this passage in para 190 in the transitive sense, and it postulates some act by somebody which is to bring the appointment to an end, and is not applicable to a case in which the appointment comes to an end merely by effluxion of time.

j For that reason and for those given by Lord Denning MR I agree that this appeal should be dismissed.

Application dismissed. Leave to appeal granted.

Solicitors: *W H Thompson* (for the applicant); *Solicitor, Department of Health and Social Security.*

L J Kovats Esq Barrister.

Childs and another v Attorney-General and others

CHANCERY DIVISION

BRIGHTMAN J

14th FEBRUARY 1973

Charity – Scheme – Power of commissioners or Secretary of State for Education and Science to establish scheme – Appeal against order establishing scheme – Certificate of commissioners or Secretary of State or leave of judge – Appeal by person interested in charity or by inhabitants of area in case of a local charity in that area – Whether certificate or leave required – Charities Act 1960, s 18 (11), (12).

Persons interested in a charity or, in the case of a local charity in any area, inhabitants of the area, on whom the Charities Act 1960, s 18 (12)^a, confers a right of appeal against an order of the Charity Commissioners or the Secretary of State for Education and Science establishing a scheme for the administration of the charity, may not appeal against such an order without a certificate of the commissioners or of the Secretary of State that it is a proper case for an appeal, or without the leave of a Chancery judge; the words in s 18 (12), 'shall have the like right of appeal under subsection (11) above as a charity trustee', incorporate the proviso to s 18 (11) which inhibits an appeal against an order establishing a scheme without such a certificate or leave (see p 110 c, post).

Notes

For the establishment of schemes by Charity Commissioners or the Secretary of State for Education and Science, see Supplement to 4 Halsbury's Laws (3rd Edn) para 641A.

For the Charities Act 1960, s 18, see 3 Halsbury's Statutes (3rd Edn) 612.

Application

On 30th November 1972 the Secretary of State for Education and Science made an order under the Charities Act 1960, s 18, establishing a scheme for the administration of a charity, local to the Wenlock ward of the borough of Wenlock, Shropshire. By an ex parte application dated 29th January 1973, the plaintiffs, Olive Childs and Audrey Williamson, inhabitants of the Wenlock ward of the borough of Wenlock, sought against the defendants, the Attorney-General, the Secretary of State for Education and Science, the Charity Commissioners, the Rural District Council of Much Wenlock, the Rural District Council of Bridgnorth and the Salop county council, the leave of the court to appeal against the Secretary of State's order. The facts are set out in the judgment.

P J Millett for the plaintiffs.

BRIGHTMAN J. This is an ex parte application by two inhabitants of the rural borough of Much Wenlock in Shropshire for leave to appeal against an order of the Secretary of State for Education and Science establishing a scheme for a charity. The charity was constituted by a conveyance made in 1936 in favour of the borough for the purposes of the use of the land conveyed as a recreation ground and playing field for the residents of the Wenlock ward of the borough.

On 30th November 1972 a scheme was sealed by the Secretary of State which, in effect, brought further land into joint user with the land comprised in the conveyance and widened the area from which the beneficiaries of the recreation ground and playing field were to be drawn. This scheme did not meet with the approval of some,

^a Section 18, so far as material, is set out at p 109 b to f, post

a at any rate, of the residents of the area intended to be benefited by the 1936 conveyance. In consequence an application was made to the Secretary of State for Education and Science for a certificate that the case was a proper one in which to appeal.

The scheme was made under s 18 of the Charities Act 1960. Section 18 (1) provides:

b 'Subject to the provisions of this Act, the Commissioners may by order exercise the same jurisdiction and powers as are exercisable by the High Court in charity proceedings for the following purposes, that is to say:—(a) establishing a scheme for the administration of a charity . . .'

Concurrent jurisdiction is exercisable by the Secretary of State for Education and Science under another enactment¹. Section 18 (11) provides:

c 'An appeal against any order of the Commissioners under this section may also, at any time within the three months beginning with the day following that on which the order is published, be brought in the High Court by the charity or any of the charity trustees, or by any person removed from any office or employment by the order (unless he is removed with the concurrence of the charity trustees or with the approval of the special visitor, if any, of the charity): Provided that no appeal shall be brought under this subsection except with a certificate of the Commissioners that it is a proper case for an appeal or with the leave of one of the judges of the High Court attached to the Chancery Division.'

The persons who desire to be plaintiffs in an appeal against the order establishing this scheme do not fall within the description of competent plaintiffs in s 18 (11). Section 18 (12), however, provides:

e 'Where an order of the Commissioners under this section establishes a scheme for the administration of a charity, any person interested in the charity shall have the like right of appeal under subsection (11) above as a charity trustee, and so also, in the case of a charity which is a local charity in any area, shall any two or more inhabitants of the area and the parish council of any rural parish comprising the area or any part of it; but a parish council shall not exercise their right of appeal without the consent of the parish meeting.'

f A 'local charity' is defined by s 45 (1) as meaning, in relation to any area—

'a charity established for purposes which are by their nature or by the trusts of the charity directed wholly or mainly to the benefit of that area or of part of it'.

g The area in question here, on the assumption that the conveyance is correctly described in para 4 (1) of the draft originating summons which has been placed before me, is the Wenlock ward of the borough of Wenlock. It follows that under s 18 (12) competent plaintiffs would include any two or more inhabitants of that ward. I understand that the persons making this application before me, Mrs Childs and Mrs Williamson, are inhabitants of that ward. When they made application to the Secretary of State for Education and Science, a reply was received from an officer of her department which reads as follows, so far as material for present purposes:

j '... the Secretary of State takes the view that the appeal which, on behalf of your clients the Wenlock Residents Group, you propose to institute against the Scheme established on 30 November 1972, is not within the scope of Section 18 (11) of the Charities Act 1960, for which either a certificate or leave is required. The matter would appear to fall rather within Section 18 (12) of the Act for proceedings under which no certificate is, in the Secretary of State's view, necessary.'

The application before me is made on a 'safety first' principle: that the Secretary of State may be wrong in her interpretation of s 18 (12) and that an appeal might not be

¹ See Charities Act 1960, s 2 (1)

competent in the absence of a certificate of the Secretary of State or the leave of a judge of the Chancery Division. The Secretary of State herself has stated that even if, contrary to her own view, she had jurisdiction to grant a certificate, she would not consider this a proper case for an appeal. So I am left with a question of construction under s 18 (12) whether persons who are only qualified plaintiffs because they are described in s 18 (12) can appeal against an order of the Secretary of State without obtaining a certificate or leave of a Chancery judge.

Inevitably, as this is an ex parte application, I do not have the advantage of argument on the two sides but I express the view that the words in s 18 (12), 'shall have the like right of appeal under subsection (11) above as a charity trustee', inevitably incorporate the proviso to s 18 (11) which inhibits such an appeal unless there be a certificate of the Charity Commissioners or Secretary of State for Education and Science or the leave of a judge of the Chancery Division. The opposite construction, it seems to me, would mean that the persons qualified under s 18 (12) do not have 'the like right of appeal' but a different right of appeal; indeed, one not subject to the requirement of a certificate or leave. I cannot think that that is the correct construction. I, therefore, intend to act on this application on the basis that it is appropriate for a judge of this Division to consider whether to grant leave under s 18 of the Act if a certificate is not forthcoming, as it is not, from the Secretary of State for Education and Science.

So far as the merits of the application are concerned I am satisfied that it would be right for me to grant leave to appeal to the plaintiffs provided that they are indeed inhabitants of the Wenlock ward of the borough of Wenlock. I will accordingly grant leave on that basis.

Application granted.

Solicitors: Peacock & Goddard, agents for Scott, Lister & Co, Shrewsbury (for the plaintiffs).

Susan Corbett Barrister.

Heron Service Stations Ltd v Coupe

HOUSE OF LORDS

LORD HAILSHAM OF ST MARYLEBONE LC, LORD DIPLOCK, LORD SIMON OF GLAISDALE AND LORD SALMON

9th, 12th, 13th MARCH, 4th APRIL 1973

Town and country planning – Control of advertisements – Display without express consent – Advertisements on business premises – Business premises – Building normally used for specified purposes – 'Business premises' not including forecourt or other land forming part of curtilage of building – Petrol service station – Station consisting of sales office, petrol pumps and concrete apron – Advertisements displayed on concrete apron in open air – Whether concrete apron part of building or whether forecourt forming part of curtilage of building – Town and Country Planning (Control of Advertisements) Regulations 1969 (SI 1969 No 1532), reg 14 (1), (3) (a).

The appellants were the occupiers of a petrol filling and service station consisting of a small office, a building housing lavatories, and a forecourt. On the forecourt were petrol pumps, covered by a fixed canopy, surrounded by an area of concrete apron under which was constructed petrol storage tanks and an elaborate system of ducts and pipes for electric and other services and drainage. The appellants displayed a number of advertisements on the concrete in the open air; some were affixed to the canopy over the petrol pumps and the remainder were situated in various positions on the concrete apron. The appellants were charged on ten separate informations, one of which related to the advertisements affixed to the canopy over the

- petrol pumps, with displaying advertisements without obtaining the necessary consent in contravention of the Town and Country Planning (Control of Advertisements) Regulations 1969, contrary to s 63 (2) of the Town and Country Planning Act 1962. The justices dismissed the informations on the ground that the whole service station was a 'building', within reg 14 (3) (a)^a of the 1969 regulations, and therefore the forecourt was not a 'forecourt or other land forming part of the curtilage of a building' within reg 14 (3) (a), proviso (ii), with the consequence that the whole station constituted 'business premises' within reg 14 (1), class IV, and express consent was not therefore required for the display of the advertisements. On appeal,

- Held**—By virtue of reg 14 (3) (a) the expressions 'building' and 'forecourt' were mutually exclusive and therefore in no circumstances could a forecourt form part of 'business premises' within reg 14 (1), class IV; furthermore every forecourt necessarily formed part of the curtilage of the building to which it related and would therefore in any event be excluded from the definition of 'business premises' by proviso (ii) to reg 14 (3) (a). Accordingly the informations relating to the advertisements situated on the apron should be remitted with a direction to convict but, since it appeared that the canopy over the petrol pumps was, or might have been, a 'structure or erection' within reg 2 (1)^b and therefore a 'building' within reg 14 (3), and therefore 'business premises' within class IV of reg 14 (1), the information relating to the advertisements affixed to the canopy should not be remitted (see p 114 j to p 115 d f and j, p 116 b and c, p 117 b e g and j to p 118 a, post).

Notes

- For display of advertisements on business premises, see 37 Halsbury's Laws (3rd Edn) 438, 439, para 556.
- For the Town and Country Planning Act 1962, s 63, see 36 Halsbury's Laws (3rd Edn) 138.
- From 1st April 1972 s 63 of the 1962 Act has been replaced by s 109 of the Town and Country Planning Act 1971.

Cases referred to in opinion

- Blakemore v Heron Service Stations Ltd* (1971) 22 P & CR 601, 69 LGR 363, DC.
- Cooper v Bailey* (1956) 6 P & CR 261, DC.
- Jones v Merioneth CC* (1968) 20 P & CR 106, 67 LGR 203, DC, Digest (Cont Vol C) 975, 151a.
- Schweder v Worthing Gas, Light and Coke Co* [1912] 1 Ch 83, 81 LJCh 102, 105 LT 670, 76 JP 3, 10 LGR 19, 25 Digest (Repl) 526, 51.

- Regulation 14, so far as material, provides:**
- (1) Advertisements of the following classes may be displayed without express consent, subject to the provisions of this regulation and to the power of the local planning authority to require the discontinuance of the display under regulation 16...
- CLASS IV—Advertisements on business premises.**
- Advertisements displayed on business premises wholly with reference to all or any of the following matters: the business or other activity carried on, the goods sold or services provided, and the name and qualifications of the person carrying on such business or activity or supplying such goods or services, on those premises...
- (3) In this regulation the following expressions have the meaning hereinafter respectively assigned to them, namely:—(a) "business premises" means, save as hereinafter provided, any building normally used for the purpose of carrying on therein any professional, commercial or industrial undertaking, or any building... normally used for the purpose of providing therein services to members of the public... but, in the case of any building normally used only partly for such purposes, means only the part of the building normally used for such purposes: Provided that the expression shall not include... (ii) any forecourt or other land forming part of the curtilage of a building...
- Regulation 2 (1), so far as material, provides:** 'In these regulations... "building" includes any structure or erection and any part of a building as so defined...'

Thompson v Sunderland Gas Co (1877) 2 Ex D 429, 46 LJQB 710, 37 LT 30, 42 JP 198, CA, 25 Digest (Repl) 525, 49. a

Appeal

On 11th February 1972 the justices for the petty sessional division of Brentford in the Middlesex area of Greater London stated the following case for the opinion of the High Court in respect of their adjudication as a magistrates' court sitting at Market Square, Brentford, on 1st November 1971. b

1. On 20th August 1971 ten informations were preferred by the respondent, Marshall William Coupe, solicitor to the London Borough of Hounslow, against the appellants, Heron Service Stations Ltd, that on 24th May 1971 at the forecourt at Heron Service Station, 270 Heston Road, Heston, they did without consent display advertisements in contravention of regs 6 and 8 (1) of the Town and Country Planning (Control of Advertisements) Regulations 1969¹, contrary to s 63 (2) of the Town and Country Planning Act 1962. c

2. The justices heard all the informations on 22nd October and 1st November 1971 and found the following facts: (a) On the dates alleged the appellants were in occupation of the service station. The service station, which was self-service, comprised petrol pumps mounted on two kerbed islands with a large canopy constructed of steel girders over them. There were also an oil change machine, air and water supply equipment and a paraffin machine. There was a tarmac surface and beneath that there were three 5,000 gallon tanks measuring 13 feet in length and eight feet in height, but between those tanks and the surface of the ground there were chambers approximately four feet square and four feet in height used for inspection purposes. There were also interceptors beneath the surface used to collect surplus water. Those interceptors led to tanks which were five feet cubed. There were services laid beneath the surface. There was an office or sales shop and that building was used principally for the operation of switchgear designed to control the equipment already referred to and to enable the cashier to speak to persons at the pumps on the forecourt. That office or shop was also used for the sale of accessories. The whole was surrounded by a fence, save at the two points of access, and in places there was a wall behind the fence. The general layout was shown on plan A, and the services were described and shown on plan F attached to the case². The total area of the service station was 4,770 square feet and the area of the sales shop was 363 square feet. The whole of the premises were constructed at one time by one contractor in 1969. (b) The service station was used for the purpose of a commercial undertaking and also for providing services to members of the public. (c) On the date alleged the appellants were displaying advertisements at the premises as set out in the schedule attached to the case² (listing the ten advertisements or sets of advertisements to which each of the ten informations related). The position of the advertisement was as shown on plan B attached to the case²; advertisement 1 was attached to the canopy over the petrol pumps, advertisements 8 and 10 were attached to the walls and fence enclosing the forecourt or apron with the remainder being free standing within that area. (d) All the advertisements referred to the business carried on or the services provided on the premises. (e) The aggregate area of all the advertisements was 46.03 square metres. (f) No express consent had been granted for any of the advertisements. (g) The advertisements were displayed by the appellants. (h) Much the greater volume of business done at the service station related to the sale of petrol. Only a small proportion related to the sale of accessories. d
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3. The justices found that (a) the whole service station was a building and (b) none of the advertisements was displayed on the curtilage of a building.

¹ SI 1969 No 1532.

² Not reproduced in this report

4. It was contended by the respondent that the advertisements were displayed without express consent granted by the local planning authority, the Minister of Housing and Local Government or the Secretary of State for the Environment and that the display of advertisements did not have deemed consent under reg 14 of the 1969 regulations. In particular, the advertisements were not displayed on business premises (as defined in the 1969 regulations) so as to bring the advertisements within class IV of reg 14 (1). They were displayed on the forecourt of business premises but as the aggregate area of the advertisements exceeded 4.5 square metres they did not come within class V of reg 14 (1) of the 1969 regulations.

5. The appellants contended that the findings in para 3 above were findings of fact that the justices should make and also contended that finding (b) in para 3 was to be inferred from the facts that apart from the service station itself there was no important building on the site, that the office was ancillary to the forecourt and that there was no land or building that was used for the comfortable enjoyment of any important building. It was contended for the appellants that because the whole service station was a building, because that building was used for the purpose of a commercial undertaking and for providing services to members of the public and because, irrespective of whether or not the advertisements were displayed on a forecourt, they were not displayed on the curtilage of a building, all the advertisements were displayed on business premises and were within class IV of reg 14 of the 1969 regulations.

[Paragraph 6 set out the cases cited.]

7. On considering the arguments put to them, the justices concluded that the premises were business premises within the meaning of the 1969 regulations and that the advertisements were within class IV of reg 14 of the regulations. The justices accordingly dismissed the informations.

8. The question for the opinion of the High Court was whether the justices came to a correct determination and decision in point of law and in particular whether or not they misdirected themselves in making the findings contained in para 3 (a) and (b) above.

On 8th May 1972 the Divisional Court of the Queen's Bench Division (Lord Widgery CJ, Shaw and Wien JJ) ordered that the determination of the justices be set aside, that the appeal by the respondent be allowed and that the case be remitted to the justices with a direction that the appellants be convicted on all the informations. On the application of the appellants, however, the court certified in accordance with s 1 (2) of the Administration of Justice Act 1960 that a point of law of general public importance was involved and gave the appellants leave to appeal to the House of Lords.

Graham Eyre QC and M H Spence for the appellants.

Charles Sparrow QC and Guy Seward for the respondent.

Their Lordships took time for consideration.

4th April. The following opinions were delivered.

LORD HAILSHAM OF ST MARYLEBONE LC. My Lords, on 8th December 1971 the present appellants appeared before the Brentford justices accused, on ten separate informations, of breaches of the Town and Country Planning (Control of Advertisements) Regulations 1969¹, which, if established, would constitute offences against s 63 (2) of the Town and Country Planning Act 1962. The justices dismissed all ten informations, but the prosecutor, the present respondent, appealed by way of case stated to the Divisional Court. On 8th May 1972 the Divisional Court, feeling itself bound by its previous decision in *Blakemore v Heron Service Stations Ltd*², allowed the appeals, and would have sent all the cases back to the justices with a direction to convict. However, the Divisional Court also certified that a point of law of general public importance was involved in the decision of the case, and gave the present

¹ SI 1969 No 1532.

² (1971) 22 P & CR 601.

appellants leave to appeal to the House of Lords. Thus the matter comes before your Lordships' House. a

The appellants occupy premises at 270 Heston Road, Heston. The premises are used as a petrol filling and service station of the self-service variety. They consist (1) of a small office or sales shop housing the cashier, and, amongst other things, containing the switch gear controlling the pumps, and used also for receiving payment and for sales, (2) a building housing lavatories for men and women, (3) a number of electric pumps mounted on two kerbed islands under a fixed canopy, (4) an area b of concrete apron under which exist the usual tanks for the storage of petrol and interception of surface water, and ducts and pipes for electric and other services and drainage; these last, in an installation of this kind, are rather elaborate. The whole area is surrounded by a fence separating the petrol filling station from neighbouring properties on the right and left of the plans annexed to the case, from some separate buildings marked off at the top of the plan as 'let', and, at the bottom of the plan, c from the road to and from which there is access by carriageway made through two breaks in the fence.

The ten informations with which this case is concerned relate to a number of advertisements connected with the business of the appellant company. All these advertisements were on the concrete in the open air. Those with which the first information was concerned, six in number, were affixed to the edges of the canopy d over the petrol pumps. The remainder were all on the apron in various positions diagrammatically indicated on a plan marked 'F' which formed part of the case. All, save those fixed to the canopy, were on what in common parlance would ordinarily be called the forecourt of the filling station. In fact the case stated expressly refers to it as such.

The question certified by the Divisional Court as a point of law of general public e importance also refers to the apron as a forecourt, for the question reads:

'Whether advertisements displayed on the forecourt of a petrol filling station can fall within Class IV of Regulation 14 of the Town and Country Planning (Control of Advertisements) Regulations 1969 having regard to the provisions in Regulation 14 (3) (a) of those Regulations.'

f

To this question, for the reasons set forth hereafter, I broadly propose the answer No.

Outdoor advertisements have been variously controlled since the Town and Country Planning Act 1947 came into force, by successive regulations made under the successive planning statutes. The Act relevant to the present proceedings is the Town and Country Planning Act 1962 and the relevant regulations are the Town and Country Planning (Control of Advertisements) Regulations 1969. The material g parts of these regulations provide, broadly speaking, that outside advertisements may only be displayed by the express consent of the relevant local authority, unless they come within certain excepted descriptions, in which case, in the language of the regulations, consent is said to be 'deemed to be granted'. In the present case there was no express consent. The only question is whether the advertisements h were within one of the classes where consent is said to be deemed to be granted.

The exceptional cases in which consent is deemed to have been granted are defined in Part III of the regulations (regs 9-16). But the appellants rested their whole case on the proposition that the advertisements came within the description of class IV of reg 14 (1) which provides for the exemption of 'advertisements displayed on business premises' wholly with reference to all or any of certain specified matters. As all j the advertisements were wholly with reference to all or some of the specified matters, the only question for decision is, therefore, whether they were on business premises for the purposes of the regulation.

In any ordinary use of the term 'business premises' this might well be thought to be the case. But at this stage the appellants encounter two, to my mind insuperable,

a difficulties. The first is that the expression 'business premises' has a precise and definite meaning assigned to it by reg 14 (3). In short, to come within the definition, business premises must be a 'building' and although, by reg 2, the expression 'building' is extended to include any 'structure or erection and any part of a building as so defined', none of the advertisements, except those attached to the canopy, could, in the ordinary sense of the word, be said to be 'displayed on a building', even in this extended sense of the word.

b The second difficulty, which reinforces the first, is that a closer examination of the text of the regulations shows, in my opinion, a clear intention on the part of the draftsman to distinguish between 'business premises', which, to come within the definition, must be 'buildings', and the 'forecourts of business premises', advertisements displayed on which, to be exempt from express consent, must come within class V and not class IV of reg 14 (1). The appellants in this case could not take advantage of class V since their advertisements greatly exceeded by a factor of ten c the maximum area (4.5 square metres) permitted if the advertisements were to be exempt under that head. Nonetheless, that the distinction was intended, and intended to be mutually exclusive as between the two classes, appears clearly, not merely from the heading and language of class V, but from the express exclusion d contained in proviso (ii) of the definition clause in reg 14 (3) (a), which unequivocally provides that the expression "'business premises" . . . shall not include . . . (ii) any forecourt or other land forming part of the curtilage of a building'. I think also that sub-para (b) of reg 14 (3) which includes in relation to class V 'any fence [etc] enclosing a forecourt and not forming part of the fabric of a building constituting business premises', emphasises the mutual exclusiveness and interrelation of the two expressions, since this is in contrast to the exclusion by proviso (iii) to reg 14 (3) of any fence, e etc from the expression 'business premises' and therefore from class IV unless it forms part of the fabric of a building constituting business premises.

f From these facts I infer that, in the regulations, the expressions 'business premises' and 'forecourts of business premises' are mutually exclusive terms, that advertisements displayed on the former are exempt if they are otherwise innocent and come within class IV of reg 14 (1), but that advertisements displayed on the latter are exempt if otherwise innocent and if they are within the maximum area permitted in class V. The provisions relating to the forecourts of business premises are thus, to my mind, mutually exclusive but interlocking.

The appellants sought to avoid these difficulties by three principal contentions. In the first place, they argued, these advertisements come within class IV and not within class V, because the whole of the premises, that is, forecourt, canopy, pumps, g kerbed islands, shop, and, I presume, lavatories, were all part of a single composite 'building' used for the specified purposes, and therefore one entire set of 'business premises' on which all the advertisements were displayed. For this purpose they called in aid a number of arguments, but principally the complicated subterranean labyrinth of ducts, wires, pipes and tanks dramatically depicted in bright colours in plan 'F'. I am not, of course, saying that subterranean constructions cannot be h buildings or structures. Were I to do so I would fall foul of the dicta in *Schweder v Worthing Gas, Light and Coke Co*¹ and *Thompson v Sunderland Gas Co*². But, if I am right in my belief that the draftsman of these regulations drew a distinction between the 'buildings' which constitute business premises, and their 'forecourts', no amount of argumentation will turn a perfectly flat piece of concrete or tarmac into a building on which advertisements may lawfully be displayed without express consent, simply j because it has electric, tanks, and ducts underneath.

The second contention of the appellants, which to my mind serves only to illustrate the fallaciousness of the first, was designed to get rid of the exclusion contained in

1 [1912] 1 Ch 83

2 (1877) 2 Ex D 429

proviso (ii) to reg 14 (3) of 'any forecourt or other land forming part of the curtilage of a building' from the definition of business premises. To give the contention validity it is first necessary to apply the qualifying phrase 'forming part of the curtilage of a building' to 'forecourt' as well as to 'other land'. It is then argued that the only forecourts excluded are those which form part of the curtilage of the building, and that this forecourt was not so excluded because the whole area was a building and there was no room for any curtilage at all, the essence of the old term 'curtilage' being an area ancillary to a main building and enjoyed with it. The fallacies in this particular argumentation appear to me to be numerous. In the first place, the argument only arises if the first submission be accepted. If, as I think, the first submission fails, the second falls with it. In the second place, I very much doubt whether there is any room for the distinction sought to be drawn between forecourts which are, and forecourts which are not, within the curtilage of the building whose forecourts they are. In my view, all forecourts are, of necessity, within the curtilage of the buildings to which they relate. Curtilage by deprivation simply means a small court or yard ancillary to some main building. The only difference between a forecourt and a backyard is that one is on the front, and the other behind the main building (see the definition of 'curtilage' in Murray's English Dictionary, vol 2). In the third place, as was pointed out in the course of argument by my noble and learned friend, Lord Diplock, for the proviso to have validity the forecourt must be something which, but for the exclusion in the proviso, was arguably part of the building, and this was the very point left open for discussion in *Jones v Merioneth CC*¹, and it was this case with which, as I agree with Widgery LJ in *Blakemore v Heron Service Stations Ltd*², proviso (ii) was almost certainly inserted to deal. If, on the other hand, 'forecourt' be something other than what is arguably part of the building itself, in the first place the appellants' premise disappears and, in the second place, the proviso becomes wholly otiose and without apparent purpose.

The third contention on the part of the appellants was that what was or was not a building, was a question of fact and degree, and that even if your Lordships heartily disagreed with the justices, this House would be bound by the findings in the case which reads:

'3 We found [sic] that—(a) the whole service station was a building and (b) none of the advertisements was displayed on the curtilage of a building.'

In support of this contention our attention was drawn, amongst other cases, to *Cooper v Bailey*³, where the question was clearly treated in the context of the particular circumstances as one of fact.

In my view, however, the, to me wholly inappropriate, use of the verb 'to find' at the beginning of para 3 quoted above is quite insufficient to turn a decision which is basically an application of the answer to a question of construction, and therefore of pure law, to a given set of facts into a question of fact. What this special case, like so many others of its kind, has done is (1) to enumerate the facts found (which is done in para 2), (2) to state the conclusions based on applying these facts to the regulation as construed by the court of summary jurisdiction (which is done in para 3), (3) to summarise the arguments and authorities (which is done in paras 4, 5 and 6) and then (4) to give the decision of the justices (which is done in para 7). The question for the court is then formulated in the last paragraph (para 8) and this reads:

'... whether we came to a correct determination and decision in point of law and in particular whether or not we misdirected ourselves in making the findings [sic] contained in paragraph 3 (a) and (b) hereof.'

¹ (1968) 20 P & CR 106

² (1971) 22 P & CR 601

³ (1956) 6 P & CR 261

a Clearly para 3 (a) and (b) cannot be pure findings of fact in the light of this formulation.

In my view, it is impossible in law to sustain the 'findings' in para 3. To do so involves misconstruing the regulations and, if they are correctly construed in the light of the facts found in para 2 and the plans annexed to the special case, there is no material on which, applying the facts to the construction, the conclusions in para 3 can be arrived at.

b However, this does not wholly dispose of the case. Although the appellants refused to take the point, and the respondent vigorously contended to the contrary, I cannot resist the view that the canopy over the pumps was, or at least may have been, a 'structure or erection' within reg 2, and therefore a 'building' within reg 14 (3), and therefore 'business premises' for the purpose of class IV of reg 14 (1) because it was normally used for the purpose of carrying on therein a commercial undertaking or providing therein services to members of the public. The respondent argued that it was not. He drew attention to the twice repeated use of the word 'therein' (the first, but not we were told, the second, use of which was new to the 1969 recension of the regulations) which he claimed to be as inapposite to a canopy as to an umbrella, and to various passages in regs 3, 12 and the provisos to class IV of reg 14 (1), which, as he argued, showed that the draftsman of the regulations had in mind business premises with an inside as well as an outside, a situation which cannot be readily postulated for a canopy over a double row of petrol pumps. That there is something in this contention I cannot deny. It might even be that if the proverbially officious bystander had been peering over the draftsman's shoulder his intervention might have caused the draftsman to put the matter beyond peradventure. But, my Lords, your Lordships' House is not that officious bystander, and this is not a question of contract, but of penal legislation, and I, for one, would not be happy to send back an information to justices for conviction unless I was quite satisfied that, quite apart from the contentions of counsel in the case, the offence was proved. I do not think that the respondent's arguments on this point survive the plain language of reg 2 (1) where it reads: "'building" includes any structure or erection . . .' It is possible that, since the question was not very fully argued, a future case before your Lordships' House may provide an opportunity of reconsidering the point at greater length, but, in the meantime, if the Secretary of State wishes to exclude the canopies over petrol pumps from his extended definition of 'building', he would be wise to amend his regulations.

e In the result, in my opinion the appeal fails. The order of the Divisional Court should be varied by the omission of the information numbered (1) from the category of informations to be remitted with a direction to convict. Otherwise the order of the Divisional Court must be sustained, and the remaining nine informations remitted with a direction to convict.

f I have carefully considered whether the small alteration in the decision of the Divisional Court which I have suggested merits a special order as to costs. I do not think it does. With the small qualification I have made, in my view the appeal must be dismissed and the appellants must pay the costs of the appeal.

g LORD DIPLOCK. I have had the advantage of reading the speech of my noble and learned friend, Lord Hailsham of St Marylebone LC, and for the reasons he gives I too would agree with the order he proposes.

j LORD SIMON OF GLAISDALE. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend on the Woolsack. I agree with it; and I therefore concur in the order which he proposes.

LORD SALMON. I have had the advantage of reading the speech of my noble and learned friend, Lord Hailsham of St Marylebone LC, and for the reasons he gives I too would agree with the order he proposes.

Appeal dismissed. Order of the Divisional Court varied by substituting an order that the informations, other than the first information, be remitted to the justices with a direction to convict.

Solicitors: *Saunders, Sobell, Leigh & Dobin* (for the appellants); *M W Coupe*, solicitor to the council, London Borough of Hounslow (for the respondent).

S A Hatteea Esq Barrister.

Texaco Antilles Ltd v Kernochan and another

PRIVY COUNCIL

LORD MORRIS OF BORTH-Y-GEST, LORD CROSS OF CHELSEA AND LORD SALMON
17th, 18th, 19th, 20th, 23th, 24th OCTOBER 1972, 15th JANUARY 1973

Restrictive covenant – Restrictive covenant affecting land – Building scheme – Land subject to scheme divided into lots – Lots conveyed subject to restrictions imposed by scheme – Certain lots subsequently coming into common ownership – Common owner subsequently conveying lots to different purchasers – Conveyances expressed to be subject to restrictions imposed by scheme – Whether purchasers of lots previously in common ownership and successors in title entitled to enforce restrictions inter se.

In 1925 BLC Ltd which owned a tract of land in the Bahama Islands prepared a building scheme for part of the land. The land allotted to the scheme was divided into 18 blocks sub-divided into lots. The lots were sold on the basis of a printed form of conveyance containing appropriate restrictive covenants binding on the company, the purchasers and their successors inter se. Condition 4 of the restrictions, set out in a schedule to the respective conveyances, provided inter alia: 'No machine shop, public garage or manufacturing establishment will be permitted on any of the lots . . .' Between 1939 and 1942 C Ltd acquired from different vendors lots 13 to 18 and 39 and 40 of block 3. All the conveyances were expressed to be subject to the restrictions imposed by BLC Ltd. In 1951 C Ltd conveyed lots 13 to 18 to predecessors of the defendants, and in 1954 C Ltd conveyed lots 39 and 40 to predecessors of the plaintiffs. Both conveyances were expressed to be subject to the restrictions imposed by BLC Ltd. The defendants acquired lots 13 to 18 in 1968 with the intention of erecting a petrol station thereon. In an action by the plaintiffs for an injunction restraining the defendants from building a public garage on lots 13 to 18 in breach of condition 4 of the restrictions, the defendants contended, inter alia, that the restrictions were unenforceable between the plaintiffs and themselves as successors in title to lots which had previously been in the common ownership of C Ltd.

Held – Since lots 13 to 18 and lots 39 and 40 were part of a larger estate which had been made subject to a building scheme, the fact that those lots had subsequently come into common ownership did not put an end to the restrictions so far as they affected the relations inter se of subsequent owners of the lots since there was nothing in the conveyances putting an end to the unity of seisin, or in the surrounding circumstances, to indicate that the restrictions of the scheme were no longer to apply.

Accordingly the plaintiffs were entitled to claim an injunction (see p 126 h to p 127 a and d to f, post).

Dicta of Cozens-Hardy MR in *Elliston v Reacher* [1908-10] All ER Rep at 615 and of Simonds J in *Lawrence v South County Freeholds Ltd* [1939] 2 All ER at 524 applied.

Brunner v Greenslade [1970] 3 All ER 833 approved.

Notes

For the essentials of a building scheme and its effect, see 14 Halsbury's Laws (3rd Edn) 565-568, paras 1053-1057, and for cases on covenants imposed in a building scheme, see 40 Digest (Repl) 333-336, 2728-2745.

Cases referred to in opinion

Brunner v Greenslade [1970] 3 All ER 833, [1971] 1 Ch 993, [1970] 3 WLR 891; sub nom *Brunner and Brunner v Greenslade* 22 P & CR 54, Digest (Cont Vol C) 869, 2744a.

Elliston v Reacher [1908] 2 Ch 665, [1908-10] All ER Rep 612, 78 LJCh 87, 99 LT 701, CA; affg [1908] 2 Ch 374, 77 LJCh 617, 28 (2) Digest (Repl) 1052, 715.

Knight v Simmonds [1896] 1 Ch 653, 65 LJCh 307, 74 LT 188; affd [1896] 2 Ch 294, 65 LJCh 583, 74 LT 563, CA, 28 (2) Digest (Reissue) 1033, 582.

Lawrence v South County Freeholds Ltd [1939] 2 All ER 503, [1939] Ch 656, 108 LJCh 236, 161 LT 11, 40 Digest (Repl) 354, 2844.

Appeal

Texaco Antilles Ltd appealed against the order of the Court of Appeal for the Bahama Islands (Sinclair P and Bourke JA, Archer JA dissenting) dated 3rd July 1969 affirming the judgment of the Supreme Court of the Bahama Islands, Equity Side (Cunningham Smith J) dated 20th May 1968 granting an injunction to the respondents, Dorothy Kernochan and Clifford Louis Kernochan, restraining the appellants from building or permitting to be built 'a gas station or public garage' on property belonging to the appellants in the Western District of the Island of New Providence in breach of certain restrictive covenants. The facts are set out in the opinion of the Board.

G H Newsom QC and J M Henty for the appellants.

Jeremiah Harman QC and N T Hague for the respondents.

LORD CROSS OF CHELSEA. This is an appeal, by leave of the Board, by Texaco Antilles Ltd, the defendants in the action, from a judgment of the Court of Appeal for the Bahama Islands dated 3rd July 1969 whereby that court by a majority (Sinclair P and Bourke JA, Archer JA dissenting) affirmed a judgment dated 20th May 1968 of Cunningham Smith J sitting on the Equity Side of the Supreme Court granting the respondents, the plaintiffs in the action, an injunction against the appellants. The injunction was in the following terms:

'THIS COURT DOTH ORDER that the Defendant be restrained whether by itself or its servants or agents or otherwise from doing the following acts that is to say building or permitting to be built on lots 13, 14, 15, 16, 17 and 18 of Block 3 of the Subdivision known as Westward Villas First and Second Addition Westward Villas situate in the Western District of the Island of New Providence the property of the Defendant a gas station or public garage or from carrying on or permitting to be carried on on the said lots the business of a gas station or public garage or any other trade or business in breach of the Restrictive covenants imposed on the owners or cocupiers of the said lots by the W. E. Brown Land Company Limited and referred to in a Deed of Conveyance dated the 12th day of February 1968 and made between Anjask Company Limited of the one part and the Defendant of the other part'.

The facts are as follows. In 1925 the W E Brown Land Co Ltd, which owned a tract of land on the north coast of New Providence Island to the west of the city of

Nassau, prepared and lodged in the office of the Surveyor General where it was open to inspection by members of the public a lotted plan of part of the land owned by them which was described as Westward Villas Subdivision and First and Second Addition Westward Villas. The plan showed some 500 lots divided into 18 blocks in three rows of six blocks each separated by roadways. The lots on the northern or seaward side of the two blocks in the centre of the northern row of blocks, numbered blocks 3 and 4, were marked 'commercial' and the lots on the southern side of those two blocks and also all the lots in the two adjoining blocks in the same row, numbered block 2 and 5, were marked 'apartments'. The lots in the other blocks were unmarked. The plan bore on it the following somewhat cryptic note:

'The above map is a proposed general plan of development of the land shown thereon. Until a plan covering any portion is filed for record the plan of development of said portion may be changed subject to the provisions of any contracts in writing expressly made relating thereto.'

It appears that shortly after the plan had been lodged the Land company began to sell some of the lots. The appellants' property—lots 13 to 18 in block 3—lie on the northern side of that block in the part marked 'commercial'. The original purchaser of lots 15 and 16 was one Albury to whom they were conveyed by the company by a conveyance dated 5th May 1927. The conveyance which was on a printed form contained, inter alia, the following recitals:

'WHEREAS the Company are seised in fee simple of the lot of land intended to be hereby granted and conveyed being part of a tract of land known as Westward Villas Subdivision and First and Second Addition Westward Villas, which has been laid out by the Company to be sold in lots for building purposes according to a plan prepared by W. E. Brown Civil Engineer, dated February 1925, and being No. 21C and now filed in the office of the Surveyor General of the Colony; AND WHEREAS some of the said lots have been already sold and the conveyances thereof contain covenants by the purchasers to observe conditions and restrictions similar to those set forth in the Schedule hereto; . . .'

The operative part of the conveyance so far as material ran as follows:

' . . . the Company AS BENEFICIAL OWNERS hereby grant and convey unto the Purchaser ALL those lots or parcels of land situate in the Western District of the said Island of New Providence and being designated as Lots 15 and 16 of Block 3 in the said plan, together with the right to enforce for the benefit of the said lots or parcels of land intended to be hereby granted and conveyed all covenants entered into by purchasers of other lots or portions of Westward Villas Subdivision and First and Second Addition Westward Villas aforesaid for the observance of conditions and restrictions similar to those set forth in the Schedule hereto TO HOLD the same unto and to the use of the Purchaser in fee simple.

'2. The Purchaser as to the lots or parcels of land intended to be hereby granted and conveyed (and with intent to bind all persons in whom the said lots or parcels of land shall for the time being be vested but so as not to be personally liable under this covenant after he has parted with the same) doth hereby covenant with the Company, their successors and assigns AND the Company as to those lots or portions of Westward Villas Subdivision and First and Second Addition Westward Villas aforesaid which now remain unsold (and with intent to bind all persons in whom the same shall for the time being be vested, but so as not to be liable under this covenant as to any lot or lots of land after they have parted with the same) do hereby covenant with the Purchaser his heirs and assigns that they, the Company and the Purchaser respectively and all persons deriving title under them respectively, will at all times hereafter observe in respect of the lots of land vested in them respectively all the conditions and restrictions set forth in the

Schedule hereto it being the intention of the parties hereto that the said conditions and restrictions shall be mutually enforceable by and against all owners for the time being of the said lots of land respectively.

'3. The Purchaser for himself his heirs and assigns, hereby covenants with the Company, their successors and assigns (and so that this covenant shall, so far as practicable, be enforceable by the owners occupiers and tenants for the time being of the said tract of land known as Westward Villas Subdivision and First and Second Addition Westward Villas which has been laid out as aforesaid), that all and singular the conditions and restrictions set forth in the Schedule hereto shall run with the land and shall bind the said lot or parcel of land intended to be hereby granted and conveyed and all subsequent owners, occupiers and tenants thereof; AND ALSO that he, the Purchaser and the persons deriving title under him, will henceforth and at all times hereafter observe and perform the said conditions and restrictions . . .

'5. The Company, for themselves, their successors and assigns do hereby declare that the Purchaser, his heirs, executors, administrators and assigns shall be entitled to the benefit of the similar covenants, conditions and restrictions entered into by any other purchaser or purchasers of any portion or portions of the said tract of land known as Westward Villas Subdivision and First and Second Addition Westward Villas which has been laid out as aforesaid.

'6. The Company, for themselves, their successors and assigns, do hereby declare that [which is clearly a mistake for 'covenant with'] the Purchaser, his heirs, executors, administrators and assigns as follows: That the conditions and restrictions set forth in the Schedule hereto shall be included in all conveyances of all lots in the Westward Villas Subdivision and First and Second Addition Westward Villas aforesaid except those lots in Blocks Two (2) Three (3) Four (4) and Five (5) . . .'

The schedule contained a number of restrictions. Numbers 1 to 3 related to the cost and character of the houses to be built on the lots. Number 4 read as follows:

'4. No more than one private residence and one garage or one combined garage and servants' quarters shall be built on any lot except on the lots in Block Two (2) to Five (5), inclusive. The Company reserves the right, however, to remove the restrictions from any or all of the lots of the said Blocks Two (2) to Five (5), inclusive, to allow the building upon them of hotels or apartment houses or stores for the sale of provisions or other merchandise, but said stores shall be permitted to be built only on the northern half of Blocks Three (3) and Four (4). No machine shop, public garage or manufacturing establishment will be permitted on any of the lots of Westward Villas Subdivision and First and Second Addition Westward Villas aforesaid.'

The respondents are the owners of lot 39 and part of lot 40 on the southern side of block 3 just behind the appellants' lots. The original purchaser of lots 39 and 40 was one Hilton who bought them from the Land company on 17th May 1933 by a conveyance—on a similar printed form—which was mutatis mutandis in the same terms as the conveyance of lots 15 and 16. By 3rd April 1935 the Land company had apparently sold some 150 of the lots, and on that day they conveyed the unsold lots—some 350 in number—which included lots 13, 14, 17 and 18 of Block 3—together with other property—to the Ocean and Lake View Co Ltd. That conveyance contained no reference either in the recitals or the operative part to the restrictions contained in the common form conveyances of the lots already sold. The unsold lots were conveyed by the following description:

'... AND ALSO ALL those pieces or parcels of land situate as aforesaid which said pieces or parcels of land form portions of the Subdivision known as Westward Villas the said Subdivision being a portion of the said tract of land originally

known as "Chapmans" or "Cunninghams" the said pieces or parcels of land having the positions boundaries shapes and dimensions as are shown on the diagram or plan hereto attached numbered 1 and being delineated on those parts which are coloured Pink of the said diagram or plan numbered 1.' a

The attached plan was a copy of the plan lodged by the Land Company with the Surveyor General with the lots being sold coloured pink and with the following note on it in addition to the note previously mentioned: b

'Note: The property shown upon this plot is restricted to residence except where otherwise indicated. W. E. BROWN LAND CO. LTD. by: F. W. Hazzard, President Andrew T. Healy, Secretary.'

On 27th January 1939 the Ocean company sold a number of the lots which they had bought from the Land company (including lots 14, 17 and 18 of block 3) together with other property to Bahamas Ltd. That conveyance recited that the lots being sold were 'subject to certain restrictions and conditions imposed on the said hereditaments by the W. E. Brown Land Company Limited which said restrictions and conditions still continue', and conveyed them expressly subject to such restrictions and conditions. On 12th January 1942 the Ocean company conveyed, inter alia, lot 13 of block 3 to Chapmans Ltd subject to the restrictions and conditions imposed by the Land company which were stated still to continue. Meanwhile Chapmans Ltd had acquired all the other lots now owned by the appellants and also the lots now owned by the respondents. They acquired lots 14, 17 and 18 from Bahamas Ltd, by a conveyance dated 3rd May 1939, lots 15 and 16 from Albury by a conveyance dated 24th October 1939 and lots 39 and 40 from Hilton by a conveyance dated 13th October 1939. All the said conveyances were expressed to be subject to the restrictions imposed by the Land company. Chapmans remained the owners of all the lots until 12th November 1951 when they conveyed lots 13 to 18 of block 3 (the lots now owned by the appellants) to Bahamian Industries Ltd. Their Lordships have only seen an abstract of this document. It would appear that it may have contained a recital referring to the restrictions; after describing the property sold by reference to the plan lodged with the Surveyor General the conveyance according to the abstract continued as follows: c
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'TO HOLD the same unto and to the use of the Purchasers and their assigns in fee simple subject to the said restrictions and conditions imposed on the said hereditaments by the W. E. Brown Land Company Limited which said restrictions and conditions still continue and the Purchasers with the object and intention of indemnifying the Vendors in respect of the said restrictions and conditions but not further or otherwise thereby covenanted with the Vendors that the Purchasers and their assigns would thenceforth duly observe and perform the same and at all times indemnify the Vendors their successors and assigns against all actions claims and demands whatsoever in respect thereof so far as the same affected the hereditaments thereby assured and the Purchasers thereby specifically indemnified the Vendors their successors and assigns against any and all of the covenants restrictions and conditions so imposed upon the said hereditaments and premises as aforesaid and thereby agreed that the Vendors were not obliged to perform the covenants in respect of the said hereditaments and premises entered into by The W. E. Brown Land Company Limited with the purchasers of various lots of the Westward Villas Subdivision. . . ' g
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On 19th March 1954 Chapmans conveyed a number of the lots including block 3 lots 39 and 40 to Western Estates Ltd. This conveyance also referred to and was made subject to the restrictions. The respondents purchased lot 39 and part of lot 40 on 9th April 1962 from one Livingston who was a successor in title to Western Estates Ltd and built a house on the property in which they have lived since then. The

a appellants bought lots 13 to 18 on 17th January 1968 from Anjask Ltd who were successors in title to Bahamian Industries Ltd with the intention of building on it what they describe as a 'service station' or 'gas station' which would be operated by a tenant to whom they would lease it. At the front of the premises—the side furthest away from the respondents' property—there would be a row of petrol pumps; in the centre there would be a building part of which would be used for the repair of tyres; b at the back—the side nearest to the respondents' property—there would be an open space covered by a canopy supported by columns with a hydraulic lift to raise cars for oiling and greasing. There would be room for four cars in this area, three of which would be being washed while the other was being oiled and greased. There would be no room to store cars. Car engines would not be overhauled and no repair work of a serious character would be undertaken but only minor repairs—such as the fitting of a new windscreen wiper or the replacement of broken lamps. When the respondents c learnt of the appellants' plan they issued their writ in this action on 22nd March 1968.

These being the facts their Lordships turn to consider the questions argued on the appeal. Condition 4 in the schedule to the printed form of conveyance is not well drafted but counsel for the appellants conceded, in their Lordships' view rightly, d that its meaning is clear enough. In general the estate has to be purely residential. The common vendor was however given the right to allow lots on the northern side of blocks 3 and 4 to be used for commercial purposes and to allow lots on the southern side of those blocks and the lots in blocks 2 and 5 to be used as hotels or flats. But no lot was to be used even with the permission of the common vendor as a machine shop, public garage or manufacturing establishment. The answer which the appellants e make to the respondents' claim to enforce this restriction is twofold. First they say that the building which they wish to erect if used for the purpose which they have in mind will not be a 'public garage'. Secondly they say that in any case the restrictions are not binding on them.

The 'public garage' point

f It is common ground that the question to be answered is not whether such an establishment would be called a 'public garage' today but whether it would have been so described in 1925. Further it is not suggested that the words bore a different meaning in the Bahamas at that date from the meaning which they bore in this country. Reference is made in some of the judgments below to the definition of 'garage' in the local Garages Licensing Act 1925 where the word is defined as 'any premises used for the repair of vehicles for profit' but their Lordships agree with Bourke JA that a definition for a particular statutory purpose does not really help one to determine g the ordinary meaning of the word. In 1901 the Oxford English Dictionary did not contain the word 'garage'. In the supplement issued in 1933 it is said to mean 'a building either private or public where motor vehicles are housed for storage or repairs and cleaning'. No doubt in 1933—and also in 1925—petrol and oil would h normally have been sold at garages but an establishment where the bulk of the receipts would come from the sales of petrol, where cars would not be housed for storage, and where only minor repairs would be carried out was probably unknown. Such establishments which are now very common can their Lordships think well be described as garages today. The appellants however submit that this is irrelevant. It is for the respondents to show beyond any reasonable doubt that what the appellants i propose to do will be a breach of this covenant construed in the light of conditions prevailing in 1925 and that although if the framers of the restrictions had foreseen the emergence of 'filling stations' they might well have prohibited them expressly it would be wrong to hold that a new type of business unknown in those days is caught by it. Many chemists—so the argument ran—sell cosmetics but a covenant not to carry on the business of a chemist would not be broken by the carrying on of the business of the sale of cosmetics. Similarly one cannot say that because in 1925 garages

sold petrol as a small part of their business a business which substantially consists in the sale of petrol is a garage within the meaning of that word as then used. The respondents on the other hand say that the appellants exaggerate the differences between a garage business as understood in 1925 and a modern 'filling station.' The very fact that the word 'garage' can properly be used to describe such establishments today shows that they are not a new type of business but simply a development of the old garage business. True it is that the sale of petrol looms larger than it did in the old days and that cars are not housed on the premises for storage but they are brought on to the premises for substantial periods for washing and greasing and the effecting of minor repairs. If someone had been asked in 1925 whether the premises which the appellants wish to build used for the purposes which they have in mind could fairly be called a 'public garage' he would so the respondents say have said 'Yes'. The point is not altogether easy and their Lordships feel the force of the argument that it is for the respondents to satisfy the court that the appellants will be committing a breach of the covenant but the judge of first instance and two of the three judges in the Court of Appeal had no doubt that they would be committing a breach of it. The question is not of course a pure question of fact but it is akin to a question of fact and on such a point their Lordships would not think it right to overrule the decision of both lower courts unless they were satisfied that it was wrong. They are not so satisfied in this case.

Are the restrictions binding on the appellants?

The appellants conceded that were it not for the 'unity of seisin' point to be referred to later the restrictions contained in the 'Albury' conveyance in relation to lots 15 and 16 would be binding on them. They submitted, however, that lots 13, 14, 17 and 18 were not in any case bound by the restrictions since the Ocean company when it purchased the legal estate in these lots from the Land company in 1935 had no notice of the existence of the restrictions and the fact that the Ocean company itself may subsequently have acquired notice of them or that any of their successors in title had notice of them when they bought would be irrelevant once the chain had been broken. The onus of showing that the Ocean company were purchasers for value without notice lies, of course, on the appellants. The terms of the conveyance of 27th January 1939 previously referred to show that by that date the Ocean company knew all about the restrictions and as in 1935 they were taking over from the Land company all the unsold lots and buying them by reference to a plan which bore a note referring to restrictions it is their Lordships think extremely unlikely that they only came to know of the restrictions after they had purchased. It is, however, common ground between the parties—and is indeed recorded in the judgment of Archer JA—that in the course of the hearing in the Court of Appeal the respondents admitted that the Ocean company had no actual notice of the restrictions when they bought the unsold lots in 1935. Their Lordships, therefore, must deal with this question of notice on what is to their minds a somewhat unrealistic hypothesis. But even if one assumes that the vendors did not disclose the existence of the restrictions and that the purchasers asked no questions about them and only got to know of them after they had purchased, the very facts which make it so unlikely that they did not have actual notice are sufficient to give them constructive notice. Any prudent purchaser of a number of unsold lots on a building estate who is shown a plan which marks some of the lots 'commercial' and others 'apartments' and bears a note saying that the property is restricted to residence except where otherwise indicated would ask the vendor whether the lots which had been already sold had been sold subject to or with the benefit of any restrictions. If the Ocean company had asked this question of the Land company and had been given—as one must assume for this purpose that they would have been given—a true answer they would have learnt of the restrictions subject to and with the benefit of which the lots already sold had been conveyed to the various purchasers.

- a The judges who were in the majority in the Court of Appeal held—rightly as their Lordships think—that the Ocean company had constructive notice of the restrictions but they reached this conclusion not simply because of the nature of the plan by reference to which the unsold lots were sold but partly because they thought that if the Ocean company had made proper searches under the Registration of Records Act 1928 they would have become aware of the existence of the restrictions. There is
- b no system of registration of title in the Bahamas nor is there any law similar to our Land Charges Act 1925 under which restrictive covenants affecting unregistered land are registrable and if registered affect a purchaser with notice even if he fails to search. The local Registration of Records Act simply provides that certain classes of documents including conveyances of land may be recorded in the register and (by s 10) that if anyone conveys the same property twice over to different persons the conveyance first lodged for record shall have priority even if later in date. It appears
- c that neither the Albury nor the Hilton conveyance was in fact recorded under the Act but at least one of the conveyances of lots sold before the purchase by the Ocean company—namely a conveyance of lot 31 in block 4 made on 22nd March 1928 to one Butler—has been recorded. The argument for the respondents on this aspect of the case was that it was the duty of the legal advisers of the Ocean company to search
- d the register before the purchase of the unsold lots went through to see whether any previous conveyance by the Land company of any of those lots was recorded, that for this purpose it was necessary for them to look at all recorded conveyances by the Land company, and that had they done this they would have become aware of the terms of the Butler conveyance. To this the appellants replied that even if, which they did not admit, a purchaser was under any duty to conduct such a wide ranging enquiry as was suggested, the only interest of the Ocean company in the Butler conveyance
- e would have been to see that it did not comprise any of the lots contracted to be sold to them and that they would not have been concerned with any restrictions contained in it. This point was not taken by the respondents in the court of first instance and no evidence as to the conveyancing practice in the Bahamas with regard to searches under the Act was given. In the Court of Appeal two of the judges accepted the respondents' contentions but Archer JA rejected them commenting that it would
- f be 'alarming' if the advisers of the Ocean company were under an obligation to search the register for all previous dispositions by the Land company. As their Lordships see it it is not necessary for them to express any view one way or the other on this question. Their Lordships now turn to the 'unity of seisin' point which was the main ground on which the appellants founded their contention that the restrictions were not binding on them. As stated above from 12th January 1942 until 12th November
- g 1951 Chapmans Ltd owned both the lots now owned by the respondents and also the lots now owned by the appellants. As soon as the two sets of lots came into the same hands it became impossible for any action to enforce the covenants to be brought by the owner of one set against the owner of the other since he was the same person and that fact, so the argument runs, put an end to the restrictions so far as
- h concerned the relations of the two sets of lots inter se. As a preliminary to the exploration of this point there was apparently much argument in the courts below and there was some argument before their Lordships whether there was here what is called in the books 'a building scheme' or a 'scheme of development'. In their Lordships' view there was clearly a scheme of development in this case. The Land company prepared a plan (which incidentally is described as a plan of development) dividing their property into a number of lots, and filed that
- i plan in a public office where it was open to inspection. They prepared a printed form of conveyance which recited that the estate had been laid out in lots for building purposes according to that plan and that the lots were being sold under the conveyances containing similar restrictions and in the body of the conveyance great pains were taken to do all that could legally be done to annex the benefit of the restrictions to every lot—sold or unsold—and to subject each lot—sold or unsold—to the burden of the

restrictions so that the 'local law' created by the restrictions should be mutually enforceable by and against all the owners for the time being of the lots. What was argued by the appellants on this aspect of the case was—as their Lordships understood—that the very fact that the Land company had been at pains expressly to annex the benefit of the covenant to every lot precluded the scheme from being a 'building scheme' in the legal sense. Their Lordships have no hesitation in rejecting that argument. Extraneous circumstances may indeed show the existence of a building scheme even though there is nothing on the face of the conveyances containing the covenants to indicate that they were to be mutually enforceable by the owners for the time being of a number of different lots but it certainly does not follow from that that there can be no 'building scheme' if the conveyances do so indicate. In this connection it is interesting to observe that the precedent for a scheme of development contained in the standard textbook (Preston and Newsom's *Restrictive Covenants*¹) is drafted on the same lines as the common form conveyance used by the land company in this case.

At this point it is convenient to clarify a point on which there seems to have been some misunderstanding in the Court of Appeal. A passage in the judgment of Bourke JA suggests that he understood the contention of the appellants to be that the fact that two or more lots came into the same hands would cause the whole scheme to collapse so that the owners of other lots would no longer be able to enforce the covenants. The appellants' argument as presented to the Board did not involve any such far reaching conclusion. According to it the covenant would continue to be enforceable by the owners of other lots against the owner of the lots in unity of seisin but if and when those lots came once more into different hands their respective owners—while remaining subject to and entitled to the benefit of the covenants as regards other owners—would not be entitled to enforce the covenants inter se.

Another point which should be mentioned at this stage is that it was common ground between counsel that even if the covenants would prima facie become once more enforceable inter se by the owners of lots which had previously been in unity of seisin it was competent to the parties to the transaction which put an end to the unity of seisin to provide that the restrictions should no longer apply as between themselves. That this is so is shown by *Knight v Simmonds*² and also by the part of the judgment of Parker J in *Elliston v Reacher*³ which deals with the claim of the plaintiffs other than Elliston. Their Lordships would add that the same consequence may well flow from the surrounding circumstances even if there is nothing said in the conveyance which puts an end to the unity of seisin to indicate that the restrictions are no longer to apply as between the parties to it. Suppose, for example, that the owner of two adjoining houses subject to a scheme of development which forbade user for professional purposes started to use one of the houses for professional purposes and shortly afterwards sold it to someone who to his knowledge proposed to continue such user. In such circumstances the purchaser would run the risk of actions by other owners but any claim by the vendor as owner of the adjoining house to enforce the covenant would be a derogation from his grant even though the conveyance contained no express release of the purchaser from the restrictions in the scheme so far as concerned the vendor as owner of the adjoining house.

The point of law which arises for consideration is therefore whether in a case where there is nothing in the conveyance putting an end to the unity of seisin or in the surrounding circumstances to indicate that the restrictions in the scheme are no longer to apply as between the owners of the lots previously in common ownership, the fact that they have been in common ownership puts an end to the restrictions so far as concerns the relations of subsequent owners for the time being of that part of the estate inter se so that if the common owner of those lots wished them to

1 5th Edn (1971), pp 86 et seq

2 [1896] 1 Ch 653 at 660, 661, per Romer J

3 [1908] 2 Ch 374 at 393-395

- a apply after the severance he would have to reimpose them as fresh restrictions under a sub-scheme relating to them. It would their Lordships think be somewhat unfortunate if this was the law. In the last century at all events it cannot have been unusual when an estate was laid out for development in lots subject to restrictions intended to apply to all the owners of lots for the time being inter se for several adjoining lots to be bought by one builder who built houses on them which he sold to separate purchasers subject to the provisions of the scheme. It is most unlikely in such a case that the builder and the purchasers of his houses would have wished that the restrictions while enforceable by and against the owners of more distant properties should not be enforceable by the adjoining purchasers from the builder inter se, yet if the appellants' contention is right they would not be so enforceable unless the builder as well as selling subject to the restrictions in the head scheme created a sub-scheme on similar terms in relation to his houses. Nor can their Lordships see any compelling considerations of principle leading to the conclusion for which the appellants contend. It is no doubt true that if the restrictions in question exist simply for the mutual benefit of two adjoining properties and both those properties are bought by one man the restrictions will automatically come to an end and will not revive on a subsequent severance unless the common owner then recreates them. But their Lordships cannot see that it follows from this that if a number of people agree that the area covered by all their properties shall be subject to a 'local law' the provisions of which shall be enforceable by any owner for the time being of any part against any other owner and the whole area has never at any time come into common ownership an action by one owner of a part against another owner of a part must fail if it can be shown that both parts were either at the inception of the scheme or at any time subsequently in common ownership. The view which their Lordships favour is supported by dicta of Cozens-Hardy MR in *Elliston v Reacher*¹ and of Simonds J in *Lawrence v South County Freeholds Ltd*² but at the time when this case was heard by the Court of Appeal there was no decision on the point. Subsequently, however, in *Brunner v Greenslade*³ which raised the point Megarry J followed those dicta. The appellants submitted that his decision was wrong but in their Lordships' view it was right.
- f

- Finally their Lordships must consider a point which was taken by counsel for the appellants before the Board though not taken below or mentioned in their 'case'—namely that by the conveyance dated 12th November 1951 of lots 13 to 18 of block 3 by Chapmans Ltd to Bahamian Industries Ltd the parties agreed that the lots conveyed and the lots retained by Chapmans—which, of course, included the respondents' lots—should be released from the restrictions. Had this point been taken below their Lordships would no doubt have been supplied with a full copy of this document. As it is, as has been said, they have only an abstract. But construing the abstract as best they can they are of opinion that the conveyance did not refer to or relate in any way to the lots then retained by Chapmans Ltd. The provisions on which the appellants rely appear to be directed entirely to protecting Chapmans Ltd from the consequences of any breach of the restrictions by Bahamian Industries Ltd or their successors in title as owners of the lots sold. Such provisions were, of course, unnecessary since Chapmans Ltd were not in direct contractual relations with any owners of other parts of the estate and could not be made responsible for anything done on the lots sold unless they participated in the breaches. But it is not at all unusual for conveyances to contain provisions which are unnecessary and it would be wrong to construe these provisions in an unnatural sense because read in their natural sense they are both unnecessary and repetitious. As part of his argument on this aspect of the case counsel for the appellants relied on the fact that the covenant by Bahamian
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1 [1908] 2 Ch 665 at 673, [1908-10] All ER Rep 612 at 615

2 [1939] 2 All ER 503 at 520, 524, [1939] Ch 656 at 677, 683

3 [1970] 3 All ER 833, [1971] 1 Ch 993

Industries Ltd to observe the restrictions was 'by way of indemnity only'. This, he submitted, was inconsistent with the idea that Chapmans Ltd as owners of their unsold lots could enforce the restrictions against the covenantors even though no one else was making any claims against them by reason of the breach committed by the covenantors. Their Lordships agree that there is some force in this contention. It is, however, to be remembered that if Bahamian Industries Ltd had entered into a direct covenant with their vendors to observe the restrictions even though Chapmans were in no need of an indemnity this covenant would have endured after Chapmans had parted with all their unsold lots and could have been enforced by Chapmans for reasons personal to themselves. Their Lordships cannot believe that if the parties had really intended to provide that the Land company's restrictions though still binding between the owners of Chapmans' lots and the owners of other lots were not to be binding between the owners of Chapmans' lots inter se they would have sought to achieve this result in such a roundabout and obscure fashion. In all probability their minds were not directed to the point at all.

In the result therefore their Lordships conclude that the restrictions were binding on the appellants and that the respondents were entitled to an injunction. It was, however, common ground between counsel before the Board that the injunction was granted in too wide terms. In the first place it refers not only to a public garage but also to a gas station. Their Lordships have, of course, held that the building which the appellants wish to put up and the business which would be carried on there—which the appellants themselves describe as a 'gas station'—would be within the covenant and it may well be that nothing which according to current usage could reasonably be described as a 'gas station' would be permissible. But words change their meanings in course of time and the reference to a 'gas station' which is not in the covenant should be deleted. Further the appellants are not threatening to carry on any prohibited trade or business other than that which their Lordships have held to be a 'public garage'. So the injunction should read after the words 'the property of the defendant' as follows: 'a public garage or from carrying on or permitting to be carried on on the said lots the business of a public garage in breach of the restrictive covenants etc.'

Their Lordships will humbly advise Her Majesty that subject to this amendment of the order the appeal should be dismissed and that the appellants pay to the respondents their costs of it.

Appeal dismissed; the words 'gas station or' to be omitted from the injunction, wherever they occur.

Solicitors: *Clifford-Turner & Co* (for the appellants); *Stephenson, Harwood and Tatham* (for the respondents).

S A Hatteea Esq. Barrister.

R v Sparrow

COURT OF APPEAL, CRIMINAL DIVISION

LAWTON LJ, MELFORD STEVENSON AND BRABIN JJ

18th DECEMBER 1972, 18th JANUARY 1973

Jury – Direction to jury – Comment by judge on failure of accused to give evidence – Limits of permissible comment.

S and the appellant stole a motor car. In the car they had with them a loaded gun. On their journey they were stopped by a police officer. The appellant accompanied the officer to a police car nearby. They were followed by S who shot the officer at close range. Thereupon both S and the appellant ran back to the stolen car and made their escape. The police officer subsequently died from his wounds. The appellant and S were eventually arrested. After his arrest the appellant admitted that S had told him that 'he couldn't work without a gun with him'. The appellant and S were tried on a charge of murdering the police officer. The prosecution case was that they had both planned to keep the loaded pistol handy and to use it for shooting any police officer who seemed likely to discover that they were in possession of the stolen car. At the trial the appellant declined to give evidence. Counsel for the appellant argued that the evidence given on behalf of the prosecution and S was consistent with a plan to do no more than frighten the police officer with the pistol and that on that basis the verdict against the appellant should be one of manslaughter. In his summing-up the trial judge, having referred to the presumption of innocence, commented six times on the failure of the appellant to give evidence; the concluding comment of his summing up was in the following terms: '... if there was a real belief in [the appellant's] mind that he never contemplated ... that any shooting was going to take place, is it not essential that he should go into the witness box and tell you that himself and be subject to cross-examination about it?' The appellant and S were convicted of murder and the appellant appealed.

Held – Although in his summing-up the judge was required to direct the jury that the accused was not bound to give evidence, but could sit back and see if the prosecution proved their case, he was not necessarily restricted merely to pointing out that the accused's absence from the witness box had deprived them of the opportunity of hearing his story tested in cross-examination; in some cases, the interests of justice called for a stronger comment and it was a matter for the judge's discretion to determine whether that was so. It was however essential that the judge should avoid telling the jury, expressly or impliedly, that the accused's absence from the witness box was to be equated with guilt. That was what the trial judge, in his concluding remark, had done and consequently in doing so he had overstepped the limits of justifiable comment. However, since on the facts of the case it was clear that the jury would have come to the same verdict if the judge had not said what he did, there had been no miscarriage of justice and the appeal would be dismissed (see p 135 g to j, p 136 c d and e to j and p 137 a b, post).

Dicta of Lord Russell of Killowen CJ in *R v Rhodes* [1899] 1 QB at 83, 84 and of Lord Parker CJ in *R v Bathurst* [1968] 1 All ER at 1178, 1179 applied.

Dictum of Lord Oaksey in *Waugh v R* [1950] AC at 211 explained.

Notes

For contents of summing-up in criminal cases, see 10 Halsbury's Laws (3rd Edn) 424, 425, para 780, and for cases on the subject, see 14 Digest (Repl) 341, 3313-3318.

Cases referred to in judgment

R v Adams (9th April 1957) unreported (see [1957] Crim LR 365), CCC.

R v Bathurst [1968] 1 All ER 1175, [1968] 2 QB 99, [1968] 2 WLR 1092, 52 Cr App Rep 251, CA, Digest (Cont Vol C) 183, 239bbb.

- R v Jackson* [1953] 1 All ER 872, [1953] 1 WLR 591, 117 JP 219, 37 Cr App Rep 43, CCA, 14 Digest (Repl) 537, 5217. a
- R v Mutch* [1973] 1 All ER 178, 137 JP 127, CA.
- R v Nodder* (1937) unreported.
- R v Pratt* [1971] Crim LR 234, CA.
- R v Rhodes* [1899] 1 QB 77, 68 LJQB 83, 79 LT 360, 62 JP 774, 19 Cox CC 182, CCR, 14 Digest (Repl) 341, 3314. b
- R v Voisin* [1918] 1 KB 531, [1918-19] All ER Rep 491, 87 LJBK 574, 118 LT 654, 26 Cox CC 224, 13 Cr App Rep 89, CCA, 14 Digest (Repl) 341, 3318.
- Selvey v Director of Public Prosecutions* [1968] 2 All ER 497, [1970] AC 304, [1968] 2 WLR 1494, 132 JP 430, 52 Cr App Rep 443, HL, Digest (Cont Vol C) 217, 5016b.
- Waugh v R* [1950] AC 203, PC, 15 Digest (Repl) 973, *5961.

Cases also cited c

- R v Fisher* [1964] Crim LR 150, CCA.
- R v Prater* [1960] 1 All ER 298, [1960] 2 QB 464, CCA.

Appeal

Peter George Sparrow applied for leave to appeal against his conviction for murder on 15th October 1971 at Oxford Assizes before Chapman J and a jury. The hearing of the application was treated as the hearing of the appeal. The facts are set out in the judgment of the court. d

Stephen Brown QC and *J I Murchie* for the appellant.

Brian Gibbens QC and *M T B Underhill QC* for the Crown.

Cur adv vult e

18th January. **LAWTON LJ.** The judgment which I am about to read in this case is the judgment of the court. Neither Melford Stevenson J nor Brabin J can be here today. They have, however, both seen the manuscript of my reasons for the judgment, and they have authorised me to say that they agree with it.

On 15th October 1971 at Oxford Assizes, this appellant, Peter George Sparrow, was convicted, together with one Skingle, of the murder of a police officer. He was sentenced by Chapman J to life imprisonment and, under the provisions of the Murder (Abolition of Death Penalty) Act 1965, the trial judge recommended that the minimum period which should elapse before the Secretary of State ordered his release on licence should be 25 years. Earlier in the assize both the appellant and Skingle had pleaded guilty to counts of the indictment which had charged them with unlawfully shortening the barrel of a shotgun (count 3), robbery (count 4) and burglary (counts 2 and 5). Both were sentenced as follows: on count 2, which was concerned with breaking into and stealing eight pistols and a shotgun, together with a large quantity of ammunition, from the armoury of Whitgift School, ten years; count 3, three years; count 4, ten years; and count 5, five years. All these sentences were ordered to run concurrently. f

Both the appellant and Skingle applied for leave to appeal against their convictions and sentences. Skingle abandoned his applications. When the appellant's application was called on, the court asked his counsel if the appellant would be willing to have the hearing of the application for leave to appeal against conviction treated as the hearing of the appeal. He said that he had taken instructions and that on behalf of his client he consented to this course and the hearing proceeded as an appeal. Counsel did not put forward any argument in support of the appellant's application for leave to appeal against the sentences, with the result that this application is dismissed. g

The appeal itself raised one point only. It was submitted that the verdict of murder should be quashed and a verdict of manslaughter substituted, because the trial judge h

a had commented too strongly, and in a manner which was wrong, on the appellant's election not to give evidence.

b On any view of this case, the appellant and Skingle were a couple of dangerous criminals acting together in the commission of a grave offence. On 18th June 1971, together with a third man with whom this appeal is not concerned, they broke into the armoury at Whitgift School and stole the weapons and ammunition to which
c reference has already been made. The next day all three drove to a service station at Warley in Essex, and held up at pistol point a Mr Jones and robbed him of his
d takings, some £70. They then separated, this appellant and Skingle going to Brighton together. There they shortened the barrel of the shotgun which they had stolen from Whitgift School. Between 21st and 23rd June 1971 they broke into a garage at Mayfield in Sussex and stole a 1300 Morris motor car. A few days later they set off in this motor car for the West Country. They took with them the pistols and the ammunition for them. On the evening of 27th June 1971 they were driving through Reading, with the appellant at the wheel, when they were stopped by Detective Sergeant Coward. It is important to consider what knowledge the appellant then had of his companion Skingle. After arrest he admitted in a written statement that Skingle had told him that 'he couldn't work without a gun with him' and that when they were stopped in Reading Skingle had a loaded gun handy, it being either in the glove box of the motor car or on the seat.

e What happened next is a little confused. There were a number of people nearby at the time but inevitably the recollections of those who gave evidence were based on views of the events from different angles. The following facts were, however, clearly established. The detective sergeant after speaking to the appellant, whilst he was still at the driving wheel of the stolen Morris motor car, went to the police
f motor car and the appellant went with him. On arrival at the police motor car, the officer used his radio to speak to his control point. Whilst he was doing so, the appellant stood by the front passenger door looking into the motor car. Skingle came up on the offside and fired nine shots into the officer at very close range. Thereupon both men ran back to the stolen motor car and drove off. Once in the motor car, one of them reloaded the pistol which had been used to shoot at the officer. Later that
g day they burned the motor car and when the wreck was found, there were in it six of the stolen pistols, including the one which had been used to shoot the officer. The appellant and Skingle then separated. The appellant was arrested on 29th June 1971. When interrogated he made a number of oral admissions and told some lies. He admitted that he had seen Skingle shoot the officer, and when it was pointed out to him that he had been present he said: 'Yes, I know I'm just as guilty as he is.' Later
h he made a written statement which followed largely what he had said to the interrogating officers. The line he took in this statement was that Skingle had acted on his own in shooting the officer and not pursuant to a joint enterprise. The detective sergeant died from his wounds on 23rd July 1971.

The prosecution's case at the trial against the appellant was that he and Skingle, being in fear of arrest, decided to keep a loaded pistol handy and to use it for shooting
i any police officer who seemed likely to find out who they were or that they were in possession of a stolen motor car. When the detective sergeant started to use his radio, the prosecution alleged that the time had come for them to carry out what they had planned and this they did, Skingle doing the shooting, the appellant standing by watching.

At the trial Skingle gave evidence, saying that he had not been with the appellant when the officer was shot and that the appellant had told him that he had been present with a man called Knoxie who had fired the pistol. The appellant did not give evidence nor call any witnesses. During the course of the trial, his counsel cross-examined the witnesses who had been called by the prosecution in order to try to establish that there had been no such joint enterprise to shoot as the prosecution had alleged. During the final speeches, the Attorney-General, who had led for the Crown,

did not, of course, comment on the appellant's absence from the witness box; but counsel for Skingle did, as he was entitled to do. When counsel for the appellant addressed the jury, he had to base his submissions on the evidence; and, save insofar as the appellant's oral and written statements had contained admissions, there was none other than that which had come from the prosecution's witnesses, Skingle and his witnesses. Doing the best he could with this unpromising material for a defence, he submitted that the evidence was consistent with a joint enterprise whereby Skingle was to do no more than frighten off the detective sergeant with a pistol and that, if this was a possible view of the evidence, the verdict against the appellant should be one of manslaughter, not murder.

The trial judge had a difficult task in summing up that part of the case which concerned the appellant. First, he had to try to get the jury to understand that the appellant's exculpatory statement to the police after arrest, which he had not verified in the witness box, was not evidence of the facts in it save insofar as it contained admissions. Many lawyers find difficulty in grasping this principle of the law of evidence. What juries make of it must be a matter of surmise, but the probabilities are that they make very little. Secondly, he had to do what he could to ensure that the jury did not draw any inferences from the appellant's election not to give evidence which they should not do. He tackled his problems in this way: at the beginning of his summing-up he referred to the presumption of innocence and explained that there is no obligation on an accused person to give any explanation of the matters alleged against him and that he can rest his case entirely, if he wishes, on the presumption that he is innocent unless and until he is proved guilty. He did, however, point out, as he was entitled to do, that a failure to give an explanation of matters which call for an explanation may give rise to comment. Thereafter he commented six times on the fact that the appellant had not given any evidence.

Counsel for the appellant conceded before this court that five of the comments, considered separately, could not be said to have been in any way wrong or unfair. It was submitted, however, that the last of them should not have been made and that the harm done by it was made worse by the cumulative effect of the earlier ones. This final comment was in these terms:

'Was there a common design, a common joint enterprise to resort to loaded weapons which he [the appellant] must have known were in that car in the event of their being pulled up by the police and questioned about it. All those matters, as to what is in a person's mind, can in the last resort only be properly gone into if they are tested and checked and people have an opportunity of asking questions about it. *That* [the judge indicating the witness box] is the place to give evidence about that, not to rely, if I can put it that way, on the eloquence of your counsel in building up from a statement that you have made which may be challengeable in a number of different particulars. It is very easy to take that course but you may think, members of the jury, that in a case of this kind it was really almost essential, if there was a real explanation as to his part, if there was a real belief in his mind that he never contemplated for the moment that any shooting was going to take place, is it not essential that he should go into the witness box himself and tell you that himself and be subject to cross-examination about it? Well, he did not do so and there it is.'

The Attorney-General seems to have been perturbed by this comment. At the end of the summing-up he invited the judge's attention to *R v Pratt*¹ and *R v Bathurst*² and ended his intervention by saying: 'The failure to give evidence itself is not an evidential factor.' To this the judge answered as follows:

1 [1971] Crim LR 234

2 [1968] 1 All ER 1175, [1968] 2 QB 99

a 'No, that is right and I am obliged to you, Mr Attorney. I hope I have not created that impression. It is not an evidential factor at all in arriving at a conclusion as to whether there was a joint venture or not, members of the jury, but of course if you are satisfied that there was a joint venture . . . well, the fact that he has not given evidence is a material matter which you take into account.'

b This court is unable to understand how in this context an 'evidential factor' differs from a 'material matter'. The judge's explanation to the jury, in our opinion, did nothing to cure such vice, if any, as there was in his comment which is under examination in this case.

c Counsel for the appellant submitted with his usual incisiveness that this comment would have been understood by the jury as a direction that they should assume that there was nothing in the appellant's defence and that he was guilty because he had not given evidence. In our judgment this is how the trial judge's comment would have been understood; but we think that this is how the jury would have assessed the situation if the judge's comment had not been made. In our experience of trials, juries seldom acquit persons who do not give evidence when there is a clear case for them to answer and they do not answer it. Lord Goddard CJ, recognised this, as one would have expected him to do, in his judgment in *R v Jackson*¹:

d ' . . . whatever may have been the position very soon after the Criminal Evidence Act, 1898, came into operation . . . everybody now knows that absence from the witness-box requires a very considerable amount of explanation . . . '

e The reason lies in common sense. An innocent man who is charged with a crime, or with any conduct reflecting on his reputation, can be expected to refute the allegation as soon as he can by giving his own version of what happened. Juries know this; and they must often be perplexed why they should be told by judges, as they often have been since the passing of the Criminal Evidence Act 1898, that when considering their verdict they should not take into account the fact that the accused has said not a word in his own defence even though the case against him is a strong one. The law, however, has set limits on what judges may say about an accused's election not to give evidence. Our task is to adjudge whether the trial judge went too far in this case.

f The limits have been set by the judges; and the experience of this court is that in recent years many judges at first instance have come to think that their right to comment on the absence of the accused from the witness box has been restricted by the decision of the Judicial Committee of the Privy Council in *Waugh v R*² and the judgment of this court in *R v Bathurst*³, to which I have referred above. Sometimes judges stress the right of the accused not to give evidence, as Devlin J did in *R v Adams*⁴; and what he said in that case, taken out of context, is often used by defending counsel as an excuse for not calling the accused.

g Two propositions founded on *Waugh v R*² and *R v Bathurst*³ are argued from time to time: first, that if a judge does decide to comment he should do so once only and that if he makes any more comments he is acting unfairly; and secondly, that any substantial variation from the form of comment suggested by Lord Parker CJ in *R v Bathurst*⁵ is unfair. Present day doubts about what a judge can and cannot say by way of comment have led us to examine what principles, if any, apply.

h Before the passing of the Criminal Evidence Act 1898 there was no problem of this kind because the accused had no right to give evidence. As soon as that Act came into

j

1 [1953] 37 Cr App Rep 43 at 50, cf [1953] 1 WLR 591 at 595

2 [1950] AC 203

3 [1968] 1 All ER 1175, [1968] 2 QB 99

4 (9th April 1957) unreported: see [1957] Crim LR 365

5 [1968] 1 All ER at 1178, 1179, [1968] 2 QB at 107, 108

operation, the question arose whether a judge had any right to comment on the election of the accused not to give evidence on his own behalf. It was answered in *R v Rhodes*¹ by Lord Russell of Killowen CJ in these words:

'There is nothing in the Act that takes away or even purports to take away the right of the Court to comment on the evidence in the case, and the manner in which the case has been conducted. The nature and degree of such comment must rest entirely in the discretion of the judge who tries the case; and it is impossible to lay down any rule as to the cases in which he ought or ought not to comment on the failure of the prisoner to give evidence, or as to what those comments should be. There are some cases in which it would be unwise to make any such comment at all; there are others in which it would be absolutely necessary in the interests of justice that such comments should be made. That is a question entirely for the discretion of the judge; and it is only necessary now to say that that discretion is in no way affected by the provisions of the Criminal Evidence Act, 1898.'

That clear statement of the law has never been questioned; it is the law. From 1899 until *Waugh's case*² in 1950, it was the practice of judges when justice required them to do so to comment in robust terms on an accused's absence from the witness box. An example of such comments which has been remembered at the Bar is provided by *R v Nodder*³ which was tried in 1937. The accused had been indicted for the murder of a small girl. Swift J began his summing-up by reminding the jury that they had heard evidence from several witnesses as to where the murdered girl had been up to a certain time when the accused was with her but none from the accused himself, although he alone could have given evidence of where she was afterwards. The justice of that case called for that comment; and at the time it was made, informed opinion at the Bar did not question the propriety of it. But it would be questioned today. Why?

Many would say that the change in judicial practice resulted from *Waugh v R*². There the appellant had been convicted of murder. The case against him was weak, so weak indeed that the police authorities, after they had completed their investigations, accepted his explanation as to what had happened and decided not to prosecute him. A coroner, however, ordered his prosecution. The only evidence of any strength against him was provided by a statement which the deceased had made shortly before his death. At the trial the appellant did not give evidence. In the summing-up the trial judge had commented nine times on this fact and on two of them he had made comments in much the same terms as Swift J had done in *Nodder's case*³. The Judicial Committee of the Privy Council disapproved of these comments. Lord Oaksey delivered the reasons for the Board's report. He said⁴:

'Whilst much of the summing-up is unexceptionable, there are certain parts of it which, in their Lordships' view, do constitute a grave departure from the rules that justice requires, and they are therefore of opinion that the conviction must be quashed. It is true that it is a matter for the judge's discretion whether he shall comment on the fact that a prisoner has not given evidence; but the very fact that the prosecution are not permitted to comment on that fact shows how careful a judge should be in making such comment.'

He went on to point out how weak the prosecution's case had been and continued⁶:

1 [1899] 1 QB 77 at 83, 84

2 [1950] AC 203

3 Unreported

4 [1950] AC at 211

5 [1950] AC at 212

In such a state of the evidence [the italics are ours] the judge's repeated comments on the appellant's failure to give evidence may well have led the jury to think that no innocent man could have taken such a course . . . in the present case their Lordships think that the prisoner's counsel was fully justified in not calling the prisoner, and that the judge, if he made any comment on the matter at all, ought at least to have pointed out to the jury that the prisoner was not bound to give evidence and that it was for the prosecution to make out the case beyond reasonable doubt.'

Lord Oaksey went on to find that the dying declaration had been wrongly admitted and inaccurately commented on. In our judgment *Waugh v R*¹ establishes nothing more than this: it is a wrongful exercise of judicial discretion for a judge to bolster up a weak prosecution case by making comments about the accused's failure to give evidence; and implicit in the report is the concept that failure to give evidence has no evidential value. We can find nothing in it which qualifies the statement of principle in *R v Rhodes*². Our view of *Waugh v R*¹ seems to have been that of Lord Goddard CJ in *R v Jackson*³ when he said⁴:

'I do not want in the least to be whittling down what their Lordships in the Judicial Committee said on this matter, but, of course, each case on such a point as this must depend on its own facts . . . It has to be remembered, among other things, in this case that the charge against the appellant was receiving stolen property, and if ever there is a case in which a prisoner might be expected to give evidence offering an explanation with regard to the offence of which he is alleged to be guilty, that is the case.'

In the present case, the charge was murder, and the evidence went to establish that when the detective sergeant was shot by Skingle, the appellant was standing close by and after the shooting, the pair of them drove off together and one of them within a short time in the presence of the other reloaded the pistol; and there has to be added to this submission of the appellant's counsel that the prosecution's evidence was consistent with the possibility that the joint enterprise between Skingle and the appellant was merely to frighten the police officer with a pistol (which the appellant knew was loaded) and that Skingle departed from it by pressing the trigger a number of times.

In the judgment of this court, if the trial judge had not commented in strong terms on the appellant's absence from the witness box, he would have been failing in his duty. The object of a summing-up is to help the jury and in our experience a jury is not helped by a colourless reading out of the evidence as recorded by the judge in his notebook. The judge is more than a mere referee who takes no part in the trial save to intervene when a rule of procedure or evidence is broken. He and the jury try the case together and it is his duty to give them the benefit of his knowledge of the law and to advise them in the light of his experience as to the significance of the evidence; and when an accused person elects not to give evidence, in most cases but not all, the judge should explain to the jury what the consequences of his absence from the witness box are and if, in his discretion, he thinks that he should do so more than once, he may; but he must keep in mind always his duty to be fair. A T Lawrence J pointed out in *R v Voisin*⁵: 'Comments on the evidence which are not misdirections do not by being added together constitute a misdirection.'

¹ [1950] AC 203

² [1899] 1 QB 77

³ [1953] 1 All ER 872, [1953] 1 WLR 591

⁴ (1953) 37 Cr App Rep at 50, cf [1953] 1 WLR at 594

⁵ [1918] 1 KB 531 at 536, [1918-19] All ER Rep 491 at 492

How should this be done? In *R v Bathurst*¹, Lord Parker CJ gave judges some guidance but what he said was an obiter dictum, as he appreciated it was. It was in these terms²:

‘... as is well known, the accepted form of comment is to inform the jury that, of course, the accused is not bound to give evidence, that he can sit back and see if the prosecution have proved their case, and that, while the jury have been deprived of the opportunity of hearing his story tested in cross-examination, the one thing they must not do is to assume that he is guilty because he has not gone into the witness box.’

In many cases, a direction in some such terms as these will be all that is required; but we are sure that Lord Parker CJ never intended his words of guidance to be regarded as a judicial directive to be recited to juries in every case in which an accused elects not to give evidence. What is said must depend on the facts of each case and in some cases the interests of justice call for a stronger comment. The trial judge, who has the feel of the case, is the person who must exercise his discretion in this matter to ensure that a trial is fair. A discretion is not to be fettered by laying down rules and regulations for its exercise (see *Selvey v Director of Public Prosecutions*³ per Lord Hodson). What, however, is of the greatest importance in Lord Parker CJ’s advice to judges is his reference to the need to avoid telling juries that absence from the witness box is to be equated with guilt. As we have already said this was implicit in *Waugh v R*⁴ and Lord Parker CJ’s obiter dictum on this point has been accepted by this court as the law in *R v Pratt*⁵ and *R v Mutch*⁶.

How should these principles be applied in this case? In our judgment there is nothing in the complaint about the cumulative effects of the comments, particularly as the trial judge at the beginning of his summing-up explained accurately and clearly that the appellant had a right to remain silent and to rest his defence on the presumption that he was innocent until proved guilty. The interests of justice required that the trial judge should get the jury to understand that an exculpatory statement, unverified on oath, such as the appellant had made after arrest, was not evidence save insofar as it contained admissions; and his task was not made easier by the present state of the law which required the Attorney-General to say nothing about the appellant’s silence but allowed counsel for Skingle to say what he liked and, had he been so minded, to put into words what it is almost certain the majority of the jurors were thinking, i.e. that, having regard to the strength of the evidence, if the appellant was innocent why had he not gone into the witness box to say so. Our law, however, does not require an accused to give evidence and a judge must not either by express words or impliedly give jurors to understand that a defence cannot succeed unless the accused gives evidence. Unfortunately, probably by a slip of the tongue, that is what the trial judge did when he said to the jury:

‘Is it not essential that he should go into the witness box and tell you that himself and be subject to cross-examination about it? Well he did not do so and there it is.’

He did overstep the limits of justifiable comment; he should not have said what he did.

¹ [1968] 1 All ER 1175, [1968] 2 QB 99

² [1968] 1 All ER at 1178, 1179, [1968] 2 QB at 107, 108

³ [1968] 2 All ER 497 at 514, [1970] AC 304 at 346

⁴ [1950] AC 203

⁵ [1971] Crim LR 234

⁶ [1973] 1 All ER 178

a How far did these few words in a long summing-up effect the jury's verdict? This must always be a matter of speculation; but we are confident on the facts of this case that the jury would have come to the same verdict if the trial judge had not said what he did. There has been no miscarriage of justice. The appeal will be dismissed.

b Appeal dismissed.

Solicitors: *Dennis Berry & Co*, Reading (for the appellant); *Director of Public Prosecutions*.

N P Metcalfe Esq Barrister.

c

Morrish v Henlys (Folkestone) Ltd

d NATIONAL INDUSTRIAL RELATIONS COURT

SIR HUGH GRIFFITHS, MR R BOYFIELD AND MR F J FIELDING
12th JANUARY 1973

e Industrial relations – Unfair dismissal – Fair and unfair dismissal – Determination whether dismissal fair or unfair – Disobedience – Employee refusing to be party to falsification of employers' records to cover general deficiency despite reassurance by employers' manager – Employee dismissed because of refusal – Whether employee unfairly dismissed.

f Industrial relations – Unfair industrial practice – Compensation – Assessment – Matters to which complaint relates caused or contributed to by aggrieved party – Reduction of award when just and equitable – Unfair dismissal – Reduction of award on ground that employee 'caused or contributed to' his dismissal – Employee dismissed for refusing to be a party to the falsification of employers' records – Employee refusing to accept reassurance by employers' manager – Whether just and equitable for tribunal to reduce assessment – Whether dismissal caused or contributed to by employee – Whether words 'caused or contributed' implying blameworthiness – Industrial Relations Act 1971, s 116 (3).

g An employee, who worked as a stores driver, was obliged to draw diesel oil for his vehicle from his employers' forecourt pumps as and when it was required. On three occasions the employee drew five gallons of diesel oil and recorded the fact on a monthly fuel invoice. On each occasion he subsequently discovered that the entry of five gallons had been changed to one of seven gallons. The alterations had been made by the employers' manager who explained to the employee that this had been done merely to cover a deficiency of two gallons in the forecourt pumps. The employee refused to have an entry recorded showing that an extra two gallons had been put into his vehicle when that was not the case. The employee was told that, since he would not accept the alterations to the entries, there was no alternative but to dismiss him. The employee was then dismissed. An industrial tribunal awarded the employee £100 compensation for unfair dismissal under the provisions of the Industrial Relations Act 1971, but did not indicate how the award was made up. However, the tribunal in their decision found that the employee had contributed to his loss by not accepting the manager's reassurance, but did not state the amount by which the employee's award had been reduced in consequence under s 116 (3)^a of the 1971 Act.

a Section 116 (3) is set out at p 140 b, post

The employee appealed against the amount of the award and the employers cross-appealed on the ground that the employee had not been unfairly dismissed. For the employers it was contended that the employee had acted unreasonably in not accepting the manager's instructions. a

Held – The appeal would be allowed and the cross-appeal dismissed for the following reasons— b

(i) the employee had not acted unreasonably in refusing to obey the manager's instructions; there was no implied term of the employee's contract of service that he should accept an order to connive at the falsification of his employers' records and the employee was fully entitled to refuse to be a party to such falsification (see p 139 g h, post);

(ii) the tribunal had erred in law in failing to show (a) the reasons for their award, (b) the way in which it had been made up, or (c) the amount by which the employee's compensation had been reduced (see p 139 j and p 140 g h, post); *Norton Tool Co Ltd v Tewson* [1973] 1 All ER 183 applied; c

(iii) the tribunal should have made no reduction in the employee's compensation under s 116 (3) of the 1971 Act on the ground that he had 'caused or contributed to' his unfair dismissal; even if an employee could be said to have 'caused or contributed to' his dismissal, within s 116 (3), without any fault on his part, the assessment of his loss could only be reduced where it was just and equitable to do so; since the employee had been in no way to blame for his dismissal, it followed that it could be neither just nor equitable to reduce his award (see p 140 f g, post). d

Notes

For fair and unfair dismissal, see Supplement to 38 Halsbury's Laws (3rd Edn) para 677B, 20, and for the general principles as to assessment of compensation on a complaint to the Industrial Court or an industrial tribunal, see *ibid* para 677F, 20. e

For the Industrial Relations Act 1971, s 116, see 41 Halsbury's Statutes (3rd Edn) 2143.

Case referred to in judgment

Norton Tool Co Ltd v Tewson [1973] 1 All ER 183, [1973] 1 WLR 45, [1972] ICR 501, NIRC. f

Cases and authority also cited

Initial Services Ltd v Putterill [1967] 3 All ER 145, [1968] 1 QB 396, CA.

Jacquot v Bourra (1839) 7 Dowl 348. g

Laws v London Chronicle (Indicator Newspapers) Ltd [1959] 2 All ER 285, [1959] 1 WLR 698, CA.

Pepper v Webb [1969] 2 All ER 216, [1969] 1 WLR 514, CA.

Chitty on Contracts (23rd Edn, 1968), vol 2, p 383, para 738.

Appeal and cross-appeal

This was an appeal by Leonard Gordon Morrish against the decision of an industrial tribunal (chairman S J Wilson Price Esq) sitting at Ashford, Kent, dated 6th October 1972, that the appellant be awarded the sum of £100 by way of compensation for unfair dismissal by the respondents, Henlys (Folkestone) Ltd, on the ground that the tribunal had misdirected itself in law by reducing the amount of the appellant's compensation under s 116 (3) of the Industrial Relations Act 1971. The respondents cross-appealed on the ground that the appellant had not been unfairly dismissed. The facts are set out in the judgment of the court. h

Gerald Levy for the appellant.

Mr Brian Deaville, solicitor, for the respondents. i

SIR HUGH GRIFFITHS delivered the following judgment of the court. This is an appeal from an industrial tribunal which, on 26th October 1972, awarded the appellant the sum of £100 on the ground that he had been unfairly dismissed by the respondents on 3rd August 1972. The appellant appeals against the amount of the award. The respondents cross-appeal on the ground that he was not unfairly dismissed.

The facts are in a small compass and are not in dispute. For nearly four years the appellant had been employed by the respondents as a stores driver, and he drove one vehicle all the time. It was his duty to draw diesel oil for the vehicle as and when it was required. On the morning of 2nd August 1972 he drew five gallons of diesel oil from one of his employers' forecourt pumps and recorded this on a document called a monthly fuel invoice. He entered in this document the date, the number of the vehicle, the amount and grade of fuel, and he signed it. Next day he drew another five gallons, but when he went to record it on the invoice he discovered that the figure of five gallons he had entered on the previous day had been altered to seven. He changed it back to five. Later that day he found that the entry had again been altered to seven, and again he changed it to five. Still later, he saw that a further entry had been made which showed that on 2nd August two gallons of diesel had been drawn by the vehicle he was driving on that day, and this entry was signed by the manager, Mr Wilkes. The appellant had by this time learned that the manager had made the previous alterations to his figure of five, and so, after crossing out the number of his vehicle against the entry of two gallons, he went to see the manager. A heated interview ensued. Mr Wilkes explained that there was no suggestion that the appellant had in fact drawn seven gallons and not five gallons, but that there was a deficiency of two gallons in the forecourt pumps and the alteration was merely to cover this deficiency and the forecourt staff. The appellant was not willing to have an entry recorded which showed that two gallons of diesel had been put into the vehicle which he was driving, when this was not in fact the case, even if it was against the signature of the manager. The manager told the appellant that as he would not accept his instructions to leave the record showing two gallons attributed to that vehicle, he had no alternative but to give him notice; and this he did. On these facts the tribunal held that the appellant had been unfairly dismissed.

The respondents contended that as there was evidence before the tribunal that it was a common practice to alter the records in this way to cover deficiencies, it was unreasonable of the appellant to object, and he should have accepted the manager's instructions. Accordingly his refusal to do so was an unreasonable refusal to obey an order, which justified dismissal. We cannot accept this submission. It involves the proposition that it is an implied term of an employee's contract of service that he should accept an order to connive at the falsification of one of his employers' records. The proposition only has to be stated to be seen to be untenable. In our view, the appellant was fully entitled to refuse to be in any way party to a falsification of this record and the tribunal was manifestly right in holding that he had been unfairly dismissed. The cross-appeal therefore fails.

The tribunal awarded the appellant the sum of £100, but apart from the question of his own contribution to his dismissal, with which we deal later, gave no indication in their award of the process of reasoning by which they arrived at this sum. The award was given before the decision of this court in *Norton Tool Co Ltd v Tewson*¹, in which it was held that it was the duty of the tribunal to state their reasons for an award and to show how the award was made up, and that a failure to do so would amount to an error in law entitling the appellant to have the amount remitted to the tribunal so that the award might be reconsidered and the correct principles applied. As the tribunal did not give reasons for their award or show how it was made up, this appeal must succeed on that ground alone.

But counsel for the appellant, in his very able argument, takes this further point.

¹ [1973] 1 All ER 183, [1973] 1 WLR 45

He says that the tribunal indicated that they were making some (but we do not know how much) reduction from the award pursuant to s 116 (3) of the Industrial Relations Act 1971. This subsection provides: a

‘Where the Industrial Court or industrial tribunal finds that the matters to which the complaint relates were to any extent caused or contributed to by any action of the aggrieved party in connection with those matters (whether that action constituted an unfair industrial practice on his part or not), the Court or tribunal shall reduce its assessment of his loss to such extent as, having regard to that finding, the Court or tribunal considers just and equitable.’ b

In their award, dealing with this point the tribunal said:

‘We also have to take account of the extent, if any, to which an applicant himself has contributed to the situation. We feel, though not without sympathy for the [appellant], that when the explanation was given to him, as it undoubtedly was by the manager, he ought to have been content to let the matter rest there so far as the present occasion is concerned and that in our view perhaps he pursued it rather further than was really necessary. Allowing for this fact, however, and taking account of all the circumstances, we have come to the conclusion that we should make an award of compensation of the amount set out in the beginning of this decision.’ c
d

The first point taken by counsel is that the appellant’s refusal to accept the falsification of the record, attributing fuel to the vehicle he was driving, cannot be an action that caused or contributed to his unfair dismissal within the meaning of sub-s (3), because he was justified in refusing to comply with an unreasonable order and was entirely free of fault in taking this stand. If the words ‘caused or contributed’ are to be construed in a purely historical sense, there is no doubt that the appellant’s conduct did cause or contribute to his unfair dismissal. But, as was pointed out by this court in *Norton Tool Co Ltd v Tewson*¹, this subsection is analogous to the provisions of the Law Reform (Contributory Negligence) Act 1945. This lends weight to the view that the words ‘caused or contributed’ should be regarded as incorporating some measure of blameworthiness. But whatever construction is placed on ‘caused or contributed’ it is to be observed that the assessment is only to be reduced to the extent that it is just and equitable. Thus, this point of construction is perhaps academic, for if a man is blameless it can be neither just nor equitable to reduce his award for an unfair dismissal. We cannot regard the appellant as in any way to blame for the stand he took in this case. It follows that no reduction should have been made pursuant to s 116 (3) of the 1971 Act. e
f
g

Counsel for the appellant takes the further point that where a tribunal does reduce the assessment pursuant to s 116 (3) it ought to state the amount by which it does so. This submission flows from *Norton Tool Co Ltd v Tewson*¹ and it is right. This appeal must therefore be allowed on these two further grounds.

Appeal allowed. Cross-appeal dismissed. No further order made consequent on the acceptance by the appellant of an offer of re-engagement by the respondents. h

Solicitors: Knocker, Bradley & Pain, Dover (for the appellant); Rootes & Allott, Folkestone (for the respondents).

Gordon H Scott Esq Barrister. i

¹ [1973] 1 All ER 183, [1973] 1 WLR 45

Re Crispin's Will Trusts Arkwright and others v Thurley and others

CHANCERY DIVISION AT MANCHESTER

SIR THOMAS BURGESS V-C

27th OCTOBER 1972

Will – Gift – Personal chattels – Articles of personal use – Collection of clocks – Collection inherited by testator – Collection maintained by testator but not added to – Clocks kept in locked rooms and not in working order – Whether clocks articles of personal use – Administration of Estates Act 1925, s 55 (1) (x).

In his youth the testator assisted T in building up and maintaining a collection of clocks which, on his death, T left to the testator. Although the testator thereafter kept the collection together he added very little to it doing only necessary repair or maintenance work. The clocks were not kept in continuous working order but were locked up in rooms. The testator died and, by his will, bequeathed to his sister free of duty 'all my personal chattels as defined in the Administration of Estates Act 1925'. The probate value of the clocks was some £51,000 out of a gross estate of £83,000. The issue arose whether the bequest of personal chattels included the clocks, by virtue of the definition in s 55 (1) (x)^a of the 1925 Act, or whether the clocks formed part of the residuary estate.

Held – The clocks were not 'articles of . . . personal use', and not therefore 'personal chattels', within s 55 (1) (x). The collection could not be said to have been for the testator's personal use, or a hobby; he had merely inherited somebody else's collection and kept it together during his lifetime. Accordingly the collection formed part of the residuary estate (see p 143 g h, post).

Re Reynolds' Will Trusts [1965] 3 All ER 686 and *Re Collins's Settlement Trusts* [1971] 1 All ER 283 distinguished.

Notes

For gifts of effects, personal estate etc, see 39 Halsbury's Laws (3rd Edn) 1020, 1021, 1029, 1030, paras 1539, 1547, and for cases on the subject, see 48 Digest (Repl) 567, 568, 5323-5340, 585, 586, 5523-5542, 587-592, 5551-5625.

For the Administration of Estates Act 1925, s 55, see 13 Halsbury's Statutes (3rd Edn) 87.

Cases referred to in judgment

Chaplin (dec'd), Re, Royal Bank of Scotland v Chaplin [1950] 2 All ER 155, [1950] Ch 507, 48 Digest (Repl) 613, 5878.

Collins's Settlements Trusts, Re, Donne v Hewetson [1971] 1 All ER 283, [1971] 1 WLR 37.

Hutchinson (dec'd), Re, Holt v Hutchinson [1955] 1 All ER 689, [1955] Ch 255, 24 Digest (Repl) 964, 9742.

Reynolds' Will Trusts, Re, Dove v Reynolds [1965] 3 All ER 686, [1966] 1 WLR 19, 48 Digest (Repl) 613, 5879.

Whitby, Re, Public Trustee v Whitby [1944] 1 All ER 299, [1944] Ch 210, 113 LJCh 170, 170 LT 176, CA, 48 Digest (Repl) 586, 5541.

^a Section 55, so far as material, provides: 'In this Act . . . the following expressions have the meanings hereby assigned to them respectively, that is to say:—(1) . . . (x) "Personal chattels" mean carriages, horses, stable furniture and effects (not used for business purposes), motor cars and accessories (not used for business purposes), garden effects, domestic animals, plate, plated articles, linen, china, glass, books, pictures, prints, furniture, jewellery, articles of household or personal use or ornament, musical and scientific instruments and apparatus, wines, liquors and consumable stores . . .'

Originating summons

By a summons dated 4th May 1972, Thomas James Arkwright, Alston Roy Grundy and John Geoffrey Thurley, the executors and trustees of the will of Richard Ainsworth Crispin, deceased ('the testator'), claimed against the defendants, (1) Doris May Thurley, (2) Hugo Stephan Elisabeth Pierre Crispin (a minor), and (3) Yolanda Stephanie Josephine Crispin (a minor), inter alia, the following relief: that it might be determined whether, on the true construction of the testator's will and in the events which had happened, the bequest of personal chattels as defined in the Administration of Estates Act 1925 to the first defendant included by its definition the testator's collection of clocks, maps, books and antique silver or whether, because it did not fall within the definition, the collection formed part of the testator's residuary estate. Under the provisions of the will the three defendants were equally entitled between themselves to the testator's residuary real and personal estate in equal shares. The clocks, watches, maps, books and antique silver in question had been valued for probate as follows: clocks, £51,912; watches, £2,964; maps, £475; books, £200; antiques, £1,272. The facts are set out in the judgment.

R A Sterling for the executors.

B C Maddocks for the first defendant.

J FitzHugh for the second and third defendants.

SIR THOMAS BURGESS V-C. This summons raises a question of construction under the will made on 2nd February 1970 of Richard Ainsworth Crispin who died on 20th January 1971 and whose will was proved by the plaintiffs in May 1971, the plaintiffs being the executors therein named. The will is professionally drawn. In cl 2 the testator gave pecuniary legacies, in cl 3 an annuity to his wife commencing on his death, and in cl 4 he gave to his sister free from death duties 'all my personal chattels as defined in the Administration of Estates Act 1925'. He then bequeathed his residue on the usual trusts and gave two-thirds to such of his grandchildren 'as shall be living at the date of my death and shall attain the age of eighteen years or marry under that age' and the remaining one-third to his sister who is the beneficiary of the specific chattels.

This case raises very acutely a question which has been before the court on several occasions, for it is quite common to save time and trouble for persons to make specific gifts to a beneficiary by reference to the definition of personal chattels contained in s 55 (1) (x) of the Administration of Estates Act 1925.

Counsel for the first defendant has quite rightly taken me through the reported cases, five to six in number, which deal with matters that have arisen from time to time before the courts. One finds as a result that jewellery¹, although one normally expects it to be worn, can include uncut diamonds when you look at all the circumstances. You find that a motor yacht² can be an article of personal use. I think that is common sense. You find, possibly less understandably, that a racehorse³ can be an article of personal use; the description is not limited to domestic horses. It may well be, although the report does not bring it out, that in that case the testator's pet conceit was the hope of seeing his own colours pass first before the post, although whether he ever did so we do not know; but they were held to be a gift for personal use for recreational purposes.

In *Re Reynolds' Will Trusts*⁴ and *Re Collins's Settlement Trusts*⁵ Stamp J and Brightman J respectively held that stamp collections were articles of personal use. It is fair to state as regards those decisions that the judges did apply their mind to the question whether

1 See *Re Whitby* [1944] 1 All ER 299, [1944] Ch 210

2 See *Re Chaplin (decd)* [1950] 2 All ER 155, [1950] Ch 507

3 See *Re Hutchinson (decd)* [1955] 1 All ER 689, [1955] Ch 255

4 [1965] 3 All ER 686, [1966] 1 WLR 19

5 [1971] 1 All ER 283, [1971] 1 WLR 37

a the testators themselves had acquired the collection and whether that be an important matter to take into consideration.

In the present case the story is almost like a fairy story. From his earliest youth the testator had assisted one Todhunter in the maintenance and building-up of a collection of clocks. When Mr Todhunter died in the war years he left those clocks in the collection to the testator. The collection was such that it needed larger premises to be housed in and the testator in fact acquired a larger house. The evidence shows, when an action was fought in the Bolton County Court, that for the most part these clocks were not kept in continuous working order and chiming in the house but were locked up in rooms. In some cases they had been dismantled and the testator had lost his enthusiasm to put them together again.

The startling feature of this case is that on his death out of a gross estate for probate value of £83,000, the clocks were of a value of some £51,000 and certain watches of nearly £3,000. It is not unfair to state that with very small exceptions the testator kept the collection of Mr Todhunter together as a collection and really added very little to it doing mainly necessary repair or maintenance work.

The question I have to decide is whether this collection passes under the gift in cl 4 of the will of personal chattels as defined by the 1925 Act, in effect really as being articles of personal use, or whether in effect it forms part of the residue. It is of interest that in all the reported cases a somewhat extended meaning has been given to the literal wording of s 55 (1) (x) of the 1925 Act. The question is whether this is another example where the courts should give an extended meaning or is a case not yet reported which goes the other way.

I must confess that the point is not an easy one, but when I look at the proportion in value that the clocks bear to the whole estate; when, rightly or wrongly, his first cousin says in evidence in the Bolton County Court that the testator always referred to the collection as the "Todhunter collection", it seems to me that if he had intended his sister to take the clocks under cl 4 of the will he would almost certainly have referred specifically in the bequest to the Todhunter collection. Sitting in the testator's arm-chair I am unaware, of course, of the instructions he gave to his solicitor when the will was drawn, but to give articles, i.e. the clocks and watches, of which the probable value amounts to nearly £54,000 out of a total estate of £83,000, in the wording contained in cl 4 seems to me to be improbable.

In my judgment on the facts of this case the collection cannot possibly be said to be one for his personal use or a hobby. He had inherited somebody else's collection and merely kept it together during his lifetime and the part he played in it was just on occasion dealing with any repairs the collection necessitated or required. With due deference to the able argument of counsel for the first defendant that I can bring the clock collection within the scope of cl 4 of the will, I feel unable to do so in the circumstances of this case. In my judgment the collection falls into and forms part of the residual estate.

As regards the books, antiques and maps, in my judgment those do pass fairly within the definition of personal chattels under the 1925 Act. Apparently the watches were in a different position from the clocks. Although it is not in evidence, the watches were on display in the house and in fact the greater part of that collection was built up by the testator himself and that, of course, is a different position from the clocks. As the parties are in the hands of capable legal advisers of both categories, I shall limit my declaration to the clocks only, and no more. That includes all the clocks. The mere fact that the testator bought an occasional one makes no difference. It was added to the Todhunter collection. The first defendant may have liberty to apply if further evidence produces any difficulty.

Declaration accordingly. Case adjourned for further consideration in relation to the watches.

Solicitors: Cyril Morris, Arkwright & Co, Bolton (for the executors); Russell & Russell, Bolton (for the first defendant); Addleshaws, Manchester (for the second and third defendants).

M Denise Chorlton Barrister.

The Angelia

Trade and Transport Incorporated v lino Kaiun Kaisha Ltd

QUEEN'S BENCH DIVISION

KERR J

8th, 9th, 10th, 11th, 30th MAY 1972

Shipping – Charterparty – Exception clause – Delay in loading cargo – Excepted cause in existence and ascertainable when charter made – Exception for unavoidable hindrances and causes or hindrances happening without the fault of the charterers – Delay in transporting cargo to port – Lack of transport – Consequent delay in loading frustrating charter – Lack of transport existing at time charter made – Lack of transport unknown to charterers and owners – Fact readily ascertainable by charterers on making enquiry – Whether exception clause giving protection when delay frustrating contract – Whether delay due to unavoidable hindrances in loading.

Contract – Exception clause – Fundamental breach of contract – Non-performance – Clause excepting liability of party for non-performance where due to circumstances beyond party's control – Contract imposing only qualified obligation on party – Whether non-performance capable of amounting to fundamental breach where due to circumstances beyond party's control.

Shipping – Charterparty – Frustration – Arbitration – Special case – Issue whether charter-party frustrated – Whether question of fact or question of law.

By a charterparty dated 12th May 1965 the charterers chartered a vessel from the owners for a voyage from Eilat in Israel to Japan with a cargo of 10,000 tons of phosphate rock. The cargo was to be supplied at an average rate of not less than 1,000 tons per weather working day commencing 24 hours after notice. Clause 2 of the charterparty provided that '... unavoidable hindrances in ... transporting, loading ... or receiving the Phosphate, restraints of established authorities and any other causes or hindrances happening without the fault of the [charterers], shippers or suppliers of cargo, preventing or delaying the ... supplying, loading ... or receiving of the cargo are excepted and neither [the charterers] nor shippers shall be liable for any loss or damage from any such excepted causes ...' The phosphate was being supplied by an Israeli mining company ('Chemicals') from their mines which were about 150 miles from Eilat. The only means of transporting the phosphate to Eilat was by a fleet of lorries owned by an Israeli government firm ('Tovala'). On 26th May the owners notified the charterers that the ETA at Eilat of the vessel nominated to perform under the charterparty was 12th June. On 30th May Tovala informed Chemicals that they would be unable to supply lorries to carry phosphate in large quantity during June and July. When they became aware that there would be no cargo at Eilat when the vessel arrived the charterers informed the owners of the position. On 10th June the owners determined the charter and submitted a claim for damages to arbitration. The arbitrators found as facts that the lack of transport from the mines to Eilat existed at the date when the charter was made; it was unknown to the charterers or the owners but it would have been disclosed to the charterers if they had made enquiry; if the charter had not been terminated the vessel would have reached Eilat on 15th or 16th June ready for loading and would not have completed loading until the end of August; she would not have finished discharge in Japan until about 10th October; if cargo had been available at Eilat she would have completed discharge at or about the beginning of August. The arbitrators made their award in the form of a special case in which they

- a stated: 'So far as it is a question of law we hold, and so far as of fact we find that the delay to which the [vessel] . . . would have been exposed was such as to frustrate the commercial purpose of the charter contract and to enable the Owners rightly to contend on 10th June 1965 that the same was no longer binding on them'. They held, however, that the charterers were protected from the owners' claim by cl 2 of the charter.
- b **Held** – (i) The question whether or not a frustrating time would have elapsed by the time the ship would have been loaded was an inference of law to be drawn by the court from the facts found in the special case, as was the question whether or not there had been a unilateral discharge of one party as the result of a frustrating breach by the other party (see p 154 c d, post); dictum of Devlin J in *Universal Cargo Carriers Corp v Citati* [1957] 2 All ER at 83 disapproved.
- c (ii) The delay in the supply of cargo was not sufficient to frustrate the charterparty having regard (a) to the fact that the possibility of delay in loading for a variety of causes was contemplated in cl 2 of the charterparty, and (b) to the fact that the consequences of any such delay would be purely financial for one side or the other. It followed that the owners were not entitled to treat the charter as at an end on 10th June 1965, when they purported to do so, and their claim in the arbitration failed in any event (see p 155 a b and d e, post).
- d (iii) If the delay had been such as to frustrate the charterparty, cl 2 was such as to give protection to the charterers provided that the delay was due to any of the causes referred to in cl 2 and the charterers were able to bring themselves within it on the facts; there was no basis for the argument that cl 2 only applied to cases where the delay was not such as to frustrate the charterparty (see p 155 h j and p 156 a to e, post). However,
- e in the circumstances the charterers would not have been entitled to avail themselves of cl 2 for the following reasons—
- (a) the non-availability of lorries to transport the cargo to the port during June and July was due to a state of affairs which already existed when the charter was concluded, and therefore it could and should have been ascertained by the charterers before that date; it followed that the delay was not due to any 'unavoidable hindrances in . . . loading' within cl 2 because the delay could reasonably have been avoided by the charterers making enquiries from Tovala as to the position before entering into the charterparty (see p 157 e and p 158 c and g to j, post).
- f (b) alternatively the charterers were debarred as a matter of law from relying on the non-availability of transport as an excepted cause within cl 2 since (1) it was a cause which was already in existence prior to the conclusion of the charterparty; (2)
- g it was one which was inevitably doomed to operate on the adventure, and (3) the existence of facts which showed that the excepted cause was bound to operate on the adventure should have been known to the party seeking to rely on them, i.e. the charterers, and the owners could reasonably have expected those facts to have been known to them (see p 159 f to p 160 a, post); *Steamship "Induna" Co Ltd v British Phosphate Comrs, The Loch Dee* [1949] 1 All ER 522 and *Reardon Smith Line Ltd v Ministry of Agriculture, Fisheries and Food* [1961] 2 All ER 577 distinguished.
- h (iv) On the assumption that the charterparty had not been frustrated by delay and that the charterers were entitled to avail themselves of the protection afforded by cl 2 of the charterparty, that protection could not be destroyed by the operation of the doctrine of fundamental breach for the following reasons—
- i (a) if the vessel had gone to Eilat and waited without a cargo beyond her lay time the charterers would not have been in breach of the charterparty and could not therefore have committed a fundamental breach; accordingly they could not be treated as having committed a fundamental breach by anticipating their ultimate inability to provide and load a cargo before the expiry of a time short of the frustrating time (see p 161 b c and d to h and j to p 162 b, post);
- (b) in any event the charterers' failure to load a cargo at any time could never have

been a breach, let alone a fundamental breach, if the failure to supply and load a cargo was due to unavoidable hindrances covered by cl 2 of the charterparty since the effect of cl 2 was that, under the charterparty, the charterers had not undertaken an absolute obligation to supply a cargo but merely a qualified obligation to do so unless prevented by unavoidable hindrances; a party to a contract could not commit a fundamental breach when the breach had occurred due to circumstances beyond its control and the contract provided that non-performance due to such circumstances was to be excused (see p 162 d to f and p 163 c to e, post).

Notes

For the duty to provide a cargo and exceptions in the charterparty covering delay or failure, see 35 Halsbury's Laws (3rd Edn) 377-384, paras 538-547, and for cases on the subject, see 41 Digest (Repl) 339-347, 1340-1414.

For the frustration of a contract, see 8 Halsbury's Laws (3rd Edn) 185-191, paras 320-323, and for cases on the subject, see 12 Digest (Reissue) 482-491, 3426-3465.

Cases referred to in judgment

Admiral Shipping Co Ltd v Weidner, Hopkins & Co [1916] 1 KB 429, 85 LJKB 409, 114 LT 171; *rvsd* [1917] 1 KB 222, 86 LJKB 336, 115 LT 812, 13 Asp MLC 539, 22 Com Cas 154, CA, 12 Digest (Reissue) 483, 3430.

Bank Line Ltd v Arthur Capel & Co [1919] AC 435, [1918-19] All ER Rep 504, 88 LJKB 211, 120 LT 129, 14 Asp MLC 370, HL, 12 Digest (Reissue) 490, 3461.

Brauer & Co (Great Britain) Ltd v James Clark (Brush Materials) Ltd [1952] 2 All ER 497, [1952] 2 Lloyd's Rep 147, CA, 39 Digest (Repl) 809, 2748.

Bunge y Born Ltda SA Commercial Financiera y Industrial of Buenos Aires v H A Brightman & Co [1925] AC 799, [1925] All ER Rep 607, 94 LJKB 840, 133 LT 738, 16 Asp MLC 545, 31 Com Cas 27, HL, 41 Digest (Repl) 324, 1254.

Captain George K, The, Palmco Shipping Inc v Continental Ore Corporation [1970] 2 Lloyd's Rep 21.

Comptoir Commercial Anversois and Power, Son & Co, Re, [1920] 1 KB 868, [1918-19] All ER Rep 661, 89 LJKB 849, 122 LT 567, CA, 12 Digest (Reissue) 496, 3485.

Crawford and Rowat v Wilson, Sons & Co (1896) 12 TLR 170, 1 Com Cas 277, CA, 41 Digest (Repl) 323, 1247.

Davis Contractors Ltd v Fareham Urban District Council [1956] 2 All ER 145, [1956] AC 696, [1956] 3 WLR 37, 54 LGR 289, HL, 12 Digest (Reissue) 507, 3518.

Farnworth Finance Facilities Ltd v Attridge [1970] 2 All ER 774, [1970] 1 WLR 1053, [1970] RTR 352, CA, Digest (Cont Vol C) 417, 35a.

Furness v Forwood Brothers & Co (1897) 77 LT 95, 8 Asp MLC 298, 2 Com Cas 223, 41 Digest (Repl) 346, 1386.

Gardiner v Macfarlane, M'Crindell & Co (1893) 20 R 414.

Glynn v Margetson & Co [1893] AC 351, 62 LJQB 466, 69 LT 1, 1 Asp MLC 366, HL, 17 Digest (Repl) 357, 1632.

Hain Steamship Co Ltd v Tate & Lyle Ltd [1936] 2 All ER 597, 155 LT 177, 19 Asp MLC 62, 41 Com Cas 350, 55 Lloyd LR 159, HL, 41 Digest (Repl) 385, 1737.

Harbutt's Plasticine Ltd v Wayne Tank and Pump Co Ltd [1970] 1 All ER 225, [1970] 1 QB 447, [1970] 2 WLR 198, [1970] 1 Lloyd's Rep 15, CA, Digest (Cont Vol C) 168, 3314a.

Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd [1962] 1 All ER 474, [1962] 2 QB 26, [1962] 2 WLR 474, [1961] 2 Lloyd's Rep 478, CA, 41 Digest (Repl) 363, 1553.

Internationale Guano en Superphosphaat-Werken v Robert Macandrew & Co [1909] 2 KB 360, 78 LJKB 691, 100 LT 850, 11 Asp MLC 271, 14 Com Cas 194, 41 Digest (Repl) 385, 1733.

Kenyon, Son & Craven Ltd v Baxter Hoare & Co Ltd [1971] 2 All ER 708, [1971] 1 WLR 519, [1971] 1 Lloyd's Rep 232.

Ocean Tramp Tankers Corp v V/O Sovfracht, The Eugenia [1964] 1 All ER 161, [1964] 2 QB 226, [1964] 2 WLR 114, [1963] 2 Lloyd's Rep 381, CA, Digest (Cont Vol B) 141, 3390e.

- Pinch & Simpson v Harrison, Whitfield & Co* (1948) 81 Lloyd LR 268.
- a** *Reardon Smith Line Ltd v Ministry of Agriculture, Fisheries and Food* (Vancouver Strike case) [1959] 3 All ER 434, [1960] 1 QB 439, [1959] 3 WLR 665, [1959] 2 Lloyd's Rep 229; *aff'd* [1961] 2 All ER 577, [1962] 1 QB 42, [1961] 3 WLR 110, [1961] 1 Lloyd's Rep 385, CA; *rvsd in part* [1963] 1 All ER 545, [1963] AC 691, [1963] 2 WLR 439, [1963] 1 Lloyd's Rep 12, HL, 41 Digest (Repl) 201, 325.
- b** *Richardsons and M Samuel & Co, Re* [1898] 1 QB 261, 66 LJQB 868, 77 LT 479, 8 Asp MLC 330, 3 Com Cas 79, CA, 41 Digest (Repl) 158, 47.
- Stag Line Ltd v Foscolo, Mango & Co Ltd* [1932] AC 328, [1931] All ER Rep 666, 101 LJKB 165, 146 LT 305, 18 Asp MLC 266, 37 Com Cas 54, HL, 41 Digest (Repl) 379, 1698.
- Steamship "Induna" Co Ltd v British Phosphate Comrs, The Loch Dee* [1949] 1 All ER 522, [1949] 2 KB 430, [1949] LJR 1058, 82 Lloyd LR 430, 41 Digest (Repl) 467, 2445.
- c** *Stuart v British and African Steam Navigation Co* (1875) 32 LT 257, 2 Asp MLC 497, 41 Digest (Repl) 382, 1720.
- Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1966] 2 All ER 61, [1967] 1 AC 361, [1966] 2 WLR 944, [1966] 1 Lloyd's Rep 529, HL, Digest (Cont Vol B) 652, 2413a.
- Thorley (Joseph) Ltd v Orchis Steamship Co Ltd* [1907] 1 KB 660, 76, LJKB 595, 96 LT 488, 10 Asp MLC 431, 12 Com Cas 251, CA, 41 Digest (Repl) 384, 1725.
- d** *Tsakiroglou & Co Ltd v Noble & Thorl GmbH* [1961] 2 All ER 179, [1962] AC 93, [1961] 2 WLR 633, [1961] 1 Lloyd's Rep 329, HL, 12 Digest (Reissue) 497, 3488.
- Universal Cargo Carriers Corp v Citati* [1957] 2 All ER 70, [1957] 2 QB 401, [1957] 2 WLR 713, [1957] 1 Lloyd's Rep 174; *aff'd* [1957] 3 All ER 234, [1957] 1 WLR 979, [1957] 2 Lloyd's Rep 191, CA, 12 Digest (Reissue) 419, 3057.
- e** *Woodhouse AC Israel Cocoa Ltd SA v Nigerian Produce Marketing Co Ltd* [1972] 2 All ER 271, [1972] AC 741, [1972] 2 WLR 1090, [1972] 1 Lloyd's Rep 439, HL.

Cases also cited

- Attorney-General v Gloelicht Industries Ogon* [1920] Lloyd LR 283.
- Baxter's Leather Co v Royal Mail Steam Packet Co* [1908] 2 KB 626, CA.
- f** *Chartered Mercantile Bank of India, London and China v Netherlands India Steam Navigation Co Ltd* (1883) 10 QBD 521, CA.
- Ciampa v British India Steam Navigation Co Ltd* [1915] 2 KB 774.
- Geipel v Smith* (1872) LR 7 QB 404, [1861-73] All ER Rep 861.
- Istros (Owner) v F W Dahlstroem & Co* [1931] 1 KB 247.
- Lancaster v J F Turner & Co Ltd* [1924] 2 KB 222, [1924] All ER Rep 189, CA.
- g** *Larrinaga & Co v Société Franco-Américaine des Phosphates de Médulla*, (1922) 92 LJKB 45.
- Pacific Phosphate Co Ltd v Empire Transport Co Ltd* (1920) 36 TLR 750.
- Penelope, The* [1928] P 180.
- Renton (G H) & Co Ltd v Palmyra Trading Corp of Panama* [1956] 3 All ER 957, [1957] AC 149, HL.
- Tennants (Lancashire) Ltd v C S Wilson & Co Ltd* [1917] AC 495.
- h** *Westport Coal Co v McPhail* [1898] 2 QB 130.
- Wilson (Thomas) Sons & Co v Xantho (Cargo Owners), The Xantho* (1887) 12 App Cas 503, [1886-90] All ER Rep 212, HL.

Special case

- i** By a charterparty dated 12th May 1965 Trade and Transport Incorporated, the disponent owners of the ship *Angelia*, chartered the ship to Iino Kaiun Kaisha Ltd for a voyage from Eilat to Japan. A dispute arose between the parties and the owners claimed damages against the charterers. Pursuant to cl 28 of the charter the dispute was referred to arbitration. The owners appointed Mr R A Clyde and the charterers appointed Mr John Chesterman as arbitrators. The two arbitrators appointed Mr Cedric Barclay as umpire. At the request of the parties, the arbitrators stated their

award in the form of a special case for the decision of the High Court pursuant to s 21 (1) of the Arbitration Act 1950. The facts and the special case are set out in the judgment.

A D Colman for the owners.

M P Saville for the charterers.

Cur adv vult

30th May. **KERR J** read the following judgment. This is a special case stated under s 21 (1) of the Arbitration Act 1950 by Mr R A Clyde and Mr J Chesterman as arbitrators. It arises out of a charterparty dated 12th May 1965 between the claimants as owners and the respondents as charterers of the ship 'Angelia' for a voyage from Eilat in Israel to a maximum of four ports in Japan with a cargo of 10,000 tons of phosphate rock in bulk. The charterparty is annexed to the case and provided that the cargo was to be supplied at the average rate of not less than 1,000 tons per weather working day commencing 24 hours after notice of readiness. It is necessary to set out four other clauses of the charterparty, as follows. Clause 2:

'Strikes or lockouts of workmen at the mines, on railways, at the loading or discharging port or elsewhere, war or effects of war, revolution, civil commotion, breakdown on or stoppage of railways, shortage of cars, wagons or lighters, interruption, stoppage or shortage of the fuel supply of shippers or the suppliers of cargo, now or hereafter under contract, stoppage or destruction of goods in transit, yellow fever or other epidemic, frost, fire, cyclones, tempests, inundations, earthquakes, unavoidable accidents to machinery or boilers, or other unavoidable hindrances in mining, transporting, loading, discharging or receiving the Phosphate, restraints of established authorities and any other causes or hindrances happening without the fault of the Charterer, shippers or suppliers of cargo, preventing or delaying the mining, supplying, loading, discharging or receiving of the cargo are excepted and neither Charterer nor shippers shall be liable for any loss or damage resulting from any such excepted causes and time lost by reason thereof shall not count as lay days or days on demurrage. The same shall apply to any delay caused by the ship or crew.'

Next, the first sentence of cl 11:

'In case the Vessel is longer detained by the Charterer or its agents and the detention is not excused by Clause No. 2 above or otherwise, demurrage shall be paid day by day at the rate of \$800.00 Eight Hundred Dollars (U.S.) per day for every running day so detained and proportionately for any part of a day.'

Clause 15:

'Should the Vessel not arrive at her loading port and be in all respects ready to load under this Charter on or before the 30th day of June 1965, the Charterer has the option of cancelling the same, to be declared not later than the day of Vessel's readiness to load. Lay days not to commence before June 10th 1965, unless with consent of Charterer.'

Clause 47:

'Owners and/or Master to give Charterers 15 days also 10 days notice of expected readiness to load with expected quantity of cargo to load, and also to give Charterers 5 days notice of readiness to load with exact quantity of cargo to load. Three days definite notice of vessel's arrival at Eilat will be given by the Master or by the Agents. The Master or Owners shall keep Charterers fully informed of vessel's position.'

The special case raises a number of difficult issues, and it is simpler and clearer to set it out verbatim than to paraphrase it. It provided as follows:

a '1. On 8th October 1964 a Japanese Company in Tokio, called Zenkoren, made a contract in writing with an Israeli Company in Haifa Chemicals and Phosphates Ltd. (hereinafter called "Chemicals"). The contract was for the purchase by Zenkoren from Chemicals of 50,000 tons of concentrated phosphate rock. The terms were FOB Eilat. The rock was to be shipped between 1st July 1964 and 30th June 1965. Three shipments had been effected under the contract (all from Eilat):—

b

Ship	Sailing Date	Quantity
(i) Athlos	6th February 1964	10,460 tons
(ii) Megaton	5th September 1964	10,300 tons
(iii) Eurymedon	12th March 1965	12,285 tons

c '2. From the above dates it will be seen that the contract of sale and purchase was a little late in being reduced to writing: but we were told and we accept that those three shipments were made under it: and that it was Zenkoren's intention that the fourth shipment should be made by the ANGELIA.

d '3. The Charterers entered into the charter of the ANGELIA (12th May 1965) in their own right as principals: they did so at Zenkoren's request. They had acted similarly in regard to the three ships listed in paragraph 1 hereof.

e '4. The phosphate rock came from Chemicals' mines at Oron, 240 kilometers from Eilat. The transport from Oron to Eilat was by road: there was no railway. There was neither storage space nor loading machinery at Eilat. The lorries which brought the rock to Eilat had to discharge their load into the ship and return in ballast to Oron for more. To maintain a loading rate of 1000 tons per 24 hours a fleet of over 50 thirty-ton lorries was needed.

'5. The matters set out in the preceding paragraph were at all material times known to the Charterers and unknown to the Owners.

f '6. The arrangements for the transport of the rock from Oron to Eilat (in respect of the three ships named in paragraph 1 and of the ANGELIA) and for the loading on board ship were of course left by the Charterers to Chemicals; Chemicals were Sellers (to Zenkoren) on terms FOB Eilat. In regard to the transport we accept as facts (and the matters of recollection as accurate) the following, which is an extract from a statement of the deputy export manager of Chemicals:—"As far as I remember there was an agreement, I believe in writing, with Mifalei Tovala to transport our phosphate . . . to Eilat . . . The normal procedure according to the agreement with Tovala, as far as I remember, was that due notice of, I believe, about two weeks was given to Tovala in order to give enough time to allocate sufficient trucks for this special operation. When we wanted transportation of cargo to the ports from our mines we telephoned Tovala or stated our requirements orally if we met". (The reference to "ports" is explained by the fact that Tovala also carried Chemicals' phosphate to the railhead near Beer Sheba, for on-carriage by rail to Israeli Mediterranean ports).

g '7. We had no other evidence of the terms of the agreement between Chemicals and Tovala: or of whether it was in writing or oral.

h '8. We find that at all material times: (i) Tovala was an organisation owned by the Israeli government. (ii) There were no other lorries in Israel, except Tovala's, capable of or suitable for the carriage of phosphate rock from Oron to Eilat.

i '9. On 26th May 1965 the Owners, through their agents in New York, informed the New York office of the Charterers that:—(i) the ANGELIA had been nominated "to perform under the charter-party." (ii) Her ETA at Eilat was on or about 12th June 1965. (iii) She would require approximately 10,000 tons of cargo. (iv) "This is the 15 days' notice required under the subject charter-party". The above information, which was given on the telephone, was confirmed in a letter of the same date, namely 26th May 1965.

'10. Meanwhile on 12th May (the charter date) news of the fixture was given in Tokio by the Charterers to Kinto K.K., who were the link between the Charterers and Zenkoren (the purchasers). Seven days later, on 19th May, Kinto cabled Chemicals "booked s.s. ANGELIA 10,000 loading 10/30 June . . ." At some time after receipt of this cable (the exact date is not known to us, but we think it reasonable to assume that it was not less than "about two weeks" prior to 10th June: that is the period referred to in paragraph 6) Chemicals orally informed Tovala of the need for lorries to transport the cargo from Oron to Eilat. a b

'11. On 30th May 1965 Tovala wrote to Chemicals that they were unable to supply lorries to carry phosphate in large quantity to Eilat during June and July: that from the end of July they might be able to carry about 10,000 tons per month to Eilat, "now that your bulk store and loading installation is ready to work"—in regard to which last statement we accept Chemicals' evidence that neither was. A copy of the letter is attached hereto and forms part hereof. c

'12. We find that the Charterers were aware that the shipments of phosphate were lagging far behind the rate contemplated in Zenkoren's contract of purchase, which provided that "ships shall be booked for loading at intervals of not more than three weeks allowing partial shipments"; and had chartered the ANGELIA without discussion with or special authorisation from Zenkoren, and without enquiring directly or indirectly from Chemicals or from anyone else whether cargo would be available on the due date at Eilat. d

'13. When they became aware that there would be no cargo at Eilat when the ANGELIA arrived there, the Charterers informed the Owners. For a time each party tried to hold the other to the contract, the Owners saying it was the duty of the Charterers to have got cargo ready to load on the ETA of the ship, and to maintain the loading rate thereafter; the Charterers saying that they were protected by Clause 2 of the charter, and would, if the Owners desired to maintain the fixture, hold the ship at Eilat and pay no demurrage, awaiting the belated advent of phosphate: but they urged "mutual cancellation". e

'14. On 10th June 1965 the Owners made arrangements with the registered owners of the ANGELIA to determine the time-charter (even though the notice of re-delivery which they could give was insufficient); and they cabled the Charterers accepting the cancellation of the voyage charter, under due reserve of their claim for damages. f

'15. We find the following facts:—(i) the phosphate rock was available at Oron but was held up there for lack of transport to Eilat. (ii) that lack of transport existed at the time the charter was made: and would have been disclosed to the Charterers if they had raised enquiry. It was completely unknown to the Owners, who indeed had no knowledge how or when the cargo was intended to reach Eilat. (iii) the Charterers made no protest to Tovala, and at no time urged them to reconsider their refusal, or to point out to them that the Eurymedon's cargo was brought to Eilat in time to enable her to sail from there with 12,285 tons of phosphate rock on 12th March 1965. (iv) during the summer of 1965 Chemicals were installing a new "loader" at Eilat which was going to be capable of loading a ship at the rate of 400 tons per hour, and a storehouse which was going to have a capacity of 30,000 tons; but we had no evidence when either of these facilities first came into operation. (Save that they would not have been available for a ship arriving at Eilat to load in June 1965). At Eilat in May–June 1965 there was no phosphate rock whatever. (v) the next shipment after the Eurymedon's in March 1965 was loaded by the Sapho, which sailed from Eilat, on 16th September 1965. (vi) if the charter had not been ended on 10th June 1965 and if, as is probable, Tovala had maintained their default under their agreement with Chemicals in spite of any protest that might have been made, the ANGELIA would have reached Eilat on 15th or 16th June, ready for loading, and would not have completed loading until the end of August: and if there had been four ports of discharge g h i

a (as there had been with the three previous fixtures) the ANGELIA would have finished discharge in Japan about 10th October 1965. (vii) if the cargo had been available on the ship's arrival and during her stay at Eilat she would have finished discharge at her fourth port in Japan at or about the beginning of August 1965.

b '16. So far as it is a question of law we hold and so far as of fact we find that the delay to which the ANGELIA, in the contingency numbered (vi) above, would have been exposed was such as to frustrate the commercial purpose of the charter contract and to enable the Owners rightly to contend on 10th June 1965 that the same was no longer binding on them.

'17. We award and adjudge that the Owners' claim fails and that the Owners pay their own and the Charterers' costs of the reference . . .

c '18. The questions of law are:—(i) whether the Owners were on 10th June 1965 entitled to treat the charter as at an end at the time when they purported to do so (ii) if yes, whether the Charterers are protected from the Owners' claim by Clause 2 of the charter.

'19. If the answer of the Court to 18 (i) is "No", then our Award in paragraph 17 hereof stands.

d '20. If the answer of the Court to 18 (i) is "Yes" and to 18 (ii) is "Yes", then our Award in paragraph 17 stands.

e '21. If the answer of the Court to 18 (i) is "Yes" and to 18 (ii) is "No", then our Award in paragraph 17 does not stand, but instead we award and adjudge that the Charterers do pay to the Owners the sum of American dollars Nineteen thousand One hundred and Fifty-one (\$19,151) together with interest thereon at the rate of 8% per annum from 1st October 1965 until the said capital sum shall be paid, and we further award and adjudge that the Charterers shall bear and pay their own and the Owners' costs of the reference . . .

'22. So far as it may be either relevant or a matter upon which it may be our duty to make a finding we find that at the material time the £ sterling was the equivalent of two American dollars and eighty cents.'

f There was then the letter of 30th May 1965 from Mifalei Tovala Ltd, which is annexed to the special case and which reads as follows:

g 'Gentlemen: Subject: Transport of Phosphates to Eilath from mine at "Oron". Mifalei Tovala Ltd, is a Government Company responsible for operating the Government owned fleet of heavy-duty trucks, which are used for the transport of essential commodities and of minerals in Israel. Replacements to our transport fleet have been delayed due to a strike in the supplier's plant in United States, at the turn of this year. As a result of this, we are short of some 50 heavy trucks. They are not likely to commence service before the end of July instead of March, as planned. We wish to emphasize that our existing transport fleet is heavily committed at the moment to the transport of essential commodities and food within the country. For this reason we are unable to make a special allocation of transport for the movement of Phosphate, in large quantity, to Eilat during the months of June and July. We trust, however, now that your bulk store and loading installation is ready to work in Eilath, that, from the end of July, our transport arrangements will enable you to ship quantities of Phosphates with no difficulty out of Eilath. During the first stages, we expect to be able to move 10,000 mt. per month to Eilath, increasing gradually from the about April 1966. Yours truly, MIFALEI TOVALA LIMITED M. Shaham Managing Director.'

j In order to avoid speculation about the meaning of a few passages in the award and the possible need for a remission for further findings, counsel agreed on the following additional matters. First, as regards the last part of para 2 and para 3 of the special case on the one hand, and the last part of para 12 on the other, it was agreed that these passages were to be understood in the following sense. The charterers had

Zenkoren's general authority to charter tonnage for the shipment of the remaining quantities under Zenkoren's contract of purchase with Chemicals, and it was at Zenkoren's request that, when chartering, the charterers did so as principals in their own right and not as agents for Zenkoren. However, although the charterers had Zenkoren's general authority to charter a vessel for the carriage of the next shipment under the contract, they chartered the *Angelia* without further discussion with or special authorisation from Zenkoren, and also—as stated in para 12—without enquiry from Chemicals or anyone else about the availability of cargo. It was further agreed that Chemicals had been pressing Zenkoren to ship out the remaining quantity of the contract and that the charterers were aware of this when they chartered the *Angelia*. Finally, as regards para 15 (iii), it was agreed that while, as there found, the charterers made no protest to Tovala, Chemicals did make such a protest, and also made representations to the relevant Ministry in an attempt to change the position indicated by Tovala's letter to Chemicals of 30th May which I have read.

The disputes in the arbitration are set out as follows in para B of the award:

'Dispute arose between the parties. The Owners said that the Charterers had repudiated the charter, shown an intention not to perform the same and/or were in fact unable to perform it without such delay as was unreasonable and/or would frustrate its commercial purpose and accordingly they did not present the ship at Eilat for loading but instead made terms with the registered owners of the *ANGELIA* to re-deliver her (in termination of the time-charter under which the Claimants were disponent Owners) and they claimed damages from the Charterers for loss of voyage. The Charterers denied liability.'

It is important to note how the owners ultimately put their claim, particularly in the context of paras 13 and 14 of the special case. On 10th June 1965 the owners treated the charterers as having wrongfully repudiated the charter and the vessel accordingly never presented herself for loading at Eilat. It was made clear by counsel on behalf of the owners that it was not contended that the charterers had wrongfully repudiated the charterparty by reason of their statements as summarised in para 13. They had not, in the well-known phrase, evinced an intention not to perform the charterparty. The anticipatory breach constituting a repudiation on which the owners relied was the alleged inability of the charterers to perform the charterparty by supplying a cargo for the vessel before the effluxion of a period of time sufficiently long to frustrate the charter. This type of repudiation was explained in the important decision of Devlin J in *Universal Cargo Carriers Corp'n v Citati*¹. Save in one respect, to which I refer later, there was no dispute between the parties about the correctness of the principles applied in that case, which were approved by the Court of Appeal on this aspect in *Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd*². I can therefore deal with it quite shortly. The first relevant principle is that a party to a contract (who may for convenience be called the 'innocent party') may treat the other party as having committed an anticipatory breach amounting to a repudiation if the innocent party can establish that the other party had 'become wholly and finally disabled' from performing the contract by the time when such repudiation is claimed to have occurred. In order to amount to a repudiation the period of such inability of performance must be sufficiently long to frustrate the commercial purpose of the contract, and for the sake of brevity this period may conveniently be referred to as a 'frustrating time'. Secondly, the innocent party, in seeking to establish the other party's inability to perform before the expiry of a frustrating time, is not restricted to reliance on facts then known to him or which had happened before the critical date, but is entitled to rely on all events to establish such impossibility whether occurring before or afterwards. These conclusions, after a lengthy review of the

¹ [1957] 2 All ER 70, [1957] 2 QB 401

² [1962] 1 All ER 474, [1962] 2 QB 26

a authorities, will be found summarised in the *Citati* case¹. The owners in the present case accordingly contended that on the facts found in the special case, and in particular paras 15 (vi) and (vii) and 16, they had established that on 10th June 1965 (see para 14), the charterers had become wholly and finally disabled from supplying and shipping a cargo before the expiry of a frustrating time. The charterers denied this.

b This was the first issue in the arbitration. It was also the primary issue in the sense that if the owners failed on it, then they were bound to fail altogether. Indeed, on this basis the owners would themselves have been in breach and wrongful repudiation of the charterparty by not presenting the vessel for loading. I was informed that this had been the charterers' contention before the arbitrators but that there had been no counterclaim because of a fall in the freight market.

c Before dealing with this first issue, it is convenient to mention the other two main issues. Although these only arise if the owners succeed on the first issue—as they did before the arbitrators—they were fully argued before me, as they had been before the arbitrators, and I was asked to deal with them in any event in case the matter goes further. The second issue was whether, apart from any question of fundamental breach, the charterers could bring themselves within the wording of cl 2 of the charterparty in respect of the period of delay which would have elapsed until some time in August (see para 15 (vi) of the special case) before the vessel would have begun to load if she had gone to Eilat. This issue turned on the application of cl 2 on its true construction to the facts found in the special case. Thirdly and finally, the owners contended that even if the charterers could bring themselves within cl 2 on its true construction, then the charterers would nevertheless still be unable to rely on the clause because of the application of the doctrine of fundamental breach. It is now unfortunately necessary for me to deal with all three of these issues in turn. e I propose to express my views about them as shortly as possible, but this is difficult since they are all questions of some complexity and involved the citation of some 40 authorities, although fortunately in the course of a hearing which only lasted a little over three days.

f The owners' first contention on the issue of 'frustrating time' was that para 16 of the special case contains a finding of fact which is binding on the court so that it is not open to the charterers to argue that the arbitrators' conclusion was wrong in law. The owners relied mainly on the passage in the *Citati* case² where Devlin J said:

'... while the application of the doctrine of frustration is a matter of law, the assessment of a period of delay sufficient to constitute frustration is a question of fact.'

g They also relied on the last sentence of art 453 in Carver's *Carriage by Sea*³, but it is to be noted that this uses the expression "'appears" to be a question of fact' instead of 'is'. I find it difficult to reconcile this passage in the *Citati* case² with the decision of the Court of Appeal in *Re Comptoir Commercial Anversois and Power, Son & Co*⁴ (which does not appear to have been cited to Devlin J in the *Citati* case⁵), and with the passage in the speech of Lord Radcliffe in *Davis Contractors Ltd v Fareham Urban District Council*⁶ (also apparently not cited), and above all with the later decision of the House of Lords in *Tsakiroglou & Co Ltd v Noble & Thorl GmbH*⁷ (in which the *Citati* case⁵ was evidently also not mentioned in argument). It is in my view highly artificial to divide

1 [1957] 2 All ER at 91-93, [1957] 2 QB at 446-450

2 [1957] 2 All ER at 83, [1957] 2 QB at 435

3 12th Edn (1971), vol 1 (British Shipping Laws, vol 2), p 396

4 [1920] 1 KB 868 particularly at 886, 890, 893, 898-900, [1918-19] All ER Rep 661 at 667, 668, 669, 670, 673-674

5 [1957] 2 All ER 70, [1957] 2 QB 401

6 [1956] 2 All ER 145 at 160, [1956] AC 696 at 727

7 [1961] 2 All ER 179, [1962] AC 93

para 16 of the special case in the way contended by the owners into a first part which finds as a fact that the commercial purpose of the charter contract was frustrated and then treats only the remainder of that paragraph as a conclusion of law, although this conclusion must then of course follow automatically. It is further to be noted that the present special case differs substantially from that in the *Citati* case¹ in that it states all the relevant facts from which the conclusion of frustration is drawn. There was no dispute as to this and I refer to these fact findings below. In the *Citati* case¹, on the other hand, the learned arbitrator had merely found that the charterer 'could have performed before the delay became so long as to frustrate'² but without making any finding when the vessel would have been loaded if she had waited. Since all the facts relevant to the issue of frustrating time appear in the special case, and having regard to the authorities mentioned above and also to the recent decision of the House of Lords in *Woodhouse AC Israel Cocoa Ltd SA v Nigerian Produce Marketing Co Ltd*³, it appears to me to be clear that the answer to the question whether or not a frustrating time would have elapsed by the time when the ship would have been loaded is an inference of law to be drawn by the court from the facts found in the special case.

On behalf of the owners it was then further contended that even if an issue whether or not there had been a mutual discharge of the contract by virtue of the doctrine of frustration was a question of law for the court, the issue whether or not there had been a unilateral discharge as the result of a frustrating breach by the other party was a question of fact. In my view there is no relevant distinction between these issues and they are both issues of law.

Assuming that the issue as to frustrating time is a question of law on which it is open to the court to review the arbitrators' conclusion in para 16, the next question is then whether or not there was such frustration on the facts found. It was common ground between the parties that the only possible frustrating cause was the extent of the delay, as found in para 15 (vi) and (vii), and the financial consequences of that delay for one or other of the parties depending on the applicability or otherwise of cl 2 of the charterparty. It was not suggested that the ship or cargo or the common adventure were in any way endangered by the postponement of the commencement of loading and the ultimate delay in the completion of the voyage, or that this delay in itself involved any consequences other than financial ones for one or other of the parties. On this basis the question whether or not the delay was sufficient to frustrate is largely one of first impression, although bearing in mind well-known authorities such as the definition of a frustrating delay suggested by Bailhache J in *Admiral Shipping Co Ltd v Weidner, Hopkins & Co*⁴, the remarks of Lord Sumner in *Bank Line Ltd v Arthur Capel & Co*⁵, the decision of the House of Lords in *Davis v Fareham*⁶ and the more recent decision of the Court of Appeal in a similar context in *Ocean Tramp Tankers Corp v V/O Sovfracht, The Eugenia*⁷. Applying the tests there laid down, I am bound to say that I feel no doubt but that the delay in the present case was not sufficient to frustrate the charterparty. The owners strongly relied on the extent of the total increase in time between the vessel's arrival at Eilat on 15th or 16th June and on the one hand the completion of discharge in Japan at or about the beginning of August and, on the other hand, about 10th October, due to the non-availability of lorries to transport the cargo to Eilat. They pointed out that the latter period was 117 days whereas the former was only 47 days, an increase in the total time of 150 per cent. They compared this difference with the substantially smaller differences in

1 [1957] 2 All ER 70, [1957] 2 QB 401

2 [1957] 2 QB at 410, cf [1957] 2 All ER at 77

3 [1972] 2 All ER 271, [1972] AC 741

4 [1916] 1 KB 429 at 436, 437

5 [1919] AC 435 at 457-460, [1918-19] All ER Rep 504 at 515-517

6 [1956] 2 All ER 145, [1956] AC 696

7 [1964] 1 All ER 161, [1964] 2 QB 226

a *The Eugenia*¹ and *The Captain George K²*. But in my view this approach is too superficial in the light of the authorities. The important considerations are that (a) the possibility of delay in loading due to a large variety of potential causes was contemplated by cl 2 of the charter, and (b) the consequences of any such delay, as already mentioned, were purely financial for one side or the other. Counsel for the charterers rightly pointed out that it is settled law that an increase in cost, unless quite extraordinary, cannot produce frustration: see for instance *Davis v Fareham*³ and *Brauer & Co (Great Britain) Ltd v James Clark (Brush Materials) Ltd*⁴. If the vessel in the present case had presented herself at Eilat on 15th or 16th June, had then given the necessary notice of readiness under cl 10, and had then waited for ten weather working days of lay time, the owners would either have received demurrage at the rate of \$800 per day until the completion of loading at about the end of August if the charterers could not bring themselves within cl 2, or alternatively would have had to bear the running expenses of the ship over this period if cl 2 protected the charterers. There might of course be other consequences for the owners, such as dislocation of the vessel's next fixture, but this would again only be a further normal financial consequence of delay. It is also to be noted that the arbitrators do not rely on anything other than delay in para 16 in support of their conclusion of frustration. Looking at the position as a whole in the light of the authorities, and even after giving due weight to the commercial view formed by these two very experienced arbitrators, I feel bound to hold that their conclusion in this paragraph is erroneous in law.

d

If I am correct in this view, then it follows that the question of law in para 18 (i) must be answered in the negative and that the owners were not entitled to treat the charter as at an end on 10th June 1965, when they purported to do so. It then also follows that their claim in the arbitration must fail in any event. However, this conclusion may be wrong, and I was in any event asked to deal with the other two issues which arise in relation to the question of law in para 18 (ii), namely the true construction and effect of cl 2 and the issues as to fundamental breach.

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Counsel for the owners put forward two main contentions about the construction and effect of cl 2. The first was that its operation could in any event not extend up to the expiry of what I have referred to as a frustrating time. The second was that the charterers could not bring themselves within the terms of the clause on the facts found in the special case and the inferences to be drawn therefrom. I therefore consider these in turn. In both connections, and indeed also in the context of the argument on fundamental breach, one must of course assume that, contrary to the view which I have expressed, the owners can establish that the charterers committed an anticipatory breach amounting to a repudiation on 10th June 1965, in that they were then wholly and finally disabled from supplying and loading a cargo before delay frustrated the venture.

f

Counsel for the owners contended, first, that the failure to supply and load a cargo before the expiry of a frustrating time was in the nature of a fundamental breach but that, quite apart from the question whether cl 2 could survive this alleged fundamental breach (which I discuss as the third issue below), there is the well-established principle that exception clauses must be construed restrictively. He therefore said that cl 2 must be construed so that it does not exempt the charterers from liability if they do not supply a cargo at all, or (which comes to the same thing in law) before the expiry of a frustrating time. He submitted on the analogy of some of the well-known deviation cases such as *Glynn v Margetson & Co*⁵ that the effect of the clause must be cut down to avoid this result. He said that 'delay' could mean 'delay for a reasonable time' without continuing until the expiry of a frustrating time, and that

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1 [1964] 1 All ER 161, [1964] 2 QB 266

2 [1970] 2 Lloyd's Rep 21

3 [1956] 2 All ER 145, [1956] AC 696

4 [1952] 2 All ER 497

5 [1893] AC 351

'prevent' could refer to a temporary prevention on some days during the loading period or to the inability to load a full and complete cargo, but could not excuse the failure to load any cargo. I cannot accept these contentions. 'Delay' and 'prevent' no doubt overlap in the context of this clause, and it is also true that 'delay' may have been intended to cover a slowing down in the rate of loading whereas 'prevent' was intended to cover periods when there was no loading at all. But in my view this makes no difference. If and so long as there is delay or prevention affecting the supply or loading of cargo due to any of the causes referred to in the clause and subject to giving to the clause its proper construction in relation to the facts found, the clause protects the charterers. If the period of delay and/or prevention due to the excepted causes thereupon continues so long that the commercial purpose of the charter becomes frustrated, then the parties are discharged and the owners are free to sail away. Alternatively, if the charterers cannot bring themselves within the terms of the clause during this period of delay, then they are treated as having repudiated the charter on the expiry of the same frustrating time. The period of time is the same whether there be frustration which results in a mutual discharge or because of a unilateral breach in the sense of the *Citati* case¹: see per Diplock J in *Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd*² which was quoted with approval by Widgery LJ in *Harbutt's Plasticine Ltd v Wayne Tank and Pump Co Ltd*³. But I cannot see how the operation of cl 2 can in either event somehow be arrested at a certain point of time short of the expiry of a frustrating time. The clause operates so long as there is delay and/or prevention by the excepted causes, and in my view until the expiry of a frustrating time if nothing intervenes. I cannot see how the wording or effect of the clause can somehow be cut down to avoid this result. The contention that the total non-provision of any cargo may be a fundamental breach so as to disentitle the charterers from relying on the clause at all falls to be considered in relation to the third issue discussed below, but I cannot see how any similar conclusion can be reached purely on the construction of the clause. I therefore now turn to the question whether the charterers can bring themselves within the clause on the facts.

There was an issue whether 'shortage of cars, wagons . . .' etc included the unavailability of lorries or only of railway cars or wagons. In my view these words cover lorries, but this is of no importance because the charterers rightly conceded that the whole of the clause was what they described as a 'no fault' provision. This follows from the general law concerning specific exceptions such as 'shortage of cars, wagons . . .', and is also expressly made clear by the references in the clause to 'other unavoidable hindrances in . . . transporting, loading . . .' and 'other causes or hindrances happening without the fault of the Charterer, shippers or suppliers of cargo, preventing or delaying the . . . supplying, loading . . . of the cargo'. For the sake of brevity, I will therefore refer to what the charterers have to establish as 'unavoidable hindrances' (or words to this effect) due to the enumerated causes.

The owners' next contention was that the failure of Tovala to provide the lorries in itself precluded the charterers from bringing themselves within the clause. Judging by the use of the word 'default' in para 15 (vi) read with the terms of the contract between Tovala and Chemicals set out in para 6 of the special case, it would seem that the arbitrators regarded Tovala's refusal as a breach of that contract. But in my view this makes no difference; nor does it make any difference whether or not the non-availability of lorries was an unavoidable hindrance so far as Tovala were concerned. If the hindrance was unavoidable by the charterers, shippers and suppliers (i.e. in this case the respondents and Chemicals), then the charterers are within the clause. An act or omission by someone in the position of a transport contractor, such as Tovala, with whom the charterers or shippers had to contract in order to enable

1 [1957] 2 All ER 70, [1957] 2 QB 401

2 [1962] 1 All ER at 485, [1962] 2 QB at 65, 66

3 [1970] 1 All ER 225 at 239, [1970] 1 QB 447 at 472

a the cargo to be brought to the port or to be loaded, is in my view within the clause if the state of affairs resulting from such act or omission could not have been avoided by the charterer or shipper. The owners' contention that the enumerated causes must have been altogether beyond human avoidance is much too wide. The authorities in which similar clauses have been considered support this conclusion: cf *Gardiner v Macfarlane*, *M'Crindell & Co*¹, *Crawford and Rowat v Wilson, Sons & Co*², *Re Richardsons and M Samuel & Co*³, and *Reardon Smith Line Ltd v Ministry of Agriculture, Fisheries and Food* (the *Vancouver Strike* case⁴).

b The owners' next contention was that the charterers should have protested against Tovala's refusal and sought to enforce performance of Tovala's contract: see para 15 (iii) of the special case. In my view this contention equally fails, for two reasons. First, as already mentioned, it was agreed that this finding did not imply that in fact c no protests had been made, but, on the contrary, that protests had been made by Chemicals as well as representations to the appropriate Ministry. The charterers are in my view entitled to rely on these since it was Chemicals and not they who were the appropriate party for taking these steps. Secondly, I think that it is reasonably to be inferred from the special case, and indeed from the steps which it was agreed had been taken by Chemicals, that such protests would have made no difference. The effect of Tovala's action was therefore unavoidable even if the charterers had protested. d In this connection I follow what was said by Sellers LJ and by Willmer LJ in the *Vancouver Strike* case⁵.

e I turn finally to the owners' main contention that the charterers cannot bring themselves within cl 2 because the non-availability of lorries to transport the cargo to the port during June and July was due to a state of affairs which already existed when the charter was concluded on 12th May and which could and should have been ascertained by the charterers or Chemicals before this date. In this connection the owners relied on the last part of para 12 and on para 15 (ii) of the special case, as well as on Tovala's letter of 30th May, which show that the position relating to lorries had existed and had been known to Tovala for some months before the charter was concluded. The charterers challenged this line of argument entirely in law and partly on the facts. f I found this the most difficult point in the case, but in my view the owners' contentions are correct, although they involve some extension of the authorities in which similar questions have arisen.

Turning first to the facts, the question is whether the charterers, or Chemicals as suppliers and shippers of the cargo, should reasonably have taken steps to ascertain and therefore discovered the non-availability of lorries before the charter was concluded. Counsel for the charterers strongly challenged this. He pointed out that g Chemicals had a contract with Tovala under which only about two weeks' notice had to be given. He also pointed out that the arrangement with Tovala had apparently worked satisfactorily in relation to last three shipments and drew attention to the last part of para 15 (iii) of the special case. He also relied on the fact already mentioned that Tovala's failure to supply the lorries on being given the required notice (see para 10) was evidently a breach of contract. Finally, he pointed out that it was only h on 26th May that the charterers were informed of the vessel's ETA at Eilat on or about 12th June: see para 9 (ii).

Although I see the force of these arguments, I do not think that they are sufficient to excuse the charterers and Chemicals. It is incontestable that the charterparty was concluded on 12th May with lay and cancelling dates of 10th/30th June and without

j 1 [1893] 20 R 414, in particular at 427

2 [1896] 1 Com Cas 277, 12 TLR 170

3 [1898] 1 QB 261

4 [1899] 3 All ER 434, [1960] 1 QB 439, in particular at 458 and 497 respectively, and in the Court of Appeal [1961] 2 All ER 577 at 590, 608, 622, [1962] 1 QB 42 at 75, 76, 104, 127

5 [1961] 2 All ER at 590 and 608, [1962] 1 QB at 75, 76 and 104

anyone on the charterers' side having troubled to enquire from Tovala whether the necessary lorries would then be available. It is also incontestable on the basis of Tovala's letter of 30th May that any enquiry from about March onwards or, even earlier, would have led to the discovery that no cargo could be brought down to Eilat for loading during any part of this period. Finally, it must in my view be borne in mind that the transportation of this cargo was clearly a major operation, since it is found in para 4 that 'To maintain a loading rate of 1,000 tons per 24 hours a fleet of over 50 thirty-ton lorries was needed'. Since there was no other means of getting the cargo to Eilat, it was in my view an ordinary business precaution for the charterers, or Chemicals as suppliers and shippers, to have made some enquiries from Tovala about the availability of lorries in June before committing the owners to the terms of this charterparty. At any rate, if they did not do so, then it would be a strange result if the charterers could nevertheless rely on cl 2. It seems to me that anyone on the owners' side concluding a charterparty containing cl 2 could reasonably expect that an enquiry of this nature would have been made or that cl 2 would not protect the charterers against liability to pay demurrage in the absence of any such enquiry having been made.

The charterers contended, however, that any analysis on these lines must fail in law because they had in fact been ignorant of the position when the charter was concluded. They said that the law in this connection was settled by the decision of Sellers J in *Steamship "Induna" Co Ltd v British Phosphate Comrs, The Loch Dee*¹ and by what was said about this point in the *Vancouver Strike* case by McNair J² and in the Court of Appeal by Sellers LJ³ and by Willmer LJ⁴.

In my view there is neither principle nor authority which compels the acceptance of the charterers' arguments, and if my analysis of the factual position is correct, then common sense points the other way. I think that the owners are correct for either or both of two reasons.

First, if one asks oneself whether there was any reasonable means of avoiding the situation whereby the *Angelia* would (if she had gone there) have had to wait for cargo at Eilat from about 15th or 16th June until some time in August (see para 15 (vi) of the special case) then the answer, on my analysis of what would have been reasonable, is that this could have been avoided by a simple enquiry from Tovala before concluding the charter. The charterers' answer to this was of course that such an enquiry would not have avoided the shortage of lorries, but would merely have resulted in the charter not being concluded or only being concluded for a later loading period. They therefore said that this line of argument was not permissible or that it was irrelevant because nothing could be taken into consideration which could and reasonably should have been done before the conclusion of the charter. But in my view this is too narrow a construction of cl 2. I think that one should ask oneself, as mentioned above, whether or not it could reasonably have been avoided by the charterers and Chemicals that (on the assumption that she would have gone there) the *Angelia* would have waited in vain for cargo during June and July. On my analysis of the facts, the answer is 'Yes' if a simple enquiry had been made from Tovala before concluding the charter. On this basis I do not consider that the charterers can validly contend that the delay and/or prevention of loading of the vessel during June and July was due to an unavoidable hindrance affecting them and the suppliers and shippers of the cargo within cl 2.

I also consider that the same common sense result can be reached by a slight but to my mind perfectly logical extension of the authorities referred to above. Both of them decide that there is no absolute rule precluding a party from successfully contending that performance of a contract had been prevented or hindered by a cause

1 [1949] 1 All ER 522, [1949] 2 KB 430

2 [1959] 3 All ER at 455-457, [1960] 1 QB at 493-496

3 [1961] 2 All ER at 594, 595, [1962] 1 QB at 82, 83

4 [1961] 2 All ER at 610, [1962] 1 QB at 107, 108

a which already existed at the time when the contract was made. In the *Induna* case¹ Sellers J held that the charterers could rely on a pre-existing cause as a defence to a claim for demurrage—an order of the Waterfront Control Commission of New Zealand prohibiting night work—because it was unknown to both parties. He said that if both parties or one of them had known of the pre-existing cause, other considerations would arise. It does not appear to have been argued that the charterers could reasonably have been expected to have known about or
b discovered the existence of this order, and such a line of argument would no doubt have been difficult on the facts. In the *Vancouver Strike* case² the charterers were held entitled to rely on the strike as an unavoidable hindrance, even though, to the knowledge of the parties, the strike was already in existence when the relevant charter-party was concluded. But when one considers the judgments, it seems to me that the reasons for that decision were clearly distinguishable from facts such as those of
c the present case. It is sufficient to mention three of the main distinctions. First, the events in that case, in particular the strike relied on as an excepted peril quite apart from the general exception of 'other hindrance . . . beyond the Charterers' control', were in fact entirely outside the control or direct concern of either party. The existence of the strike was a matter of public knowledge and its effect and likely duration the subject of public speculation. In the present case the non-availability of
d lorries was not a publicly known fact and one which only the charterers or shippers could be expected and concerned to know. Secondly, all the judgments emphasised³ in different ways the fact, and the authorities bearing on the point, that strikes are always subject to unexpected termination and that no one can tell how long a strike may last. In the present case the period of delay was finite and could have been ascertained by a simple enquiry. Thirdly, the judgments emphasise in different degrees the consideration that if parties enter into a contract containing an exception of strikes
e against the background of a known and important strike affecting an important port within the range of optional ports, then one would expect them to provide expressly that the exception should not apply to this strike if this had been their intention. This reasoning has no relevance to the present facts. I therefore do not consider that the decision in the *Vancouver Strike* case² assists the charterers on this point. But the
f analysis of Willmer LJ⁴ helpfully summarises the position in which a party would in his view be debarred from relying on a pre-existing cause as an excepted peril so as to excuse performance of a contractual obligation. He said that this would be so (a) if the pre-existing cause was inevitably doomed to operate on the adventure, and (b) if the existence of facts which show that the excepted cause is bound to operate is known to the parties at the time of the contract, or at least to the party
g who seeks to rely on the exception. In my view it is a perfectly reasonable and common sense extension of the latter requirement (although it did not arise in the *Induna*¹ and *Vancouver Strike* cases²) to add words such as 'or if the existence of such facts should reasonably have been known to the party seeking to rely on them and would have been expected by the other party to the contract to be so known'. In the present case, as already mentioned, I think that the owners could
h reasonably expect, on concluding a charterparty containing cl 2, that the charterers and/or shippers would have made whatever enquiries were reasonable before concluding the charter in order to ascertain and ensure that in the absence of unforeseen events a cargo would be available for the vessel at Eilat for loading before her cancelling date or shortly thereafter. Since the charterers and shippers failed to take what

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1 [1949] 1 All ER 522, [1949] 2 KB 430

2 [1959] 3 All ER 434, [1960] 1 QB 439; *on appeal* CA [1961] 2 All ER 577, [1962] 1 QB 42

3 See [1959] 3 All ER 446, 447, [1960] 1 QB at 479-481, per McNair J; [1961] 2 All ER at 593, 594, [1962] 1 QB at 80, 81, per Sellers LJ; and [1961] 2 All ER at 610, 612, 613, [1962] 1 QB at 108, 110-112, per Willmer LJ

4 [1961] 2 All ER at 610, [1962] 1 QB at 107, 108

I regard as a reasonable business precaution to this effect, I find nothing in any authority or in common sense which leads to the conclusion that they can nevertheless rely on cl 2. a

It follows that if I had answered the question in para 18 (i) of the special case in the affirmative, then I would have answered the question in para 18 (ii) 'No'. The arbitrators clearly formed the contrary view and concluded that the charterers were protected by cl 2. It was faintly argued on behalf of the charterers that this implied some finding of fact which was binding on the court. In my view this is untenable. All the relevant facts having been found, the effect of cl 2 was rightly left as a question of law to the court. Further, I think that the arbitrators' conclusion is perfectly explicable on the basis that they took a contrary view of the law. They were clearly critical of the charterers' conduct prior to the conclusion of the charter (see the last part of para 12 and para 15 (ii)), but may well have taken the view that these were not matters which they could properly take into consideration. In my view these matters can and should be taken into consideration. b

I now turn finally to the third issue of fundamental breach. I do so reluctantly because I am reluctant to prolong an already long judgment and because the issue of fundamental breach only arises if (contrary to the view of the arbitrators) I am right on the first issue and (again contrary to their view) I am wrong on the second issue. I do so for the reasons explained above, quite apart from the obvious possibility that I may be wrong on both points. c

For the purpose of the issue of fundamental breach it must therefore be assumed that (a) the charterers had on 10th June 1965 become wholly and finally disabled from loading a cargo before the expiry of what I have called for brevity a frustrating time, and (b) the charterers could nevertheless rely on cl 2 as a defence to the owners' claim. If the latter assumption is not made, then the doctrine of fundamental breach is obviously irrelevant in any event, since the owners only seek to invoke it in order to destroy the protection of cl 2 in favour of the charterers. d

On these assumptions the owners' contention was succinct but far-reaching, if not revolutionary, against the background of our law of contract as I think it has so far been understood. It was based on what they claimed was the combined effect of the judgments of the House of Lords in *Hain Steamship Co Ltd v Tate & Lyle Ltd*¹, *Suisse Atlantique Société D'Armement Maritime SA v NV Rotterdamsche Kolen Centrale*², and the recent decisions of the Court of Appeal in *Harbutt's Plasticine Ltd v Wayne Tank and Pump Co Ltd*³ and *Farnworth Finance Facilities Ltd v Attryde*⁴, both of which were considered by Donaldson J in *Kenyon, Son & Craven Ltd v Baxter Hoare & Co Ltd*⁵. Their contention can be summarised as follows. The provision of a cargo is a fundamental obligation, if not the most fundamental obligation, of charterers under a contract of affreightment such as this. As shown by the decision of the House of Lords in *Bunge y Born Ltda SA Commercial Financiera y Industrial of Buenos Aires v H A Brightman & Co*⁶ it is also prima facie an absolute obligation. In the event of a breach of this fundamental obligation by the charterers, the owners have an election whether to treat such breach as a repudiation or not. In the present case the owners treated such breach as a repudiation on 10th June. Having done so, it follows from the foregoing authorities that the contract was then terminated and that the charterers could in any event not rely on any exception clause. It was therefore immaterial to consider whether or not they could rely on cl 2, because the owners had elected to treat the charterers as being in fundamental breach and repudiation of their contract. The applicability e

1 [1936] 2 All ER 597

2 [1966] 2 All ER 61, [1967] 1 AC 361

3 [1970] 1 All ER 225, [1970] 1 QB 447

4 [1970] 2 All ER 774, [1970] 1 WLR 1053

5 [1971] 2 All ER 708, [1971] 1 WLR 519

6 [1925] AC 799, [1925] All ER Rep 607

a and effect of cl 2 would only be material if, notwithstanding the charterers' fundamental breach, the owners had done something to affirm the contract so as to keep it alive, such as the presentation of the vessel at Eilat, in which event they would have kept alive the whole of the contract including whatever might be the effect of cl 2. But since the owners did not take this course any consideration of cl 2 is irrelevant.

b In my view these contentions are quite untenable for at least two reasons, one of which turns on the peculiar circumstances of this case and the other on general principle. First, I consider that the doctrine of fundamental breach cannot be invoked so as to destroy the effect of cl 2 in the case of an anticipatory breach such as the assumed repudiatory breach in the present case. Secondly, I do not consider that the failure to supply and load a cargo under the terms of this charterparty could ever constitute a fundamental breach if, as must be assumed for the purpose of this argument, the charterers are prima facie entitled to rely on cl 2 on the basis of unavoidable hindrances having caused such failure. I must briefly deal with these points in turn.

c As to the first point, I do not begin to understand on what basis the owners can validly contend, even assuming everything else in their favour, that the charterers had by 10th June 1965 committed a fundamental breach which somehow entitled the owners to disregard cl 2 altogether. The owners claim this because they treated the charterers as having repudiated the charter on this date. But on 10th June the charterers had not committed any actual (as opposed to 'anticipatory') breach whatever. Further, as shown by *Universal Cargo Carriers Corp'n v Citati*¹, the failure to provide a cargo and the failure to complete the loading before the expiry of the lay days are merely breaches of warranty and not breaches of condition. It follows that even if the Angelia had gone to Eilat and been kept waiting without a cargo beyond her lay time for some period short of a frustrating time, the charterers would not have been in breach of condition. A repudiatory breach would then only have arisen on the expiry of a frustrating time. What the owners did in the present case (as they were entitled to do on the basis of the analysis in the *Citati* case² if—contrary to my view—the cargo would not have been loaded before the expiry of a frustrating time) was to anticipate the charterers' ultimate inability to provide and load a cargo before such time. They treated the charterers as having committed a so-called anticipatory breach, without having to wait for an actual breach constituting a repudiation. But they cannot on this basis in my view be in a better position than if the ship had gone to Eilat and waited; nor can they deprive the charterers of defences which would in that event have been available to the charterers. In particular, the owners cannot thereby deprive the charterers of whatever protection cl 2 may afford them. The owners seek to overcome this point by claiming that they treated the charterers' conduct as a repudiation on 10th June and by relying on the authorities on fundamental breach cited above. But how can the owners say that the charterers cannot rely on cl 2 because they must be treated as having committed a fundamental breach on that date when they had not yet committed any actual breach whatever, and when for a period of weeks after the ship's arrival at Eilat they would only have been in breach of warranty?

h In my view the whole of this argument on behalf of the owners fails in limine. The charterers are entitled to have the position analysed as though the Angelia had gone to Eilat, had then been kept waiting beyond the lay days and finally until the expiry of a frustrating time. Since the whole of the argument based on fundamental breach is irrelevant and not required by the owners except for the purpose of trying to destroy the effect of cl 2, one must accordingly assume that on the facts throughout this waiting period the charterers would have been protected by cl 2. On this analysis, they would therefore not even have been in breach of warranty during the waiting

i ¹ [1957] 2 All ER at 79, 80, [1957] 2 QB at 428-430

² [1957] 2 All ER 70, [1957] 2 QB 401

period. Admittedly, there would then have come a point of time at which the adventure would have been frustrated by delay. At this point the owners would have been entitled to sail away. But how could the owners then say that at that point the charterers committed a fundamental breach when up to that point they had been protected by cl 2 against having committed any breach at all? The owners contended that this result somehow followed from *Joseph Thorley Ltd v Orchis Steamship Co Ltd*¹ and *Internationale Guano en Superphosphaat-Werken v Robert Macandrew & Co*², because it was there held that a deviation at a later stage of the voyage dis-entitles a carrier from relying on an exception clause in respect of damage sustained by the cargo at an earlier stage, and that in this way a deviation operates retrospectively. They accordingly appeared to contend that on this basis the owners could retrospectively deprive the charterers of the protection of cl 2 if the charterers failed to provide a cargo on the expiry of a frustrating time. I cannot see that these cases have anything to do with the present position.

The second reason against the owners' contention is that, quite apart from the foregoing considerations relating to the question of anticipatory breach, the doctrine of fundamental breach has in my view nothing to do with a case such as the present. The charterers' failure to load a cargo at any time could never be a breach, let alone a fundamental breach, if the failure to supply and load a cargo was due to unavoidable hindrances covered by cl 2 of the charterparty. It is an impossible argument, and one which puts the cart before the horse, for the owners to say that the supply of a cargo is *prima facie* an absolute and fundamental obligation and that they can therefore get rid of cl 2 by treating the charterers' failure to supply a cargo as a repudiatory and fundamental breach, although cl 2 expressly provides that such failure shall be no breach at all if due to unavoidable hindrances. The correct analysis is that under this charterparty the charterers did not undertake an absolute obligation to supply a cargo, but merely the qualified obligation to do so unless prevented by any unavailability hindrances within cl 2. The owners deny this by saying that cl 2 is in the nature of an exception clause which can be destroyed by treating the charterers as having repudiated the contract, and that it is not a provision which qualifies the charterers' obligation. They contend that cl 2 falls within the second category of the categories of protective conditions listed by Donaldson J in *Kenyon, Son & Craven Ltd v Baxter Hoare & Co Ltd*³ where he said:

'Protective conditions are of three distinct types: first, those which limit or reduce what would otherwise be the defendants' duty; second, those which exclude the defendants' liability for breach of specified aspects of that duty, and third, those which limit the extent to which the defendant is bound to indemnify the plaintiff in respect of the consequences of breaches of that duty.'

In my view the effect of cl 2 is for present purposes properly to be regarded as falling within the first of these categories. This appears also to have been the view of Lord Esher MR in *Crawford and Rowat v Wilson, Sons & Co*⁴ where he said in relation to a similar clause:

'The charter is, therefore, not an absolute contract that the defendants shall take delivery of the cargo whatever may happen. It is a contract that they will do so unless prevented by "unavoidable hindrances."'

Similarly, in the *Vancouver Strike* case⁵ McNair J said:

'I have already observed earlier that the exception clause in these charterparties . . . quite clearly applies to delay in the supply or bringing down of the cargo

¹ [1907] 1 KB 660

² [1909] 2 KB 360

³ [1971] 2 All ER at 711, [1971] 1 WLR at 522

⁴ (1896) 1 Com Cas at 280, 12 TLR at 171

⁵ [1959] 3 All ER at 468, [1960] 1 QB at 514

a and that properly construed the clause qualifies the absolute obligation to supply cargo for loading on the vessel's arrival to the extent of the delay arising from the excepted causes. See the observation of DENNING, J., in *Pinch & Simpson v. Harrison, Whitfield & Co*¹.

It is true that on the basis of its wording cl 2 is properly to be described as an exception clause. This has the consequence, for instance, that it must be strictly construed.

b But its effect in the context of the question whether or not it can be relied on as an answer to an allegation of fundamental breach cannot depend on the semantic question whether the charterparty says: 'I promise to supply a cargo but shall not be liable if I do not do so due to unavoidable hindrances', or 'I promise to supply a cargo unless prevented by unavoidable hindrances'. The conclusive answer to any allegation of fundamental breach is in my view that the relevant provision (whether

c it be properly described as an exception clause or as a qualification of the obligation) excuses non-performance due to circumstances which are not the fault of the charterers. No case was cited on either side, nor have I been able to find one, in which it has ever been suggested that a party can commit a fundamental breach when the breach occurs due to circumstances beyond its control and the contract provides that non-performance due to such circumstances is to be excused. It seems to me that by

d its nature the doctrine cannot have any application in such a case. The authorities in which the doctrine has been applied by holding that a party cannot rely on a protective provision in the contract, have all been cases, so far as I can find, where the breach was due to a cause within the control of the defendant, so that, to put it colloquially, the breach was in some way the fault of the defendant; and where the nature of the fault, or the seriousness of its consequences, or both, were such that the relevant

e protective provision in the contract could on its true construction not be relied on to excuse the breach. This applies, for instance, to all the illustrations of fundamental breaches listed in the speech of Lord Wilberforce in the *Suisse Atlantique* case². See also the textbooks, e.g. Anson's *Law of Contract*³ and Chitty on Contracts⁴.

f A party cannot possibly be treated as having repudiated a contract when it seeks to perform it, is prevented from doing so by circumstances beyond its control, and where the contract provides that in such circumstances it shall not be liable for non-performance.

Whilst the point seems to me to be too clear for argument, it was also rightly pointed out on behalf of the charterers that the owners' contention is in principle inconsistent with the doctrine of frustration and also with vast numbers of decided cases of settled authority. The essence of the doctrine of frustration is that a party will be excused

g from performance, even of absolute and fundamental obligations, if such performance has been rendered impossible by circumstances beyond its control. Since this is the position at common law without any exception clause, how can it be said that an express exception of unavoidable hindrances can be ousted by treating the non-performance as a fundamental breach? the owners answered this by saying that the exception would still operate if, but only if, the occurrence of the excepted causes would in

h any event have resulted in frustration. But in my view this is not a tenable proposition. It cannot be said that if the excepted cause would in any event have produced frustration then there is no breach at all, but if it falls short of this, although still occurring without fault on the part of the defendant, then it can be disregarded by saying that the defendant has committed a fundamental breach.

j As pointed out by counsel for the charterers, apart from the innumerable cases in which exception clauses have been upheld to protect parties against non-performance

1 (1948) 81 Lloyd LR 268 at 273

2 [1966] 2 All ER at 92-94, [1967] 1 AC at 433-435

3 23rd Edn (1968), pp 157-167

4 23rd Edn (1969), vol 1, paras 740-747

in circumstances outside their control without any reference to the doctrine of frustration, such as *Furness v Forwood Brothers & Co*¹ in circumstances analogous to those of the present case, there are also many cases of the highest authority in which exception clauses have been held to protect a party even where a breach of what would otherwise have been an absolute and fundamental obligation occurred as the result of a cause which he could have avoided, such as negligence in many cases and in some cases even a deliberate act. An instance of the latter category are cases in which carriers commit what would have otherwise have been a wrongful deviation, but may be exonerated by the presence of an exception clause which permits a measure of deviation, and where the deviation is within a reasonable construction of such clause: see for instance the approach of the House of Lords to the deviation clause in *Stag Line Ltd v Foscolo, Mango & Co Ltd*² and *Stuart v British and African Steam Navigation Co*³. In the latter case Pollock B excused the deviation because of the presence of a deviation clause in picturesque words which he said were 'sometimes used by the older writers on the subject' and which are worth recalling even though they do not in my view touch the present case: 'You must not so construe a condition as to make it eat up the contract . . .'

It seems to me that the foregoing points are so clear that there is no need to prolong this judgment by referring to the other numerous authorities and illustrations which were relied on by the charterers. I do not accept the owners' argument that all this jurisprudence can be dismissed simply by saying that the doctrine of fundamental breach has been developed in a new and radical manner since the decision of the House of Lords in *Hain Steamship Co Ltd v Tate & Lyle Ltd*⁴. It is also unnecessary for me to deal with various submissions which were made about the effect in the present context and generally of *Harbutt's case*⁵ and *Farnworth's case*⁶, in particular the difficulty about the interaction between on the one hand an exception clause which is prima facie effective to protect even against liability for a particular kind of fundamental breach, and on the other hand the termination of the contract as the result of the consequences of such fundamental breach or because the innocent party does not thereafter affirm the contract but treats it as so terminated. It would in any event be preferable that this difficult question and other implications of these decisions should be considered and the law rationalised at a higher level.

I therefore consider that if (contrary to the views expressed above) the owners are right on the first issue of frustrating time but the charterers are right on the second issue in that they are protected by cl 2, then the owners' claim would still fail because they could not destroy the effect of cl 2 by reference to the doctrine of fundamental breach.

In the upshot I accordingly answer the question of law in para 18 (1) 'No', so that the question in para 18 (ii) does not arise. If I am wrong about the answer to para 18 (i) then I would answer para 18 (ii) also with 'No'.

It follows that in my judgment the award in para 17 stands and that the owners' claim fails, although for different reasons. In these circumstances, it is unnecessary for me to deal with the questions about the currency in which the award has been expressed and the fact that interest has been awarded beyond the date of the award, which arise under paras 21 and 22. These points will be open to both parties if the case goes further.

Award upheld. Appeal dismissed.

Solicitors: *William A Crump & Son* (for the owners); *Hill, Dickinson & Co* (for the charterers).

E H Hunter Esq Barrister.

¹ (1897) 77 LT 95

² [1932] AC 328, [1931] All ER Rep 666

³ (1875) 32 LT 257

⁴ [1936] 2 All ER 597

⁵ [1970] 1 All ER 225, [1970] 1 QB 447

⁶ [1970] 2 All ER 774, [1970] 1 WLR 1053

Frank Bucknell & Son Ltd v London Borough of Croydon

QUEEN'S BENCH DIVISION

KILNER BROWN J

12th, 15th JANUARY 1973

Licensing – Late night refreshment house – Meaning – House, room, shop or building kept open for public refreshment, resort and entertainment – Building inside which public may congregate for refreshment – Stall from which refreshment could only be served to members of public standing outside – Stall a permanent structure – Whether a refreshment house – Late Night Refreshment Houses Act 1969, s 1.

On the true construction of s 1^a of the Late Night Refreshment Houses Act 1969 a 'late night refreshment house' is a house, room, shop or building kept open so that people may congregate inside for the purposes of 'refreshment, resort and entertainment'. Accordingly a stall from which refreshment can only be served through a hatch to members of the public standing outside is not a 'late night refreshment house' within s 1 of the 1969 Act even though the stall is a permanent structure and is open between the hours of 10.00 p m and 5.00 a m (see p 167 c to e, post).

Rogers v Dodd [1968] 2 All ER 22 applied.

e Notes

For refreshment house licences, see 22 Halsbury's Laws (3rd Edn) 622, 623, para 1303, and for cases on the subject, see 30 Digest (Repl) 11, 12, 40-44.

For the Late Night Refreshment Houses Act 1969, s 1, see 17 Halsbury's Statutes (3rd Edn) 1266.

f Cases referred to in judgment

Cooper v Dickenson (1877) The Times, 23rd January, 30 Digest (Repl) 12, 43.

Howes v Inland Revenue Board (1876) 1 Ex D 385, 46 LJMC 15, 41 JP 423, CA, 30 Digest (Repl) 11, 42.

Rogers v Dodd [1968] 2 All ER 22, [1968] 1 WLR 548, 66 LGR 401, DC, Digest (Cont Vol C) 382, 540b.

Taylor v Oram (1862) 1 H & C 370, 31 LJMC 252, 7 LT 68, 27 JP 8, 158 ER 928, 30 Digest (Repl) 11, 40.

Action

The plaintiffs, Frank Bucknell & Son Ltd, brought an action against the defendants, the London Borough of Croydon, claiming a declaration that the plaintiffs' stall at 759A London Road, Thornton Heath, in the London Borough of Croydon, was not a 'late night refreshment house' for the purposes of the Late Night Refreshment Houses Act 1969 and that the plaintiffs were therefore entitled to carry on their business of selling coffee and light refreshments from the stall between the hours of 8.00 p m and 5.00 a m without requiring a licence under the 1969 Act and notwithstanding the conditions contained in a licence dated 28th October 1969 issued by the defendants to the plaintiffs. The facts are set out in the judgment.

J S Colyer for the plaintiffs.

Alan Fletcher for the defendants.

KILNER BROWN J. In this case the plaintiffs seek a declaration that a certain structure at 759A London Road, Thornton Heath, is not a late night refreshment house and is therefore not subject to licence. The plaintiffs were possessed of a coffee stall which once had been on wheels. No doubt in order to defeat the byelaws controlling the use of stalls and barrows this particular stall was divested of its wheels and cemented on to the forecourt and provided with a fixed outer covering of breeze blocks. It became a structure and a fixture singularly lacking in aesthetic appeal. The question I have to decide is whether its subsequent user converted it into a refreshment house. a

The evidence is that persons, of whom the majority were lorry drivers, were supplied at night time with coffee in plastic cups which were served through a hatch in the side of this structure. Once served, some stood on the forecourt under a collapsible canopy; others stood on the forecourt away from the canopy; others stood on the pavement. No one could be served inside the structure and no chairs, benches or tables were provided outside. Nor were there any chains or posts or delineating boundary marks. Once served a customer could go and stand anywhere. The actual site of the structure was transferred to the plaintiffs on 2nd April 1968, together with a right for customers to pass over and along and stand on the forecourt adjoining the structure. The area subject to this right included the portion underneath the extended canopy. No part of the forecourt was in the ownership of the plaintiffs. b

Section 1 of the Late Night Refreshment Houses Act 1969 reads as follows. c

‘For the purposes of this Act, a “late night refreshment house” is a house, room, shop or building kept open for public refreshment, resort and entertainment at any time between the hours of 10 o’clock at night and 5 o’clock of the following morning, other than a house, room, shop or building which is licensed for the sale of beer, cider, wine or spirits.’ d

It is believed that no one has before now been called on to interpret this particular section, but the Act is one of a series of Acts governing the control of refreshment houses and relies on terminology which has from time to time been examined by the courts. e

There are two limbs to the plaintiffs’ argument. First, it is said the structure and the forecourt must be regarded as separate places and neither is a shop or building and, second, the structure and forecourt do not comprise a shop or building kept open for public refreshment, resort and entertainment. To come within the Act the place must be kept open for all three categories. f

Much diligent research has led to the citation of several authorities. To begin with I would respectfully agree with Pollock CB who observed in *Taylor v Oram*¹ that the more usual meaning of ‘entertainment’ contemplates diversion and amusement. However, in *Howes v Inland Revenue Board*² the Court of Appeal held that consumption of ginger beer while standing up came within the definition of ‘refreshment and entertainment’. The word ‘entertainment’ has ever since been construed as an enlargement of refreshment rather than diversion or amusement. In 1877 the Court of Common Pleas finally extinguished the argument that ‘entertainment’ involved diversion when seated. In *Cooper v Dickenson*³ the court held that the partaking of a pennyworth of tripe served on a plate with no knife and fork and consumed from a standing position was both refreshment and entertainment. Thus authority plainly requires me to say that drinking coffee from plastic cups while standing on a forecourt is both refreshment and entertainment. g

But does this practice mean that the plaintiffs have been keeping a late night refreshment house? Even without the assistance of authority I would be minded to h

¹ (1862) 1 H & C 370 at 376

² (1876) 1 Ex D 385

³ (1877) The Times, 23rd January i

a say that it is straining the words of the Act to say that a person is keeping a refreshment house when he hands out cups of coffee through a hatch for customers to go away and drink on a forecourt. The defendants are particularly anxious that I should not find a distinction between the general area and the small space under the canopy, for such a finding could easily be defeated by taking the canopy away. The most helpful and recent case which is of assistance is *Rogers v Dodd*¹. On a case stated to the Divisional Court the facts were that a coffee bar was closed, as it was required to be, at 1.00 a.m. Later, in the early hours of the morning, customers were served with comestibles known as hot dogs through an open window. Lord Parker CJ giving the judgment of the court said that the sole question to be decided was whether or not the words 'kept open' in the Brighton Corporation Act 1966, which controlled the use of coffee bars, meant keeping open the premises to allow the public to resort therein for the purpose of refreshment. The court held that the mischief aimed at was the congregation of the public in premises and was not intended to deal with the serving of members of the public in the street. The case was not brought under the Act which I have to consider and is not directly in point, but it is very near it and, in my judgment, the reasoning is analogous. Counsel for the defendants seeks to distinguish it on the facts. In this case, it is argued, customers were not on the road, they were on a forecourt the use of which was permitted by a grant to the owners of the structure. By way of analogy, it is argued that licensed premises may include a forecourt or yard or lawn where customers may take their refreshment. Nevertheless, in my judgment, there is a great deal of difference between the term 'licensed premises' and the term 'refreshment house'. A house or room connotes an area enclosed by walls. Such a connotation cannot apply to the facts of this case.

e If the matter is of importance to local authorities throughout the country the mischief could easily be cured by a simple amendment to the Act by the legislature to bring the definition more in keeping with modern times.

In my judgment, therefore, the plaintiffs are entitled to the declaration which they seek.

f Declaration granted.

Solicitors: *Gosling & Co*, agents for *Rawlence & Son*, Croydon (for the plaintiffs); *Sharpe, Pritchard & Co*, agents for *Alan Blakemore*, Croydon (for the defendants).

E H Hunter Esq Barrister.

g
1 [1968] 2 All ER 22, [1968] 1 WLR 548

Re Icknield Development Ltd

CHANCERY DIVISION

PLOWMAN J

12th, 13th MARCH 1973

Company – Winding-up – Liquidator – Appointment – Qualifications and experience – Discretion of court – Practice.

The Companies Court ought not to appoint a junior and inexperienced accountant to the office of liquidator of a company. The established practice of the court not to appoint an accountant of less than five years' standing is, therefore, a good working rule but the court retains an overall discretion and may appoint an accountant who has the necessary experience even though he acquired his professional qualification less than five years previously (see p 169 j and p 170 a b, post).

Notes

For the appointment of a liquidator, see 6 Halsbury's Laws (3rd Edn) 578, 579, paras 1128-1131, and for cases on the subject, see 10 Digest (Repl) 913-914, 6223-6244.

Cases cited

Johannisberg Land and Gold Trust Co, Re [1892] 1 Ch 583.

Reynolds (Charles) & Co, Re (1895) 39 Sol Jo 263.

Rolls Razor Ltd (No 2), Re [1969] 3 All ER 1386, [1970] Ch 576.

Motion

By notice of motion dated 23rd February 1973, First Finsbury Trust Ltd, creditors of Icknield Development Ltd, a company in compulsory liquidation ('the company'), sought an order that the order of Mr Registrar Berkeley dated 31st January 1973 be reversed, and that Roger William Cork, chartered accountant, the person nominated as liquidator at the first meeting of creditors of the company held on 4th January 1973, be appointed liquidator of the company. The facts are set out in the judgment.

Allan Heyman QC and Brian Parker for First Finsbury Trust Ltd.
The Official Receiver appeared in person.

PLOWMAN J. This is a motion on behalf of First Finsbury Trust Ltd for the appointment of Mr Roger William Cork, chartered accountant, as liquidator of the company, Icknield Development Ltd.

On 31st January 1973 Mr Registrar Berkeley refused to make the appointment, with the consequence that the Official Receiver remains liquidator. This follows from s 239 of the Companies Act 1948, the relevant parts of which are as follows:

'The following provisions with respect to liquidators shall have effect on a winding-up order being made in England:—(a) the official receiver shall by virtue of his office become the provisional liquidator and shall continue to act as such until he or another person becomes liquidator and is capable of acting as such; (b) the official receiver shall summon separate meetings of the creditors and contributories of the company for the purpose of determining whether or not an application is to be made to the court for appointing a liquidator in the place of the official receiver; (c) the court may make any appointment and order required to give effect to any such determination and, if there is a difference between the determinations of the meetings of creditors and contributories in respect of

a the matter aforesaid, the court shall decide the difference and make such order thereon as the court may think fit; (d) in a case where a liquidator is not appointed by the court, the official receiver shall be the liquidator of the company . . .

The matter arises in this way. On 27th November 1972 the company was ordered to be wound up compulsorily on the petition of First Finsbury Trust Ltd who were judgment creditors for a sum of approximately £90,000. The first meeting of creditors b was held on 4th January 1973. At that meeting the representative of First Finsbury Trust put forward the name of Mr Roger Cork as liquidator. His name had been suggested by First Finsbury Trust's auditors, with whom Mr Roger Cork had been articulated. The only two creditors represented at the meeting who were entitled to vote were First Finsbury Trust and the Inland Revenue, and both voted for Mr Roger Cork. There was no resolution for a liquidator at a meeting of contributories c because there was never an effective meeting of contributories. The question which I have to consider is whether this court ought to do what the learned registrar declined to do and make the appointment.

Let me say at once there has never been any question of Mr Roger Cork's integrity or professional competence. Mr Registrar Berkeley refused to make the order on the ground that Mr Roger Cork was not qualified by experience to undertake the appointment d and for no other reason, and it was conceded before me that, on the evidence which was before him, the learned registrar came to the proper conclusion.

Mr Roger Cork is very junior in his profession. He served four years' articles in the City of London with Messrs Moore Stephens & Co, passing his final examination in May 1969. During his articles he received a general accountancy training. He was admitted e an associate of the Institute of Chartered Accountants in England and Wales in November 1969, and in the same month joined Messrs W H Cork, Gully & Co, a firm which includes a number of well-known and experienced liquidators, among them Mr Roger Cork's own father, Mr Kenneth Cork. Mr Roger Cork became a partner in his father's firm on 1st April 1971.

Before dealing further with this specific case, I want to make certain general observations. Liquidation work is specialised work, carrying heavy responsibilities. A liquidator f in a compulsory liquidation is an officer of the court. Various powers and duties imposed on the court itself are delegated to him. Section 273 of the Companies Act 1948 provides as follows:

'Provision may be made by general rules for enabling or requiring all or any of the powers and duties conferred and imposed on the court in England by this Act in respect of the following matters—(a) the holding and conducting of meetings to ascertain the wishes of creditors and contributories; (b) the settling g of lists of contributories and the rectifying of the register of members where required, and the collecting and applying of the assets; (c) the paying, delivery, conveyance, surrender or transfer of money, property, books or papers to the liquidator; (d) the making of calls; (e) the fixing of a time within which debts h and claims must be proved; to be exercised or performed by the liquidator as an officer of the court, and subject to the control of the court . . .'

Appropriate rules have been made under that section.

In my judgment the court ought not, as a general rule, to appoint a junior and inexperienced accountant to this official, responsible and specialised position. For this reason it has been a rule of practice in this court for at least 30 years not to appoint an i accountant of less than five years' standing, and I think that is a good working rule, although the overall discretion of the court remains.

Ought an exception to be made in this case? On the one hand, to do so might create a false impression that Mr Roger Cork was being singled out for favourable treatment because he was the son of his father. On the other hand, I have had evidence, which the learned registrar did not have, of the impressive and extensive experience which

Mr Roger Cork has had since he joined his present firm in relation to bankruptcies, voluntary liquidations, receiverships, and trusteeships of deeds of arrangement, many of them involving considerable sums of money. I am satisfied that Mr Roger Cork has had sufficient experience of insolvency matters in the last three years or so to match the average chartered accountant's experience of those matters over a considerably longer period, and strictly on his own merits I propose to appoint him liquidator.

Order accordingly

Solicitors: *Herbert Oppenheimer, Nathan & Vandyk* (for First Finsbury Trust Ltd).

Jacqueline Metcalfe Barrister.

London Computer Operators Training Ltd and others v British Broadcasting Corporation and others

COURT OF APPEAL, CIVIL DIVISION

LORD DENNING MR, CAIRNS AND LAWTON LJJ

15th, 16th JANUARY 1973

Libel and slander – Pleading – Particulars – Defence – Justification – Relevance of particulars to pleading – Plaintiffs a computer school and directors of school – Allegations by defendants that school a financial racket and guilty of publishing misleading advertisements – Allegation that founder and manager of school unfit to run a school – Whether defendants entitled to give particulars of founder's criminal record.

The first defendants, the BBC, broadcast a radio programme in which two speakers, the second and third defendants, made serious imputations against a computer school. They alleged that the school was 'a financial racket where the aptitude test is bogus to begin with, where the certificate at the end is bogus'. They spoke of the need to warn 'gullible and naive' people against the school's 'misleading advertisements'. They referred to the 'woeful business record' of the founder of the school, stated that his brother had said that he would not be responsible for his debts, and asked: 'Is this the sort of man to run a computer school?' The school and two of its directors bought an action for libel against the defendants who pleaded justification and fair comment. The founder, who was still running the school, was not joined as a plaintiff. The defendants subsequently discovered that the founder had a criminal record and sought leave to amend their particulars of justification by adding details of his convictions and sentences.

Held – The amendment should be allowed. In their natural and ordinary meaning the words complained of were capable of meaning that the company was being run by people of questionable honesty and background who were unfit to run a computer school. Accordingly it was open to the defendants to justify the words complained of by showing that the founder was unfit to run the school by reason of his criminal conduct (see p 172 h j, p 173 b c and d e and p 174 b c and g h, post).

Notes

For particulars of the defence of justification, see 24 Halsbury's Laws (3rd Edn) 93-95, paras 167, 168, and for cases on the subject, see 32 Digest (Repl) 114-117, 1367-1382.

a Cases referred to in judgments

Cadam v Beaverbrook Newspapers Ltd [1959] 1 All ER 453, [1959] 1 QB 413, [1959] 2 WLR 324, CA, 32 Digest (Repl) 116, 1382.

Lewis v Daily Telegraph Ltd [1963] 2 All ER 151; sub nom *Rubber Improvement Ltd v Daily Telegraph Ltd* [1964] AC 234, [1963] 2 WLR 1063, HL, 32 Digest (Repl) 85, 1073.

Maisel v Financial Times Ltd (1915) 84 LJBK 2145, [1914-15] All ER Rep 671, 112 LT 953, HL, 32 Digest (Repl) 77, 993.

b *S and K Holdings Ltd v Throgmorton Publications Ltd* [1972] 3 All ER 497, [1972] 1 WLR 1036, CA.

Interlocutory appeal and cross-appeal

By a writ issued on 26th February 1971 London Computer Operators Training Ltd ('the school'), James Edward Robert Cleaver and Joseph James Cleaver, directors of the school, issued a writ against the British Broadcasting Corporation, Anthony Howard and Roger Cooke claiming (1) damages for libel contained in a radio programme entitled 'World at Weekend' broadcast and published by the defendants on 7th February 1971, and (2) an injunction to restrain the defendants their servants or agents or otherwise from further publishing the words complained of or any similar words defamatory of the plaintiffs. In their statement of claim the plaintiffs set out the text of the broadcast and alleged that by reason of the publication thereof they had been gravely injured in their character, credit and reputation and had been brought into public scandal, odium and contempt. By their defence the defendants pleaded, inter alia, that the words complained of were true in substance and in fact. In their particulars they gave details of how people had paid money to the school for training as computer operators but had failed to obtain employment as promised by the school's advertisements. On 8th June 1971, on a summons for directions, the defendants were given leave by Master Ritchie to amend their defence by adding an additional sub-paragraph to their particulars of justification giving details of the criminal record of Murray Alexander, the founder of the school. The plaintiffs appealed against that order and, on 15th November 1972, Geoffrey Lane J ordered that the order of Master Ritchie be varied by the omission of certain details from the additional sub-paragraph. The plaintiffs appealed against that order and the defendant cross-appealed on the grounds that the judge had erred in law and/or wrongly failed to exercise his discretion to allow the amendment sought and that the amendment sought raised matters relevant to the issues to be tried. The facts are set out in the judgment of Lord Denning MR.

g *R L C Hartley* for the plaintiffs.
A T Hoolahan for the defendants.

LORD DENNING MR. On 7th February 1971 the BBC broadcast a radio programme called 'World at Weekend'. It made serious imputations against a computer school known as the London Computer Operators Training Ltd. One passage ran:

'It's a financial racket where the aptitude test is bogus to begin with, where the certificate at the end is bogus; and I think it's important that the racket should be exposed so that those very gullible and naive people who fall for the misleading advertisements which appear are warned in advance.'

j A little later, referring particularly to the plaintiffs, it was said:

'I went along to LCTS and spoke to its founder Mr Murray Alexander. Mr Alexander began in the window cleaning business with his brother some years ago. The brother, in the light of Murray Alexander's woeful subsequent business record, would make no comment, except to say that he wouldn't be responsible for any of his brother's debts. Is this the sort of man to run a computer school?'

Now the plaintiffs, London Computer Operators Training Ltd, and two of its directors bring this libel action against the BBC and two of the speakers in that programme. The defendants pleaded justification and fair comment on a matter of public interest. The defendants gave particulars in which they set out occasions when young students went to this establishment, paid large sums for training and were unable to obtain employment afterwards.

It appears that quite recently the BBC got information about the founder of the school, Mr Murray Alexander, and about his criminal record. As a result they seek to amend their defence and put in further particulars of justification in these words. I put part in square brackets for reasons which will soon appear.

[On the 10th January 1966 the said Murray Alexander was at Clerkenwell Magistrates Court conditionally discharged for 12 months for having stolen a Jaguar motor car 8830 7C, value £800 the property of Cullen Stores Limited.] On 11th November 1966 the said Murray Alexander was at Inner London Quarter Sessions sentenced to 21 months imprisonment on each of 8 charges of larceny and obtaining articles and money by false pretences (the sentences to run concurrently); [and 3 months for larceny upon conviction of a further offence committed during the period of the order of conditional discharge:] on the said occasion nine other offences were taken into consideration.'

We have been given further details of the eight charges of larceny there referred to. Six of them were for stealing motor cars. These may have involved false pretences—because false pretences often led to larceny by a trick. The remaining two were for obtaining by false pretences a camera and a cheque.

The master gave leave for the whole of that amendment to be made; but the judge disallowed the parts in square brackets. He only allowed the part about the sentence of 11th November 1966 at the Inner London Quarter Sessions to 21 months' imprisonment. Now there is an appeal and a cross-appeal to this court. The plaintiffs say that none of this amendment should be allowed. Whereas the BBC say that the whole ought to be allowed.

At the outset I would observe that the plaintiffs did not plead any innuendo at all. They relied only on the natural and ordinary meaning of the words. We have said several times that it is very desirable that the plaintiffs in a libel action should plead an innuendo. In the absence of it, we have to see what are the various meanings which a jury might reasonably put on the words, as being the way in which ordinary people might understand them. I think the words in this case are capable of the meanings which the judge himself stated, namely—

'this particular company want to get money from gullible students—shy, inexperienced gullible coloured—if not by false pretences, at least by rigging the aptitude tests [and] a reasonable jury [might find] that this company in those circumstances was being run by people of questionable honesty and background'.

If such is the reasonable meaning which may be put on the words by the jury, the question is whether the convictions of Mr Alexander are relevant and admissible as tending to prove the truth of the words in that meaning. I think they are. They go to show that this computer school was being run by people of questionable honesty and background, who were ready to resort to false pretences to get their own ends.

In support of this view I would refer to a case in the House of Lords: *Maisel v Financial Times Ltd*¹. An article in the Financial Times said that Mr Maisel had been arrested and charged with fraud. The plaintiff himself pleaded a wide innuendo charging generally that he was a dishonest person. The House held that the width of the innuendo extended the scope of the particulars of justification so as to admit

a evidence of all sorts of dishonesty. In this case, where an innuendo has not been pleaded, we look to see the full width of the meanings which the jury might reasonably put on the words. The greater the conceivable width, the greater the scope of the particulars of justification. That is what took place in *S and K Holdings Ltd v Throgmorton Publications Ltd*¹. The words were capable of a wide defamatory meaning; and this extended the scope of the particulars of justification.

b Applying this test, I would go further than the judge. I think the whole of this amendment should be allowed. All these convictions are relevant and material to prove the meaning which the jury may put on these words in the libel. I think therefore that the master was right; the appeal should be dismissed and the cross-appeal allowed. The whole of this amendment can appear in the particulars of justification.

c **CAIRNS LJ.** I agree both as to the appeal and as to the cross-appeal. I, of course, accept counsel for the plaintiffs' proposition that you cannot plead, in justification of a statement that a man has behaved improperly in one way, the fact that he has behaved improperly in some other way. On the other hand, if words complained of are capable of meaning that the plaintiff is a person who is not to be trusted, then
d that may be justified by proving any type of conduct which shows that he is not to be trusted; and if part of the words complained of is that the person who is running a computer school is not fit to run a computer school, then you may justify that by establishing any type of conduct to show that he is unfit, whether it be in the nature of criminal conduct or something else. It appears to me, therefore, that the whole question here depends on what meaning the words are reasonably capable
e of bearing; and in this connection I take as my guide two passages from the speech of Lord Reid in *Lewis v Daily Telegraph Ltd*². Lord Reid said³:

f 'What the ordinary man would infer without special knowledge has generally been called the natural and ordinary meaning of the words. But that expression is rather misleading in that it conceals the fact that there are two elements in it. Sometimes it is not necessary to go beyond the words themselves as where the plaintiff has been called a thief or a murderer. But more often the sting is not so much in the words themselves as in what the ordinary man will infer from them and that is also regarded as part of their natural and ordinary meaning.'

And then in the other passage Lord Reid said⁴:

g 'In this case it is, I think, sufficient to put the test in this way. Ordinary men and women have different temperaments and outlooks. Some are unusually suspicious and some are unusually naive. One must try to envisage people between these two extremes and see what is the most damaging meaning that they would put on the words in question.'

h I approach the question of what is the meaning of these words on that basis. I bear in mind that Mr Murray Alexander is not in fact a plaintiff in this case; but counsel for the plaintiffs has not sought to say, and in my view has properly not sought to say, that for that reason the defendants are not entitled to justify by establishing misconduct on the part of Mr Alexander, provided it comes within what is alleged in the libel in relation to Mr Alexander. It appears to me that the
j strongest point in the argument of counsel was to this effect: that the passage in the

1 [1972] 3 All ER 497, [1972] 1 WLR 1036

2 [1963] 2 All ER 151, [1964] AC 234

3 [1963] 2 All ER at 154, [1964] AC at 258

4 [1963] 2 All ER at 155, [1964] AC at 259

broadcast relating to Mr Alexander deals with his record as a businessman, with his apparent unreliability as a debtor; and then adds this sentence: 'Is this the sort of man to run a computer school?' Counsel for the plaintiffs says one must read that last sentence in the light of what has gone before and must interpret it not as meaning that in general Mr Alexander is not fit to run a computer school but as meaning that he is not so fit because of his business record and his unreliability as a debtor. In my view that is putting too narrow a construction on what is said about Mr Alexander. Taking account of the broadcast as a whole, with its allegations of business racket and so on, taking account of the fact that it is made clear in the script that Mr Alexander was the founder of this school and is still running it, it appears to me that the jury would certainly be entitled to interpret the words 'Is this the sort of man to run a computer school?' as meaning: this is not the sort of man, considering his character as a whole; and, that being so, anything that is relevant to his character as a whole is relevant by way of justification. Like Lord Denning MR, I can see no reason for distinguishing between the conviction in January 1966 and the convictions in November 1966. I think once it becomes relevant to look at the record of Mr Alexander, it is relevant to look at the whole record in relation to a time as recent as 1966; and I therefore think that the order of the master was right and I agree that it should be restored.

LAWTON LJ. I too agree that the appeal should be dismissed and that the cross-appeal should be allowed. In the course of the argument I reminded myself from time to time that there are three stages at which the meaning of alleged defamatory words has to be examined. It is for the jury in the end to say what the words mean. But before they do so the trial judge will have to say what the words are capable of meaning. For the purposes of an interlocutory appeal it seems to me what has to be considered is whether the meanings relied on by the defence are reasonably arguable as the meaning, or, to use the phrase of Morris LJ in *Cadam v Beaverbrook Newspapers Ltd*¹, whether the meaning relied on by the defendant is a conceivable meaning. Now, in the circumstances of this case, the learned judge in chambers, after having dealt with what he considered to be the sting of the libel, went on to say:

'There is a further possibility of a reasonable jury finding that this company in those circumstances was being run by people of questionable honesty and background.'

I agree that that is a conceivable meaning. Once it is accepted that that is a conceivable meaning, then in my judgment it is clear that the record of the people who were running the business becomes relevant; and one of the people running the business had a criminal record, and had been in prison. He had not been out all that long before he started the business and was allowed by the plaintiff company's directors to take a very active part in running it up to the date of the broadcast. In my judgment it is a matter which the jury should be allowed to consider, and it is for them and not for this court to say whether the allegations made by the defendants have been proved.

Appeal dismissed; cross-appeal allowed. Leave to appeal to the House of Lords refused.

Solicitors: Watts, Vallance & Vallance (for the plaintiffs); William Charles Crocker (for the defendants).

L J Kovats Esq Barrister.

a

The Atlantic Star

The owners of the Atlantic Star v The owners of the Bona Spes

b HOUSE OF LORDS

LORD REID, LORD MORRIS OF BORTH-Y-GEST, LORD WILBERFORCE, LORD SIMON OF GLAISDALE AND LORD KILBRANDON

12th, 13th, 14th, 19th, 20th, 21st, 22nd FEBRUARY, 10th APRIL 1973

Practice – Stay of proceedings – Foreign defendant – Action in rem – Action by foreign plaintiff against defendant's vessel whilst vessel visiting English port – Grounds justifying stay – Balance of advantage to plaintiff and disadvantage to defendant of allowing action to proceed – Degree of relative advantage and disadvantage – Substantial advantage – Necessity of showing that disadvantage even more substantial – Collision between plaintiff's and defendant's vessels in foreign waters – Proceedings arising out of collision commenced by other parties against defendant in foreign court – Foreign court appropriate and convenient forum in which action to be tried – Plaintiff offered adequate security for foreign proceedings – Additional expense and delay of separate action in England – Whether sufficient grounds to justify a stay of proceedings.

A collision took place in dense fog in a channel of the River Scheldt leading to the port of Antwerp. The collision involved a ship belonging to the appellants, a Dutch company, and two barges, one Dutch and one Belgian; the barges were moored at the time. The Dutch barge was owned by the respondents. Shortly after the accident the owners of the Belgian barge and the respondents applied to the Commercial Court at Antwerp for the appointment of a surveyor. Under Belgian law it was the surveyor's duty to investigate the circumstances of the accident with the assistance of legal representatives of the parties involved and to report to the court his conclusions. Accordingly a surveyor was appointed and made his report within 13 months to the court; the report appeared to be favourable to the appellants. There was evidence that, in the event of proceedings before the court arising out of an accident, the court would usually accept the opinion arrived at by the surveyor. Meanwhile, after the surveyor had been appointed, proceedings were brought in the Antwerp court against the appellants by (i) the owners of the Belgian barge, (ii) the owners of the cargo thereon, (iii) the dependants of certain deceased members of the crew thereof, and (iv) by the owners of the cargo on the Dutch barge. The respondents, however, on learning that the appellants' ship was due to call at an English port, began an action in rem in the Admiralty Court in England against the ship. The appellants entered a conditional appearance and applied for the action to be stayed. They offered to undertake that, if the action were stayed, they would provide reasonable security for the respondents' claim in Belgium. Brandon J dismissed the motion and the Court of Appeal^a dismissed an appeal on the ground that, although the Antwerp court was the appropriate and convenient forum, the appellants had failed to show any special circumstances which would justify the court depriving the respondents of their right to bring their action in the English courts. On appeal,

j

Held (Lord Morris of Borth-y-Gest and Lord Simon of Glaisdale dissenting) – The appeal would be allowed for the following reasons—

(i) Although a foreign plaintiff was not lightly to be refused the right to sue in an English court if jurisdiction had been properly founded, that right was not absolute

and the court had a discretion to grant a stay. That discretion was to be exercised by taking into account (i) any advantage to the plaintiff, and (ii) any disadvantage to the defendant. The advantage to the plaintiff of allowing the suit to proceed had to be substantial, and not merely fanciful; a bona fide advantage was a solid weight in the scale, often decisive, but not necessarily so. In particular in Admiralty proceedings in rem the security provided by the arrest of the ship, or the offer of security in lieu, was an advantage which the plaintiff could legitimately seek. On the other hand the disadvantage to the defendant had to be even more substantial to justify a stay of the action; the words 'oppressive' and 'vexatious' were indicative of the degree and character of the prejudice to the defendant but those words were to be interpreted liberally nor given too restricted or technical an application (see p 180 h j, p 181 j, p 190 f to j, p 192 c d, p 193 g to p 194 b d and f to h, p 198 e and p 210 c and g h, post).

(ii) On the facts the appellants had succeeded in showing that there were grounds justifying the grant of a stay. Since the appellants had offered adequate security in Belgium the respondents obtained no advantage by virtue of the action in rem; nor had it been shown that the plaintiff would obtain any advantage from the procedure of the English courts. The only advantage to the respondents was their hope that they might stand a better chance of winning in the English court than they would, in the face of the surveyor's report, in Belgium. Although that was not to be disregarded it had to be weighed against the considerations on the other side. The disadvantages to the appellants were real and strong and it would be unjust to compel them to submit to proceedings in England in all the circumstances, including the long interval before the action would be heard, the difficulty of obtaining witnesses, the additional and unnecessary expense of an action in England and the fact that, on the respondents' application, the appellants had already been exposed to a full inquiry by the surveyor in Belgium (see p 182 b c, p 195 e and g to h, p 196 a b and d to f, p 198 e, p 202 b to e, f and h j and p 203 b c, post).

Dicta of Bowen LJ in *McHenry v Lewis* (1882) 22 Ch D at 407, 408 and in *Peruvian Guano Co v Bockwoldt* (1883) 23 Ch D at 233, of Sir Gorell Barnes P in *Logan v Bank of Scotland* (No 2) [1904-7] All ER Rep at 443 and of Scott LJ in *St Pierre v South American Stores (Gath & Chaves) Ltd* [1935] All ER Rep at 414 explained and applied.

Decision of the Court of Appeal [1972] 3 All ER 705 reversed.

Notes

For stay of proceedings where no foreign proceedings begun and in Admiralty actions, see 7 Halsbury's Laws (3rd Edn) 172, 174, 175, paras 308, 311, and for cases on the subject, see 11 Digest (Repl) 542, 1508-1511, 550-552, 1578-1592.

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Adams v Adams (Attorney-General intervening) [1970] 3 All ER 572, [1971] P 188, [1970] 3 WLR 702.

Arantzazu Mendi, The [1939] 1 All ER 719, [1939] AC 256, 160 LT 513, 19 Asp MLC 263, 63 Lloyd LR 89, sub nom *Government of the Republic of Spain v Arantzazu Mendi* 108 LJP 55, HL, 1 Digest (Repl) 129, 155.

Baltimore & Ohio Railroad Co v Kepner (1941) 314 US 44.

Canada Malting Co Ltd v Paterson Steamships Ltd (1932) 285 US 413.

Carron Iron Co v Maclaren (1855) 5 HL Cas 416, 24 LJCh 620, 26 LTOS 42, 10 ER 961, HL; rvsq sub nom *Maclaren v Stainton* (1852) 16 Beav 279, 51 ER 786, 11 Digest (Repl) 547, 1543.

Chaparral, The, Zapata Off-Shore Co v The Bremen and Unterweser Reederei GmbH [1972] 2 Lloyd's Rep 315.

Christiansborg, The (1885) 10 PD 141, 54 LJP 84, 53 LT 612, 5 Asp MLC 491, CA, 11 Digest (Repl) 551, 1587.

- a** *Currie v McKnight* [1897] AC 97, 66 LJPC 19, 75 LT 457, 8 Asp MLC 193, HL, 1 Digest (Repl) 117, 33.
Devine v Cementation Co Ltd [1963] NI 65, Digest (Cont Vol A) 233, *473a.
Gulf Oil Corp'n v Gilbert, doing business as Gilbert Storage & Transfer Co (1947) 330 US 501.
Harmer v Bell, The Bold Buccleugh (1852) 7 Moo PCC 267, [1843-60] All ER Rep 125, 19 LTOS 235, 13 ER 884, PC, 11 Digest (Repl) 551, 1580.
- b** *Hyman v Helm* (1883) 24 Ch D 531, 49 LT 376, CA, 11 Digest (Repl) 547, 1545.
Ionian Bank Ltd v Couvreur [1969] 2 All ER 651, [1969] 1 WLR 781, CA, Digest (Cont Vol C) 156, 1531b.
Janera, The [1928] P 55, 97 LJP 58, 138 LT 557, 17 Asp MLC 416, 11 Digest (Repl) 551, 1583.
- c** *Logan v Bank of Scotland (No 2)* [1906] 1 KB 141, [1904-7] All ER Rep 438, 75 LJKB 218, 94 LT 153, CA, 11 Digest (Repl) 542, 1508.
London, The [1931] P 14, 100 LJP 57, 144 LT 375, 18 Asp MLC 180, 11 Digest (Repl) 543, 1515.
Lucile Bloomfield, The [1964] 1 Lloyd's Rep 324, Digest (Cont Vol B) 7, 1718a.
McHenry v Lewis (1882) 22 Ch D 397, 52 LJCh 325, 47 LT 549, CA; *aff'd* (1882) 21 Ch D 202, 52 LJCh 16, 46 LT 567, 11 Digest (Repl) 548, 1512.
- d** *Madrid, The* [1937] 1 All ER 216, [1937] P 40, 106 LJP 39, 11 Digest (Repl) 544, 1527.
Martin v Stopford-Blair's Executors (1879) 7 R 329, 17 SCLR 208, 24 Digest (Repl) 816, *2106.
Merchant Prince, The [1892] P 179, [1891-94] All ER Rep 396, 67 LT 251, 7 Asp MLC 208, CA, 42 Digest (Repl) 790, 5589.
- e** *Metropolitan Bank v Pooley* (1885) 10 App Cas 210, [1881-85] All ER Rep 949, 54 LQJB 449, 53 LT 163, 49 JP 756, HL, 1 Digest (Repl) 81, 613.
Mobil Tankers Co SA v Mene Grande Oil Co (1966) 363 F 2d 611.
Monte Urbasa, The [1953] 1 Lloyd's Rep 587.
Norton's Settlement, Re, Norton v Norton [1908] 1 Ch 471, 77 LJCh 312, 99 LT 257, CA, 11 Digest (Repl) 542, 1510.
- f** *Peruvian Guano Co v Bockwoltdt* (1883) 23 ChD 225, 52 LJCh 714, 48 LT 7, 5 Asp MLC 29, CA, 11 Digest (Repl) 545, 1530.
Quo Vadis, The [1951] 1 Lloyd's Rep 425.
Reinbeck, The (1889) 6 Asp MLC 366, 60 LT 209, 11 Digest (Repl) 552, 1589.
Ripon City, The [1897] P 226, [1895-99] All ER Rep 487, 66 LJP 110, 77 LT 98, 8 Asp MLC 304, 1 Digest (Repl) 122, 73.
- g** *St Pierre v South American Stores (Gath & Chaves) Ltd* [1936] 1 KB 382, [1935] All ER Rep 408, 105 LJKB 436, 154 LT 546, CA, 11 Digest (Repl) 372, 378.
Sheaf Steamship Co Ltd v Compania Transmediterranea 1930 SC 660, 1 Digest (Repl) 293, *416.
Sim v Robinow (1892) 19 R 665.
- h** *Société du Gaz de Paris, La v La Société Anonyme de Navigation, "Les Armateurs Français"* 1926 SC (HL) 13, 23 Lloyd LR 209.
Soya Margareta, The, Owners of cargo on board the Soya Louisa v Owners of the Soya Margareta [1960] 2 All ER 756, [1961] 1 WLR 709, [1960] 1 Lloyd's Rep 675, Digest (Cont Vol A) 257, 1531a.
Telford Panel & Engineering Works Pty Ltd v Elder Smith Goldsbrough Mort Ltd [1969] VR 193.
- j** *Thornton v Thornton* (1886) 11 PD 176, [1886-90] All ER Rep 311, 55 LJP 40, 54 LT 774, CA, 11 Digest (Repl) 543, 1522.
Tovarisch, The [1930] P 1, 99 LJP 23, 142 LT 372, 18 Asp MLC 58, 35 Lloyd LR 183, CA; *aff'd on other grounds* [1931] AC 121, [1930] All ER Rep 559, 38 Lloyd LR 139, HL, 1 Digest (Repl) 239, 1323.
Williamson v North-Eastern Railway Co (1884) 11 R 596.

Appeal

The owners of the motor vessel *Atlantic Star* appealed against an order of the Court of Appeal¹ (Lord Denning MR, Phillimore and Cairns LJ) dated 27th July 1972 affirming an order of Brandon J² dated 7th March 1972 dismissing a motion by the appellants that the writ of summons and all subsequent proceedings in the action commenced by the respondents, the owners of the motor vessel *Bona Spes*, be set aside or alternatively that all further proceedings be stayed on the ground that there was pending in the Commercial Court of Antwerp, Belgium, an action between the parties involving the same subject-matter and relief and/or on the grounds that the proceedings were oppressive and vexatious and an abuse of the process of the court. The following statement of facts is taken from the judgment of Brandon J².

On the night of 27th/28th January 1970 in dense fog the Dutch motor vessel *Atlantic Star*, owned by the appellants, collided with the Dutch motor barge *Bona Spes*, owned by the respondents, in a channel of the River Scheldt leading to one of the locks at Antwerp. The *Bona Spes* was lying moored outside a Belgian dumb barge, the *Hugo van der Goes*, which was in turn lying moored to the quay on one side of the channel. As a result of the collision the *Hugo van der Goes* was crushed between the *Bona Spes* and the quay, and the two barges were so badly damaged that they sank at their berths with their cargoes. Two men on board the *Hugo van der Goes*, the skipper and a sailor, were drowned.

Following the collision various proceedings took place in the Commercial Court of Antwerp. On 29th January and 16th February 1970, on the application of the owners of the *Hugo van der Goes* and *Bona Spes* respectively, orders were made appointing a court surveyor to enquire into the circumstances and causes of the collision. He took statements from witnesses between February and May 1970 and collected various reports and ships' documents. Belgian lawyers representing the parties concerned were present at the hearings before him. On 12th January 1971 the owners of the *Hugo van der Goes* began an action against the appellants in the same court claiming damages for the collision.

In or about February 1971 the court surveyor made his report on the circumstances and causes of the collision. While the report did not say so in plain terms, his opinion appears to have been that the collision was attributable to the difficulties caused by the dense fog, and that there was no fault of the *Atlantic Star*.

On 25th May 1971 Belgian industrial accident insurers, who had become liable to make payments to the dependants of the deceased skipper and crew member of the *Hugo van der Goes*, began an action against the appellants in the same court claiming damages under rights of subrogation. At that stage, therefore, apart from the preliminary inquiry and report by the court surveyor, there were two actions arising out of the collision pending in the Commercial Court of Antwerp.

In that state of affairs, on 15th June 1971, the respondents, taking advantage of the fact that the *Atlantic Star* was shortly due in Liverpool, began an action in rem against the appellants in the Admiralty Court, claiming damages for the collision. Solicitors for the appellants, in order to avoid arrest of the vessel, accepted service of the writ and arranged for a guarantee of £80,000 in respect of the claim. On 1st July 1971 the appellants entered a conditional appearance and on 20th July 1971 they issued a notice of motion asking for the writ to be set aside or the action stayed. The motion did not come on for hearing until 7th February 1972.

In the meanwhile further developments took place in Antwerp. On 12th August 1971 the owners of part of the cargo laden on board the *Hugo van der Goes* began an action against the appellants in the Commercial Court, claiming damages for loss of cargo. Later, on 2nd December 1971, insurers of cargo on board the *Bona Spes* and other owners of cargo on board the *Hugo van der Goes* began an action against

1 [1972] 3 All ER 705, [1972] 3 WLR 746

2 [1972] 1 Lloyd's Rep 534

a the appellants in the same court, claiming damages in respect of salvage costs payable to the City of Antwerp as port authority. That brought the number of actions arising out of the casualty pending in the Antwerp Court to four, and the number of claims to five.

b By that time the respondents, while anxious to prosecute their action in England if they could, were concerned to see that, if they were not allowed to do so, their claim would not be time-barred in Belgium. Accordingly on 23rd December 1971 their solicitors wrote to the solicitors for the appellants asking that the latter should agree, in the event of the application for a stay succeeding, to take no point that the time limit of two years for beginning an action in Belgium had expired. On 6th January 1972 the solicitors for the appellants replied saying that they could not recommend their clients to agree to the suggestion put forward, and expressing the view that
c the respondents should take whatever action they thought fit to preserve the time limit.

In those circumstances, on 21st January 1972, the respondents began an action against the appellants in the Commercial Court of Antwerp claiming damages for the collision. That action was begun solely to preserve the time limit in Belgium in case the action in England should be stayed, and not with any intention of harassing
d the appellants by two concurrent actions in different countries. It was then anticipated that one further claim arising out of the casualty might be brought against the appellants in the Commercial Court of Antwerp by the City of Antwerp as port authority for salvage costs not recoverable from other parties.

At an early stage of the proceedings the appellants contended that, by applying to the Commercial Court of Antwerp for the appointment of a court surveyor, the respondents had invoked the jurisdiction of that court in respect of their substantive claim. On that basis the appellants maintained that, when the respondents began their action in England, there was already pending another action relating to the same subject-matter between the same parties in Antwerp, and that the case was accordingly one of *lis alibi pendens*. Before Brandon J, however, it was conceded for the appellants that the respondents' application for the appointment of a court
e surveyor, and his participation in the subsequent inquiry, did not have that effect. The inquiry by the court surveyor was in the nature of a preliminary proceeding, and the party applying for it, while he might subsequently prosecute his substantive claim in the same court if he wished, was in no way committed to doing so. If he did prosecute his claim there, the findings of fact and the opinion on responsibility contained in the surveyor's report, while not binding on the court at the trial, would carry much weight with it. As regards the findings of fact, the court would in most cases accept them, and, although it had power to hear witnesses again, would seldom
f do so. As regards the opinion on responsibility, the matter was fully open to argument at the trial, but the court would pay great regard to the views of its appointed expert, and was likely to accept them more often than to depart from them.

The respondents stated their willingness to undertake that, if their action was allowed to proceed, they would as soon as possible discontinue the action in Belgium.
h The appellants at the same time offered to undertake that, if the action were stayed, they would provide reasonable security for the respondents' claim in Belgium. The effect of that, so far as security for the claim was concerned, was that a stay of the respondents' action would not prejudice them.

In dismissing the appellants' appeal against the refusal of Brandon J to grant a stay, the Court of Appeal held that, although on the grounds of convenience the Antwerp court was the appropriate forum, convenience was not a sufficient reason to deprive
j a plaintiff of the right to prosecute his action in the English courts and the appellants had failed to show that the continuance of the action would work injustice to them or that a stay would not cause injustice to the respondents.

R L A Goff QC and Michael Thomas for the appellants.

J Franklin Willmer QC and Nicholas Phillips for the respondents.

Their Lordships took time for consideration.

10th April. The following opinions were delivered.

LORD REID. My Lords, in this case the appellants ask us to review the law regarding stay of proceedings in an English court in cases where proceedings with regard to the same matter have been or will be brought in a foreign court. This case arises out of the arrest in an English port of a Dutch vessel, the *Atlantic Star*, belonging to the appellants who are large and well-known Dutch shipowners. The respondents are a Dutch company who owned a barge which was sunk in Belgian waters in a collision with the *Atlantic Star*. They allege that this was due to the fault of the appellants' vessel and in order to recover damages they arrested the appellants' vessel in this country. Thereby they founded jurisdiction against the appellants in England and on release of the vessel obtained ample security to cover their claim. They were entitled to do this but the appellants seek a stay of their action in England because the Belgian court is the proper forum to deal with the respondents' claim.

The facts have been fully, accurately and clearly stated by Brandon J in his judgment in the Admiralty Court¹ and I shall only state such of the facts as are relevant to the determination of the question now before your Lordships.

The collision occurred in dense fog in the Scheldt on the night of 27th January 1970. Three vessels were involved. The third vessel began proceedings in Belgium on 29th January. It appears that the normal course in Belgium is for the court to appoint a court surveyor to enquire into the circumstances and causes of the collision and this was done. On 16th February 1970 the respondents were joined in the inquiry. The surveyor took statements from witnesses and collected various reports and documents. The respondents' lawyers were present. In February 1971 the surveyor made his report. It appears to point to a conclusion that the *Atlantic Star* was not at fault. Apparently the Belgian court generally agrees with the surveyor's reports, so the respondents might well fail if their case against the appellants proceeds in Belgium.

So in June 1971 when the *Atlantic Star* was calling at an English port they began proceedings in England where they think for various reasons that they have a better chance of success. Brandon J said²: 'I have no doubt at all that, so far as convenience is concerned, the Commercial Court of Antwerp is by far the more appropriate forum.' He gave five main reasons for this, including the place of collision, the fact that the case is governed by Belgian law and local regulations, the fact that five other claims arising out of the collision are pending in Antwerp, the fact that by reason of an offer made by the appellants full security will be available there; and he said³:

'... the case has absolutely no connection with England, except that, because the [appellants'] ship trades from time to time to an English port, she is liable to arrest here.'

But following the trend of modern authority he felt bound to refuse to stay this action, and this decision was upheld in the Court of Appeal³. The authorities are dealt with by my noble and learned friend, Lord Wilberforce, and I shall not repeat that examination. They support the general proposition that a foreign plaintiff, who can establish jurisdiction against a foreign defendant by any method recognised by English law, is entitled to pursue his action in the English courts if he genuinely thinks that that will be to his advantage and is not acting merely vexatiously. Neither the parties nor the subject-matter of the action need have any connection with England. There may be proceedings on the same subject-matter in a foreign court. It may be a far more appropriate forum. The defendant may have to suffer great expense and inconvenience in coming here. In the end the decisions of the English

¹ [1972] 1 Lloyd's Rep 534

² [1972] 1 Lloyd's Rep at 539

³ [1972] 3 All ER 705, [1972] 3 WLR 746

a and foreign courts may conflict. But nevertheless the plaintiff has a right to obtain the decision of an English court. He must not act vexatiously or oppressively or in abuse of the process of the English court, but these terms have been narrowly construed.

It is said that the right of access to the Queen's court must not be lightly refused. In the present case Lord Denning MR said¹:

b 'No one who comes to these courts asking for justice should come in vain . . . This right to come here is not confined to Englishmen. It extends to any friendly foreigner. He can seek the aid of our courts if he desires to do so. You may call this "forum shopping" if you please, but if the forum is England, it is a good place to shop in, both for the quality of the goods and the speed of service.'

c My Lords, with all respect, that seems to me to recall the good old days, the passing of which many may regret, when inhabitants of this island felt an innate superiority over those unfortunate enough to belong to other races. It is a function of this House to try, so far as possible, to keep the development of the common law in line with the policy of Parliament and the movement of public opinion. So I think that the time is ripe for a re-examination of the rather insular doctrine to which I have referred.

d The appellants' counsel first referred to the law of Scotland, where for a very long time the plea of *forum non conveniens* has been recognised as valid. No doubt it is a desirable objective to diminish remaining differences between the laws of the sister countries. But we must proceed with all due caution. That plea is particularly important in connection with the peculiar Scottish method of founding jurisdiction by arrestment *ad fundandam jurisdictionem*. I cannot foresee all the repercussions of making a fundamental change in English law and I am not at all satisfied that it would be proper for this House to make such a fundamental change or that it is necessary or desirable. So in my opinion we should seek any change within the existing framework of English law. The existing basis is that the plaintiff must not be acting vexatiously, oppressively or in abuse of the process of the court. Those are flexible words and I think that in future they should be interpreted more liberally.

f There was a time when a judgment obtained in one country was of little use in any other. There was a time when it could reasonably be said that our system of administration of justice, though expensive and elaborate, was superior to that in most other countries. But today we must, I think, admit that as a general rule there is no injustice in telling a plaintiff that he should go back to his own courts.

g So I would draw some distinction between a case where England is the natural forum for the plaintiff and a case where the plaintiff merely comes here to serve his own ends. In the former the plaintiff should not be 'driven from the judgment seat' without very good reason, but in the latter the plaintiff should, I think, be expected to offer some reasonable justification for his choice of forum if the defendant seeks a stay. If both parties are content to proceed here there is no need to object.

h There have been many recent criticisms of 'forum shopping' and I regard it as undesirable.

i I think that a key to the solution of the problem may be found in a liberal interpretation of what is oppressive on the part of the plaintiff. The position of the defendant must be put in the scales. In the end it must be left to the discretion of the court in each case where a stay is sought, and the question would be whether the defendants have clearly shown that to allow the case to proceed in England would in a reasonable sense be oppressive looking to all the circumstances including the personal position of the defendants. That appears to me to be a proper development of the existing law.

¹ [1972] 3 All ER at 709, [1972] 3 WLR at 757, 758

So I turn to the present case. I would not regard a foreigner who arrests a ship in England as necessarily forum shopping. The right to arrest a ship is an ancient and often a necessary right. Not only may there be difficulty otherwise in establishing jurisdiction in an appropriate forum, but the arrest gives to the arrester what may be a very necessary security. In the present case, however, that is not so. Proceeding in the appropriate Belgian forum offers no difficulty and the appellants have offered to provide security there. I reject the technical argument that we are not entitled to consider an offer of security made after proceedings have commenced. That may have to be considered when awarding costs, but we must, I think, take account of the position when the stay is asked for. a

It is true that looking to the resources of the appellants there would be no great hardship in requiring them to litigate here, but that is only one element in considering whether on the whole it would be oppressive to require them to litigate here. On the whole I think that the appellants have shown clearly enough that they ought not to be required to litigate here as well as in Antwerp. b

There is one other matter to which I must refer. In 1952 there was an international convention¹ by which the parties including this country agreed certain rules regarding civil jurisdiction in matters of collision. Article 1 (2) provides: 'It shall be for the plaintiff to decide in which of the Courts referred to in (1) of this article the action shall be instituted.' That includes the court of the place where an arrest had been effected. c

The convention only purports to deal with jurisdiction and no one disputes that the English court has jurisdiction to deal with this case. But the respondents argue that this article must have been intended to have a wider effect because it would be a mockery to allow the plaintiff to choose the English court and then to make that choice ineffective by staying his action. But this argument proves too much. If right, it would prevent the English court from staying the action on any ground except perhaps bad faith. We cannot read into the article some qualification such as 'provided that his decision is reasonable'. There are some very limited grounds on which an English court can under present practice stay an action arising out of a collision, e.g. where the ship has already been arrested in another jurisdiction and security obtained there. So if this is the meaning of the convention there would have to be some change in English law. Still more there would have to be a change in the law of Scotland: the plea *forum non conveniens* would have to be entirely excluded in collision cases. d

A treaty does not become part of our law except insofar as it is embodied in an Act of Parliament. The Administration of Justice Act 1956 was obviously intended to bring the law of the United Kingdom into line with the convention. But I can find nothing in it to alter either the law of England or the law of Scotland so as to restrict the power of the courts of either country to stay an action. Parliament and those advising it must have thought that the convention dealt solely with jurisdiction and had nothing to do with power to stay an action. In this I think they were right. So in my opinion the terms of the convention ought not to affect our judgment with regard to the staying of an action and I have left it out of account in reaching my decision. e

For the reasons which I have given I would allow this appeal. f

LORD MORRIS OF BORTH-Y-GEST. My Lords, following a collision in a channel of the River Scheldt leading to one of the locks at Antwerp, between a Dutch motor vessel, the *Atlantic Star*, owned by the Holland-America Line and a g

¹ International Convention on Certain Rules concerning Civil Jurisdiction in matters of Collision, signed at Brussels on 10th May 1952, and ratified by the United Kingdom on 18th March 1959 (Cmnd 1128) h

a Dutch motor barge, the *Bona Spes*, the owner of the latter desires to litigate in this country. He has commenced proceedings here. It is beyond question that he was entitled to do so. The English court has jurisdiction to hear the suit. But the owners of the former ship wish to have the litigation in Belgium. Which of the two Dutch owners should prevail?

b The situation here arising (that is to say, a situation where a plaintiff has chosen to sue here and under our law has every right to do so but where a defendant has reasons for asking that the case be tried in another country) is one that has constantly and frequently called for examination by our courts. That the court has a power to stay is undeniable. The proviso to s 41 of the Supreme Court of Judicature (Consolidation) Act 1925 makes this plain. Furthermore, a court has an inherent power to protect itself from the abuse of its process by a proceeding without reasonable grounds so as to be vexatious and harassing (see *Metropolitan Bank v Pooley*¹). But from a succession of decisions in our courts a pattern has emerged. It differs from that which has emerged in Scotland. If the motion to stay in this case had been decided on the principles which apply in Scotland (see e.g. *La Société du Gaz de Paris v La Société Anonyme de Navigation, "Les Armateurs Français"*²) I think that it would have been held that on a consideration of the balance of convenience a trial in the Belgian courts would be more appropriate than a trial in England. In his careful judgment Brandon J³ marshals the various circumstances which support that view.

d But the motion was decided and had to be decided both by the learned judge and by the Court of Appeal⁴ on the basis of English law and of the principles laid down in a long line of English cases. Only, I think, if there is a departure from these cases could the present appeal be allowed. The appellants contend that there should be an 'expansion of the relevant principles into a doctrine of *forum non conveniens*'. Broad questions of judicial policy are, therefore, involved. Should the principles which are clearly to be found in the English cases now be basically altered? Should they be so altered in cases where jurisdiction rests on a firm recognition and acceptance of the existence of maritime liens? Should they be altered by this House in a case which will have been brought in the English courts on the basis of the pronouncements which have indicated the only circumstance in which jurisdiction which is available and which has been invoked will be denied? The learned judge exercised his discretion, as did concurrently the members of the Court of Appeal, on the basis of those pronouncements.

e The Admiralty Court differs from courts in which the suits and the suitors are predominantly domestic. It is a court to which suitors from a range of maritime countries have been accustomed or content to resort. No chauvinism is involved in recognising as a fact that it has been at the choice of many shipowners from other countries, as it was in the present case, that Admiralty cases have been brought in the English Admiralty Court. Ought a fundamental change of policy to be made by a decision of this House? If some change were thought to be desirable, ought it to be made, not by judicial decision, but rather in some other way and possibly only after processes of consultation which might lead to a common acceptance of policy f by the maritime countries principally concerned?

h A study of the English cases reveals a consistent approach. Benefit is to be derived rather from considering what has been the general line of that approach than from considering the particular decisions reached on particular facts. The cases show that if there is jurisdiction in the court and if a plaintiff becomes enabled to invoke it and chooses to do so he may nevertheless in some circumstances not be allowed to do so. In the decisions which indicate what those circumstances are certain words j

1 (1885) 10 App Cas 210, [1881-85] All ER Rep 949

2 1926 SC (HL) 13

3 [1972] 1 Lloyd's Rep 534

4 [1972] 3 All ER 705, [1972] 3 WLR 746

constantly emerge. They are such words as 'vexation' or 'oppression'. Thus in *McHenry v Lewis*¹ Sir George Jessel MR said that it was part of the general jurisdiction of the court to prevent a defendant being 'improperly vexed' by legal procedure: and where there was one action in this country and another action in another country the court would protect a defendant by staying the action if the defendant was being improperly vexed. Cotton LJ² said that if a plaintiff's action is 'vexatiously harassing the Defendant' then it may be stayed. Bowen LJ³ rested on—

'the general principle that the Court can and will interfere whenever there is vexation and oppression to prevent the administration of justice being perverted for an unjust end.'

In another case in the Court of Appeal a few weeks later (*Peruvian Guano Co v Bockwoldt*⁴) Sir George Jessel MR, Lindley and Bowen LJJ laid down the same principles. In that case an English company sued a French firm in England and also in France. A motion on behalf of the defendants that the plaintiff be ordered to elect as between the two proceedings was refused. There was no vexatious harassing which could amount to oppression. The pursuit of the two suits was not vexatious 'where the Plaintiff seeks to get a real substantial advantage'. Sir George Jessel MR⁵ pointed to the danger of 'depriving men of the opportunity of asserting their rights, which they are asserting *bona fide*, unless we arrived clearly at the conclusion that the asserting of them was vexatious'. Bowen LJ said⁶:

'It seems to me we have no sort of right, moral or legal, to take away from a plaintiff any real chance he may have of an advantage. If there is a fair possibility that he may have an advantage by prosecuting a suit in two countries, why should this Court interfere and deprive him of it?'

In *Hyman v Helm*⁷ plaintiffs, who carried on business in San Francisco, sued defendants in England alleging that the defendants had been agents for the plaintiffs to make purchases. The plaintiffs claimed an account. The defendants, who carried on business in England, claimed that they had not been agents but had as principals sold goods to the plaintiffs. The defendants then sued the plaintiffs in San Francisco to recover what they said was due to them. The plaintiffs moved to restrain the defendants from taking these proceedings. The motion was refused by Chitty J and this decision was upheld by Sir Baliol Brett MR, Cotton and Bowen LJJ. It was refused because the foreign proceedings did not constitute a vexatious or oppressive multiplication of actions. The course of procedure in San Francisco might have been such as to give advantages to the defendants. Both in *Thornton v Thornton*⁸ and *Re Norton's Settlement, Norton v Norton*⁹, the test of mere balance of convenience was not accepted. In the latter case a stay of proceedings in England was granted because the English venue 'was not chosen for any legitimate reason' and because the injustice to the defendant of continuing the proceedings in England would be oppressive. The allegation had been made that the action was not *bona fide* but had been instituted for purposes of embarrassment and annoyance. The process of the court was being used 'for a sinister or bye purpose'. In the former case⁸ in 1886 where a stay was refused similar considerations were voiced to those which had been expressed in

1 (1882) 22 Ch D 397 at 399

2 (1882) 22 Ch D at 407

3 (1882) 22 Ch D at 408

4 (1883) 23 Ch D 225

5 (1883) 23 Ch D at 232

6 (1883) 23 Ch D at 234

7 (1883) 24 Ch D 531

8 (1886) 11 PD 176, [1886-90] All ER Rep 311

9 [1908] 1 Ch 471

a the *Peruvian Guano* case¹. The wife thought (and with some reason) that she had an advantage in prosecuting her suit in England. Ought she to be deprived of her right to do so? Only, said Bowen LJ², if the court saw clearly that there would be oppression or waste or vexation if her suit proceeded and if the court by staying it could do no harm. In the circumstances existing in *The Janera*³ Hill J refused to stay. The ground of the application for a stay was that the action was oppressive and vexatious. The plaintiffs had instituted a cross-action in Egypt prior to bringing proceedings in England; they then discontinued their cross-action in Egypt. Had they not done so they would have been put to their election, but as they had done so then, even though they were being sued in Egypt in respect of the collision, Hill J considered that they ought not to be deprived of their right to sue in England.

b In the earlier case of *The Christiansborg*⁴, where a ship was first arrested in Holland and later in this country, the test of oppression was applied on an application to stay. Fry LJ, who was one of the majority in upholding the order for a stay made by Hannen J, was of the opinion that the institution of the action in England was in the circumstances of the case 'against good faith'.

c In *St Pierre v South American Stores (Gath & Chaves) Ltd*⁵, one argument that was advanced in the Court of Appeal in support of an application to stay was that the English court was not the forum conveniens but the test of a mere balance of convenience was not accepted. In a passage in his judgment that has often been cited Scott LJ said⁶:

d 'The true rule about a stay under s. 41, so far as relevant to this case, may I think be stated thus: (1.) A mere balance of convenience is not a sufficient ground for depriving a plaintiff of the advantages of prosecuting his action in an English Court if it is otherwise properly brought. The right of access to the King's Court must not be lightly refused. (2.) In order to justify a stay two conditions must be satisfied, one positive and the other negative: (a) the defendant must satisfy the Court that the continuance of the action would work an injustice because it would be oppressive or vexatious to him or would be an abuse of the process of the Court in some other way; and (b) the stay must not cause an injustice to the plaintiff. On both the burden of proof is on the defendant. These propositions are, I think, consistent with and supported by the following cases: *McHenry v. Lewis*⁷; *Peruvian Guano Co. v. Bockwoldt*¹; *Hyman v. Helm*⁸; *Thornton v. Thornton*⁹; and *Logan v. Bank of Scotland (No. 2)*¹⁰.'

e In cases since 1936 the test as to whether proceedings are vexatious has been the test applied. Thus in *The Soya Margareta*¹¹ Hewson J said:

f 'Though convenience is a matter ... not lightly to be discarded, I do not think that there is such a preponderance of convenience in the getting together of the evidence necessary in this case as to make this action so vexatious that I ought to prevent the [plaintiffs] from following the course they have chosen.'

g In the earlier case of *The Quo Vadis*¹² Pilcher J regarded it as axiomatic that a stay

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1 (1883) 23 Ch D 225

2 (1883) 23 Ch D at 233

3 [1928] P 55

4 (1885) 10 PD 141

5 [1936] 1 KB 382, [1935] All ER Rep 408

j 6 [1936] 1 KB at 398, [1935] All ER Rep at 414

7 (1882) 22 Ch D 397

8 (1883) 24 Ch D 531

9 (1886) 11 PD 176, [1886-90] All ER Rep 311

10 [1906] 1 KB 141, [1904-7] All ER Rep 438

11 [1960] 2 All ER 756 at 761, 762, [1961] 1 WLR 709 at 716

12 [1951] 1 Lloyd's Rep 425

would not be granted unless proceedings were oppressive or vexatious. In *Ionian Bank Ltd v Couvreur*¹ the Court of Appeal in affirming a refusal to stay an action held that the defendant had failed to show that its continuance was vexatious or oppressive; the plaintiff had a fair possibility of advantage in prosecuting his suit.

In my view, if the present motion is to be decided according to the principles which have for a long time guided and indeed bound learned judges and the Court of Appeal then I think that this appeal must fail. The proceedings brought in this country by the Dutch owner against the Holland-America Line cannot, in my view, be regarded as vexatious or oppressive. They were not instituted in order to harass the defendants. There was no bad faith. There was no improper motive. The owner of the *Bona Spes* considers that as his vessel when lying moored was run into and sunk by the *Atlantic Star* he has a good cause of action. Rightly or wrongly he believes that in the advancement or for the protection of his legitimate financial interests his prospects of success are better in this country than in Belgium. It is not our province to decide whether he is right or wrong. But his good faith cannot be assailed. We are told that the report of the court surveyor in Belgium indicates his view that the *Atlantic Star* was not to blame. We are further told that though the report will not bind a Belgian court at a trial it will carry much weight with it; a court will in most cases accept the findings of fact of a surveyor; as to the views on responsibility of a surveyor a court is more likely to accept them than to depart from them. In view of this the plaintiff believes that his claim might fail in Belgium and that in England he will have a better chance of success. The learned judge said²: 'Whether his beliefs in these respects are right or wrong, it would, in my view, be difficult to say that there were no reasonable grounds for his holding them.' I see no reason to suggest that there was any error in their exercise of discretion either by the learned judge³ or by the members of the Court of Appeal⁴. In my view, only if the law as hitherto propounded be now changed could their exercise of discretion be overturned.

In his judgment the learned judge accurately reviewed and stated the law which bound him and then proceeded to consider how he should exercise his discretion. His conclusions were expressed as follows⁵:

'If, therefore, a finding that the Commercial Court of Antwerp was by far the more convenient forum was sufficient of itself to justify me in granting a stay, I should have no hesitation in doing so. As I have indicated, however, I do not consider that the authorities permit me to adopt that approach. I turn to consider, therefore, whether the plaintiff has any good reason for suing here, so that a stay would prejudice him; and whether the difficulties which the defendants would meet as a result of having to defend the action here would be so great as to cause them injustice. On the first point, I do not think that it can justly be said that the plaintiff's motive in suing here is in any way improper. He is suing here because he thinks that he is more likely to succeed here. He has reasons for thinking so, which cannot fairly be categorized as either nugatory or unreasonable. In these circumstances I am of opinion that he would be prejudiced by a stay in the sense that he would be deprived of an advantage which he genuinely and reasonably believes trial of his claim in England would give him. On the second point, while it is inconvenient and expensive for the defendants to have to defend the plaintiff's claim here, while at the same time having to defend at least five other claims in Belgium, I do not consider that the degree

1 [1969] 2 All ER 651, [1969] 1 WLR 781

2 [1972] 1 Lloyd's Rep 534 at 538

3 [1972] 1 Lloyd's Rep 534

4 [1972] 3 All ER 705, [1972] 3 WLR 746

5 [1972] 1 Lloyd's Rep at 539

- a of inconvenience and expense is so great as to make it unjust to the defendants to oblige them to do so.'

In the Court of Appeal Lord Denning MR accepted the findings of the learned judge as to convenience and said¹:

- b 'But, given all that convenience, the judge refused to stay the action in this country; and I agree with him. It is plain that the plaintiff honestly believes that there are substantial advantages to him in taking proceedings in England.'

Phillimore LJ² agreed in dismissing the appeal while saying that if the problem could be treated as *res integra* he would have wished to allow the appeal. Cairns LJ said³:

- c 'I can conceive of cases where inconvenience might be so great as to amount to oppression. I cannot see that the inconvenience here is of that degree. It is by no means uncommon for different causes of action arising out of the same casualty to lead to two actions in different countries. I cannot see that the multiplicity of actions at Antwerp adds much to the inconvenience to the defendants. The fact that witnesses are not within the jurisdiction of the English court and may not be compellable to give evidence here is a common enough feature of Admiralty actions. In my view any inconvenience to the defendants here falls far short of oppression or vexation or injustice.'
- d

He further said that he could not accept that there was no real or substantial advantage to the plaintiff in suing in England.

- e I entirely agree with Cairns LJ³ that there may be cases where the measure of inconvenience which is caused to a defendant is so great as to amount to oppression. There are very many cases which could be brought either in one jurisdiction or in another. In such cases it could be said that the proceedings within whichever is the chosen jurisdiction are 'unnecessarily' brought. But 'oppression' is not thereby proved.

- f The circumstances which determine whether a court has jurisdiction are not those which govern the question whether there should be a stay of proceedings. Only where there is jurisdiction will the decision have to be taken whether an application to stay should be made. But where by the law of a country it is proclaimed that a certain jurisdiction is available and may be 'invoked' there will not lightly be a withholding or a withdrawing of that which in the first place is held out. The Admiralty Court is in a somewhat special position because of the existence of maritime liens. g Whatever may have been their origin in law the Admiralty Court has exercised the right to arrest a ship on the basis that after an event such as a collision a maritime lien attaches to the offending ship for the damage caused. More strictly perhaps it can be said that the lien attaches to a ship that is alleged to have offended.

- h The nature of a maritime lien was considered by the Privy Council in *The Bold Buccleugh*⁴ on appeal from the High Court of Admiralty. A maritime lien was said to be the foundation of the proceeding in rem a process to make perfect a right inchoate from the moment the lien attaches. The claim or privilege travels with the thing. In *Currie v M'Knight*⁵ the decision in *The Bold Buccleugh*⁴ was approved. Lord Watson⁶ described it as a 'reasonable and salutary rule' that when a ship is so carelessly navigated as to occasion injury to other vessels which are free from

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1 [1972] 3 All ER at 711, [1972] 3 WLR at 759, 760

2 [1972] 3 All ER at 712, [1972] 3 WLR at 761

3 [1973] 3 All ER at 714, [1972] 3 WLR at 764

4 *Harmer v Bell, The Bold Buccleugh* (1852) 7 Moo PCC 267, [1843-60] All ER Rep 125

5 [1897] AC 97

6 [1897] AC at 106

blame the owners of the injured craft should have a remedy against the corpus of the offending ship. (See also the judgment of Gorell Barnes J in *The Ripon City*¹).

No suggestion was advanced that it is today no longer necessary and desirable to maintain the long-standing system under which arrest can be made wherever the ship is found. If such suggestion was advanced it would not I think raise a matter for the decision of judicial authorities. The system has lasted for a very long time and is accepted and recognised. The result is that a shipowner knows that in the course of maritime commerce his ship (if a maritime lien attaches to it) may be liable to arrest in many different places. It follows that the decision as to the place of arrest will be made by someone who is to be plaintiff in the proceedings which will follow. It is natural and inevitable and, indeed, is an inherent feature of the recognised system that a plaintiff will choose the place where he considers that his legitimate interests will be best advanced. A shipowner knows this and expects it just as a potential plaintiff knows it. If a plaintiff chooses to sue in England and becomes enabled and entitled to sue he knows that the proceedings may be stayed but will only be stayed if they are oppressive or harassing or are brought in bad faith and for no legitimate reason. If the law of one country is more favourable than the law of another country, is a plaintiff to be criticised for choosing the former? If because of any one of many features such, for example, as that of time limitation he will win if he goes to one country but lose if he goes to another should he be deprived of his right of choice? It is suggested that the matter should be looked at objectively with the interests of justice as the aim to be achieved. But this is only to side-step the problem. It can be assumed that the court in any country will be animated by a desire to do justice. It can be assumed that the court in any country will do justice according to law. But there may be, and presumably are, variations in the law and practice of different countries. As a result there may be advantage for a plaintiff if he proceeds in one country rather than another.

It may well be that maritime nations will decide to have some new and common or uniform provisions of law. But so long as they have not, it is inevitable that a plaintiff who has a maritime lien will exercise his rights in such manner as he deems best calculated legitimately to advance his interests. All concerned with maritime commerce will know this.

It is, I think, important to note some of the provisions relating to Admiralty jurisdiction which are contained in the Administration of Justice Act 1956. These were enacted subsequently to an International Convention on Certain Rules concerning Civil Jurisdiction in matters of Collision². It is clear from s 1 (4) (a) of the Administration of Justice Act 1956 that included in the Admiralty jurisdiction of the High Court are claims for damage done by or received by ships 'whether British or not and whether registered or not and wherever the residence or domicile of their owners may be'. Claims 'wheresoever arising' are included. The Act makes provision for the mode of exercise of Admiralty jurisdiction. It recognises the distinction between actions in rem and actions in personam. By s 3 (3), it is recognised that in a case in which there is a maritime lien on a ship the Admiralty jurisdiction may be invoked by an action in rem against that ship. The Admiralty jurisdiction may be invoked by an action in personam but subject to certain limitations. Thus, if there is a claim for damage arising out of a collision between ships (see s 4 (7)) no court in England and Wales can entertain an action in personam unless the defendant has his habitual residence or place of business within England and Wales or unless the cause of action arose within inland waters or the limits of a port or unless an action arising out of the same incident or series of incidents is proceeding in the court or has been heard and determined in the court. It is further provided that no court in England and Wales is to entertain an action in personam to enforce a claim

1 [1897] P 226, [1895-99] All ER Rep 487

2 Cmnd 1128

a to which s 4 applies until any proceedings previously brought by the plaintiff in any court outside England and Wales against the same defendant in respect of the same incident have been discontinued or ended (see s 4 (2)). In s 5 (2), it is provided:

‘Nothing in this Part of this Act shall be construed as limiting the jurisdiction of the court to refuse to entertain an action for wages by the master or a member of the crew of a ship, not being a British ship.’

b While there is nothing in the Act which limits the power of the Admiralty Court to stay an action in rem which is within its jurisdiction so also there is nothing in the Act requiring the court to exercise its power to stay on principles differing from those which had for so many years prior to 1956 been recognised. The authorities which have established those principles may not be binding on this House but they have been consistent in what they have laid down and have for long been accepted.

c Particularly in reference to a court whose doors have been held widely open to those concerned in international maritime trade I consider that if any change is to be made it should be made by some process other than that of judicial pronouncement. For the reasons which I have given I would dismiss the appeal.

d **LORD WILBERFORCE.** My Lords, at first instance, Brandon J¹ held that, so far as convenience was concerned, the Commercial Court of Antwerp was by far the more appropriate forum to try the claim in this action. This holding was justified by the following facts: 1. The collision took place in a channel of the River Scheldt leading to the port of Antwerp. 2. Four other proceedings arising out of the collision were pending before the Commercial Court of Antwerp. (A fifth action has been

e begun there by the respondent, in order to preserve the time limit.) 3. A court surveyor appointed by the Commercial Court of Antwerp, on the application of the respondent, had made a comprehensive report on the collision: the surveyor soon after the event interviewed all witnesses directly or indirectly involved: he took a number of statements which are set out in the report. The respondent was represented by a Belgian lawyer before the surveyor: there is a right, which was

f exercised, to cross-examine witnesses. Normally this report would be considered at a court hearing in the Commercial Court of Antwerp but only, of course, if proceedings were brought by a claimant. 4. The rights and liabilities of those involved depend, at least in part on Belgian law and port regulations. In addition: 5. Neither the Atlantic Star nor the Bona Spes is British or British owned—both are Dutch vessels, owned by Dutch nationals. 6. The only connection of any element in the

g action with England is that the present suit was begun in rem against the Atlantic Star when the vessel was expected in Liverpool. She would no doubt have been arrested if the appellants had not given a guarantee of £80,000 for the respondent’s claim. I shall comment later on this aspect of the matter, and on the nature of the advantage to the respondent of continuing the action here.

h The case for staying this English action and remitting the respondent to his remedy in Antwerp is therefore a strong one. If the question whether it should be stayed is a matter of judicial discretion, there would seem to be very good reasons for doing so. So the first question must be whether the discretion exists, and if so whether it is a free discretion or one limited in any way by any rule of law. I dispose first of some arguments which, if accepted, might exclude the discretion.

i 1. The jurisdiction of the High Court in Admiralty matters is now governed by the Administration of Justice Act 1956. This Act restates, but does not, as I understand it, in any respect relevant to the present issue, extend the previous law as stated in the Supreme Court of Judicature (Consolidation) Act 1925. It confers jurisdiction to entertain actions in rem in respect of damage done by a ship whether the defendant ship is British or not and wherever the residence or domicile of its owners

may be. It refers (s 3 (3)) to cases where there is a maritime lien (the present is such a case) and provides that in such a case the Admiralty jurisdiction of the High Court 'may be invoked' by an action in rem against the ship in question. The Act thus establishes beyond question the court's jurisdiction, i.e. power to try the suit. In my opinion, it does no more. It does not oblige the court to proceed with any case: it does not affect any matter of procedure, nor in terms or by implication affect the court's power, inherent or statutory, to say proceedings. It leaves the court, as it was under the 1925 Act, and as it was before the 1925 Act, master of its own procedure: it imposes no fetter on any discretion it may have.

2. Reference was made in argument and in the judgments of the Court of Appeal¹ to an international convention² signed at Brussels on 10th May 1952 concerning civil jurisdiction in matters of collision. It seems clear that the 1956 Act was passed in order, in certain respects, (e.g. s 3 (4)) to implement this convention. There is no question here of referring to the text of the convention in order to interpret the Act: the terms of the Act are clear, and I have dealt with them. And the convention has no independent relevance in this case. It does not represent, or constitute, customary international law: it is a limited agreement between its parties. It has no legal effect in a private suit in England except so far as incorporated in our law. Even if it could be looked at, it could not avail the respondent who is a citizen of the Netherlands, not a party to the convention: and, although Belgium is a party, no Belgian subject is concerned in the action. I shall make no further reference to this convention. There is one other preliminary matter of importance. Reference was made to the Scottish doctrine of *forum non conveniens*. This is a doctrine of general application in Scotland, which has been validated in this House: *La Société du Gaz de Paris v La Société Anonyme de Navigation, "Les Armateurs Français"*³. A similar doctrine has gained acceptance in the United States of America with the authority of the Supreme Court: see *Gulf Oil Corp'n v Gilbert*⁴ and, in an international matter, *Canada Malting Co Ltd v Paterson Steamships Ltd*⁵. We were urged to take this opportunity to bring English law into line with these legal systems and hold 'forum non conveniens' to be a plea available in England.

My Lords, I am of opinion that this is a course which we cannot take. It is clear, from decisions to which I shall refer, that for some 100 years the law of England has taken a divergent path with its own rules, defined and adjusted in numerous cases, some of high authority. This same path has been followed in other Commonwealth jurisdictions—Australia, Canada, India, New Zealand. The arguments in favour of 'forum non conveniens' as a general rule are not so overwhelming that we should now make a radical change of direction: indeed there is much to be said for the English rule, provided that it is not too rigidly applied. I would not therefore favour accepting the radical solution.

I now examine the English rules in this matter: the governing statement at the present time is contained in the well-known judgment of Scott LJ in *St Pierre v South American Stores (Gath & Chaves) Ltd*⁶ which I shall quote later. There is a danger, as with all clear propositions, of this receiving quasi-statutory force, and of the key words 'oppressive' and 'vexatious' being too rigidly construed and applied. I do not think that these are technical words: they can only be understood against an evolutionary background. It is not necessary to go back much more than 100 years.

Of the early cases before the Supreme Court of Judicature Act 1873, it is only useful

¹ [1972] 3 All ER 705, [1972] 3 WLR 746

² International Convention on Certain Rules concerning Civil Jurisdiction in matters of Collision, ratified by the United Kingdom on 18th March 1959 (Cmnd 1128)

³ 1926 SC (HL) 13

⁴ (1947) 330 US 501

⁵ (1932) 285 US 413

⁶ [1936] 1 KB 382 at 398, [1935] All ER Rep 408 at 414

a to cite the decision of this House in *Carron Iron Co v Maclaren*¹. This was concerned with a subject-matter very different from the present and suitable enough for chauvinistic treatment, namely, an administration action in the English Chancery Court, the question being whether an injunction should be granted against the appellant, a Scottish company, restraining proceedings in Scotland. Sir John Romilly MR² had granted an injunction but this was set aside by a majority in this House¹.

b The reasons given were, in general terms, that where there is litigation here, in which complete relief may be given, it may be vexatious for a party to commence foreign proceedings and he may be restrained from continuing them: but that this is not necessarily so in every case. Lord Cranworth LC³ refers to interfering 'on principles of convenience, to prevent litigation, which it has considered to be either unnecessary, and therefore vexatious, or else ill adapted to secure complete justice', but recognising that there were limits to this principle he set the injunction aside, and Lord Brougham agreed. Lord St Leonards, dissenting, argued for a wider rule,

c that the court has power to act as the ends of justice require, and with that view to order parties to take or omit to take any steps and proceedings in any other court of justice, whether in this or in a foreign country. If this argument had prevailed, English law might have developed closer to the Scottish doctrine of *forum non conveniens*: but it was not the view of the House and was not taken up in later

d authorities.

Before the third important decision there was passed the Supreme Court of Judicature Act 1873. That Act (s 24 (5)) removed the power to restrain proceedings before the High Court by injunction, but in the same subsection recognised the courts' inherent power to stay. The terms in which it did so are of interest:

e '... nothing in this Act contained shall disable [the court] from directing a stay of proceedings in any cause or matter pending before it if it shall think fit; and any person ... who would have been entitled, if this Act had not been passed, to apply to any Court to restrain the prosecution thereof ... shall be at liberty

f to apply ... for a stay of proceedings in such cause or matter, either generally, or so far as may be necessary for the purposes of justice.'

The Act, further, provided in a schedule initial rules of court which were to take effect until altered under power conferred by the Act. The initial rules contained no reference to vexation or oppression in relation to the courts' power to stay.

The form of s 24 (5) was evidently such as to secure that whatever special powers

g might be defined by rules of court, the inherent and general power of the High Court to stay proceedings should remain. This has been generally accepted since 1873. Section 24 (5) has itself been replaced by s 41 of the Supreme Court of Judicature (Consolidation) Act 1925 which is in similar form: and though there is now in the rules a provision relating to cases of vexation or oppression it has never been contended that the power of the court to stay is limited to such cases.

h The leading case of *McHenry v Lewis*⁴ was decided against this background. There was an application to stay proceedings in this country during the pendency of two other actions, one in England brought by a different plaintiff, one in America brought by the same plaintiff jointly with another person. The Court of Appeal dealt with it as a matter of general jurisdiction and refused to stay the English action. Each member of the distinguished Court of Appeal is found using the word 'vexatious'

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1 (1855) 5 HL Cas 416

2 See, sub nom *Maclaren v Stainton*, (1852) 16 Beav 279

3 (1855) 5 HL Cas at 438

4 (1882) 22 Ch D 397

but as a word of illustration rather than limitation: for the widest range of considerations is taken into account and carefully weighed. Bowen LJ's words¹ are well-known and, to my mind, sum up the basis of the decision:

'... it would be most unwise, unless one was actually driven to do so for the purpose of deciding this case, to lay down any definition of what is vexatious or oppressive, or to draw a circle, so to speak, round this Court unnecessarily, and to say that it will not move outside it... they ["vexation" and "oppression"] must vary with the circumstances of each case.'

All the Lords Justices emphasise that there is power to stay an English action, if there is concurrent litigation abroad—Bowen LJ² says that the court could do it 'if necessary for the purposes of justice'—but the jurisdiction is to be exercised cautiously—special circumstances must exist.

It is obvious that this important case depends on a principle quite distinct from 'forum non conveniens': it recognises an exceptional power capable of being described by reference to 'vexation' and 'oppression' but shows that these words are to be widely interpreted in relation to the circumstances and in the light of the fact that the court's discretion is general.

In 1883 the Court of Appeal again considered the matter (*Peruvian Guano Co v Bockwoldt*³). This was an action in England by an English company for delivery of the cargoes of seven ships or damages, and another action in France by the same plaintiff in relation to six of the same ships. The defendants were French. The court refused to stay the English suit so far as it related to the six ships, the subject of the French action. Sir George Jessel MR found 'substantial reasons of benefit' to the plaintiff⁴ for bringing the two actions. Bowen LJ said that there was no precedent for preventing double litigation when the double litigation has no element of oppression other than that an action was going on abroad which would give other or additional remedies beyond those attainable in England. And he said this:⁵

'When a plaintiff comes into an English Court he asks for justice. The Court is bound therefore not to refuse to hear his case, or to put him under difficulties in the way of having his action brought to a conclusion. Of course that rule does not mean that a plaintiff, under the pretence of asking for justice, is to do that which is oppressive and vexatious, and the Courts have always at Common Law, with which I am more familiar, and no doubt in Equity also, interfered to prevent a plaintiff under colour of asking for justice from harassing others. Therefore, when that which he is asking for is frivolous, or sometimes when he is asking for it in a way which necessarily involves injustice, the Courts have interfered.'

It is quite certain that, in these words, he had no intention of going beyond what he had said in *McHenry v Lewis*¹ or placing any more weight or meaning on the words, 'oppressive' and 'vexatious' than he had previously done. These cases, together with *Hyman v Helm*⁶, which I need not cite, gave a firm direction to the law, so that citation of many subsequent cases would be superfluous.

I mention one other before coming to the *St Pierre* case⁷. In *Logan v Bank of Scotland (No 2)*⁸ the cases cited were applied as between England and Scotland. The transactions in issue took place in Scotland and all the parties, except one defendant,

1 (1882) 22 Ch D at 407, 408

2 (1882) 22 Ch D at 409

3 (1883) 23 Ch D 225

4 (1883) 23 Ch D at 230

5 (1883) 23 Ch D at 233

6 (1883) 24 Ch D 531

7 *St Pierre v South American Stores (Gath & Chaves) Ltd* [1936] 1 KB 382, [1935] All ER Rep 408

8 [1906] 1 KB 141, [1904-7] All ER Rep 438

a resided in Scotland. The necessary evidence would have to be obtained from Scotland. A stay of the English action was sought on the ground, it appears, of vexation and oppression, and was granted by the Court of Appeal. Sir Gorell Barnes P in his judgment referred to the Scottish doctrine of *forum non conveniens* and expressed the opinion that, as such, this was not followed in England. The English rule he stated in the following words¹:

b 'The English Courts are freely open to persons foreign to this country seeking to enforce their rights against our corporations, companies and citizens, in cases in which the Courts can properly exercise jurisdiction, but, while I think we ought to be careful not to check this freedom, I am of opinion that we ought not to allow this hospitality to be abused . . . The Court should, on the one hand, see clearly that in stopping an action it does not do injustice, and, on the other hand, I think the Court ought to interfere whenever there is such vexation and oppression that the defendant who objects to the exercise of the jurisdiction would be subjected to such injustice that he ought not to be sued in the Court in which the action is brought, to which injustice he would not be subjected if the action were brought in another accessible and competent Court.'

d The *St Pierre* case² arose out of a lease of land in Chile. The defendants were English companies, one trading in Chile, the other in Argentina. One or both of these had started proceedings in Chile against the plaintiffs raising the same issue as arose in England: the defendants applied for a stay of the English action. This was refused. The judgment of Scott LJ contains the well-known passage³ which, at this stage, it may be convenient to quote:

e 'The true rule about a stay under s. 41, so far as relevant to this case, may I think be stated thus: (1.) A mere balance of convenience is not a sufficient ground for depriving a plaintiff of the advantages of prosecuting his action in an English Court if it is otherwise properly brought. The right of access to the King's Court must not be lightly refused. (2.) In order to justify a stay two conditions must be satisfied, one positive and the other negative: (a) the defendant must satisfy the Court that the continuance of the action would work an injustice because it would be oppressive or vexatious to him or would be an abuse of the process of the Court in some other way; and (b) the stay must not cause an injustice to the plaintiff. On both the burden of proof is on the defendant. These propositions are, I think, consistent with and supported by the following cases: *McHenry v. Lewis*⁴; *Peruvian Guano Co v. Bockwoldt*⁵; *Hyman v. Helm*⁶; *Thornton v. Thornton*⁷; and *Logan v. Bank of Scotland (No. 2)*⁸.'

h This clear and emphatic statement has proved its usefulness over the years. It has been applied by judges, without difficulty, to a large variety of cases. I should be most reluctant, even if I were capable, of replacing it by some wider and more general principle. But too close and rigid an application of it may defeat the spirit which lies behind it. And this is particularly true of the words 'oppressive' and 'vexatious'. These words are not statutory words: as I hope to have shown from earlier cases, they are descriptive words which illustrate but do not confine the courts' general jurisdiction. They are pointers rather than boundary marks. They are capable of a strict, or technical application; conversely, if this House thinks fit, and as I think they should,

i 1 [1906] 1 KB at 150, [1904-7] All ER Rep at 443

2 [1936] 1 KB 382, [1935] All ER Rep 408

3 [1936] 1 KB at 398, [1935] All ER Rep at 414

4 (1882) 22 Ch D 397

5 (1883) 23 Ch D 225

6 (1883) 24 Ch D 531

7 (1886) 11 PD 176, [1886-90] All ER Rep 311

8 [1906] 1 KB 141, [1904-7] All ER Rep 438

they can in the future be interpreted more liberally. In my opinion, the passage cited embodies the following principles—all of which have been discussed in earlier authorities. a

First, a plaintiff should not lightly be denied the right to sue in an English court, if jurisdiction is properly founded. The right is not absolute. The courts are open, even to actions between foreigners, relating to foreign matters. But they retain a residual power to stay their proceedings. I may add that, in relation, *inter alia*, to Admiralty suits, the existence of this power has been explicitly affirmed in the United States of America. Mr Benedict, a writer of acknowledged authority, says¹: b

‘Admiralty Courts have jurisdiction of Admiralty suits entirely between foreigners when proper service can be had or property attached, but it is discretionary with the Court whether it will accept such jurisdiction or not.’

The judgment of Brandeis J in *Canada Malting Co Ltd v Paterson Steamships Ltd*² supports this with several judicial citations. c

Secondly, in considering whether a stay should be granted the court must take into account (i) any advantage to the plaintiff; (ii) any disadvantage to the defendant: this is the critical equation, and in some cases it will be a difficult one to establish. Generally this is done by an instinctive process—that is what discretion, in its essence, is. But there are perhaps some elements which it is possible to disengage and make explicit. In the first place, I do not think it would be right to say that *any* advantage to the plaintiff is sufficient to prevent a defendant from obtaining a stay. The cases say that the advantage must not be ‘fanciful’—that a ‘substantial advantage’ is enough. I do not even think that one can say that the advantage must be substantive (i.e. in the existence in English law of some more favourable substantive rules than would apply elsewhere) rather than adjectival, though more weight might be given to the former. An example given by Lord Denning MR illustrates this: a motor collision in Italy between two Italian citizens, one of whom catches the other here and sues him. Lord Denning MR says that this would be purely Italian and so (inferentially) should be stayed. But if this is right, it must follow that advantage to a plaintiff is not in itself decisive for the suit may well have been brought here because our courts give higher damages, or damages under broader heads: so if a stay is to be granted it must be because the court can additionally consider the nature of the case, and the disadvantage to the defendant. A bona fide advantage to a plaintiff is a solid weight in the scale, often a decisive weight, but not always so. d

Then the disadvantage to the defendant: to be taken into account at all this must be serious, more than the mere disadvantage of multiple suits; to prevail against the plaintiff’s advantage, still more substantial—how much more depending how great the latter may be. The words ‘oppressive’ or ‘vexatious’ point this up as indicative of the degree and character of the prejudice that must be shown. I think too that there must be a relative element in assessing both advantage and disadvantage—relative to the individual circumstances of the plaintiff and defendant. This was certainly a factor in the marginal case of *Devine v Cementation Co Ltd*³ and without it, the case could hardly be supported. e

How, then, should these principles be applied to the present case? Before I attempt to apply them I must consider whether there is any special factor relevant to the Admiralty jurisdiction which should impose some modification on the general rule. There are several points to bear in mind. f

First, the Admiralty Court in this country is one with a long history and a wide international reputation. It is one to which resort is made from all over the world in matters having no intrinsic connection with England. The proportion (we were g

¹ The Law of American Admiralty (ed Krauth) (1940), vol I, p 260 and footnote

² (1932) 285 US 413

³ [1963] NI 65 h

a supplied with figures researched by counsel) of purely foreign suits which it entertains is substantial. It is a forum of choice often selected by parties to contracts: it is accustomed to applying foreign law, it is well-equipped to take expert advice which itself has a high repute. While all of these considerations still obtain today, there are now in existence, in other maritime countries, courts with Admiralty jurisdiction with comparable, if not equal, experience and I think it would be right that weight should be given to this when one of such courts is presented as the alternative forum.

b Secondly, there has not been brought to notice any case—at least of an action in rem—where, in a case where foreign proceedings are pending, and the plaintiff in one suit is defendant in the other, a stay has been granted. A list of cases to the contrary includes well-known cases: *The Janera*¹; *The London*²; *The Madrid*³; *The Quo Vadis*⁴; *The Monte Urbasa*⁵; *The Lucile Bloomfield*⁶; *The Soya Margareta*⁷. These instances are impressive, but they are instances. More than one of them recognises the existence of the discretion to stay (cf *The London*², *The Quo Vadis*⁴, *The Lucile Bloomfield*⁶ ‘the Court must weigh the equities, not only on one side, but on both sides’ per Hewson J⁸). I do not find either in their facts or in any statement of principle in them, a general rule which would cover this case. But they do vouch the proposition that a very clear case is needed to justify a stay, where a plaintiff is (properly as to jurisdiction) suing here and that the mere fact that there are proceedings abroad is not enough.

d Thirdly, the present case, as many other Admiralty suits, is an action in rem, with a view to arrest. It is a case in which, by virtue of the collision, a maritime lien exists on his ship. These circumstances, it is said, provide a strong reason for retaining the action in the English court: they provide, in themselves, a strong point of connection with an English forum.

e My Lords, I have no doubt that in many, if not most, cases, this argument would be a sound one. The reason, normally, for bringing proceedings in rem here is, by means of the procedure of arrest, to obtain security for the claim. But I do not regard it as conclusive in every case. The right to bring an action in rem in England is by statute conferred in the same terms as the right to bring any other type of action—
f by the use of the facultative ‘may’ (Administration of Justice Act 1956, s 3 (3)). The Act confers jurisdiction but the residual right to decline to exercise it always remains. If the object of suing here is to obtain security, it could hardly be denied that this was an ‘advantage’ which a plaintiff can legitimately seek, and which it would be an injustice to deny. But in the present case this is not so. The appellants, owners of the Atlantic Star, are the Holland-America Line, one of the leading shipping enterprises, located in the Netherlands, whose ships, including the Atlantic Star itself, sail into
g Antwerp as frequently as any claimant against them could desire. A contention that it was necessary, or even advantageous, to wait for a sailing to England in order to get security here, would be hollow, indeed almost disingenuous, and the respondent does not make it. Instead he takes the point—a technical one—that the English court cannot take any notice of the fact that an undertaking to provide security, which undoubtedly would be adequate, in Antwerp was offered after the issue of the writ.
h But this point fails because there is no doubt, in my opinion, that the court, in considering a stay, looks at the state of the matter as at the date of consideration (cf *The Janera*⁹).

i 1 [1928] P 55

2 [1931] P 14

3 [1937] 1 All ER 216, [1937] P 40

4 [1951] 1 Lloyd's Rep 425

5 [1953] 1 Lloyd's Rep 587

6 [1964] 1 Lloyd's Rep 324

7 [1960] 2 All ER 756, [1961] 1 WLR 709

8 [1964] 1 Lloyd's Rep at 329

9 [1928] P at 57

So I do not think that, in the circumstances of this case, which may be exceptional, the nature of the action adds anything of weight to the arguments against a stay of proceedings. Where, then, does the balance lie, on the equation as I have stated? On the respondent's side, beyond the initial fact—which always requires displacement—that he is suing here in a court whose doors are open to him, there is beyond his ipse dixit no demonstrated advantage. As regards security, he will have all that he needs if he sues in Antwerp. He cannot point to any real, solid, advantage, procedural or substantive, in suing here. He says—or it is said in support of his case—that by suing here he will get the advantage of English procedure—oral, adversary, experienced. But beyond the fact that this may be different from Belgian procedure and that our courts have confidence in their own, there is nothing solid here. It may well be that to sue in Belgium may be cheaper and speedier: an English trial will not happen till years after the event: some witnesses may be unavailable. As to substantive law some suggestion was made that, by suing here, the respondent would be able to take advantage of a resumption which arises when a ship in motion collides with a ship at anchor. But it was not shown that this 'presumption'—after all a matter of common sense—would not be taken account of in Belgium. In final analysis, the 'advantage' to the respondent comes to nothing more than a hope that in an English court he might stand a better chance of winning than, in the face of the surveyor's report, he would stand in Belgium. There is nothing wrong with this. As Lord Esher said in *The Reinbeck*¹ you may expect men of business to act as such, in a good stand up fight. But one must weigh the considerations on the other side.

I need not repeat the latter—they are disadvantages real and strong. The appellants, certainly, are a powerful company, which on any result can support financial detriment. But I do not think that to compel them to submit to proceedings here, starting, after a long interval, from the beginning with undoubted difficulty of obtaining witnesses, after they have been exposed on the respondent's application to a full inquiry in Belgium and, if both actions proceed, with the risk of conflicting decisions in the two courts, is essentially just.

I would allow the appeal.

LORD SIMON OF GLAISDALE. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend, Lord Morris of Borth-y-Gest. I agree with it so entirely that I add a few words of my own only because of the importance of the issue before your Lordships—your Lordships being invited to interfere with the basis of jurisdiction of the English Admiralty Court, one of the most famous and historic courts in the world and one of international jurisdiction not only by public law but also by general commercial recourse:

(1) Your Lordships are here faced with two irreconcilable, and each entirely respectable, legal stances; though, since every obverse has its reverse, each has concomitant disadvantages. On the one hand, there is the principle of *forum conveniens*. According to this doctrine, whatever the law may say about jurisdiction, the parties will be compelled, through the court's exercise of its inherent or statutory power to stay proceedings, to litigate in the forum which in all the circumstances seems to the court the most appropriate one. On the other, there is the doctrine that, if a court has jurisdiction which is invoked by a plaintiff, it will not deny him justice.

(2) The former doctrine—that of the *forum conveniens*—is apparently part of Scots and United States law; and it obviously has much to be said for it. The latter doctrine—that a plaintiff who founds jurisdiction will not be denied a hearing unless he is misusing the forensic process so as to perpetrate injustice—has also much to be said for it; and it is clearly the doctrine established in English law. It may, indeed, be merely a particular application of the promise made at Runnymede that 'to no

one will We deny justice'. (It would be an inadequate performance of such a promise to say, 'You can (to our way of thinking) get perfectly satisfactory justice elsewhere.')

(3) 'Forum-shopping' is a dirty word; but it is only a pejorative way of saying that, if you offer a plaintiff a choice of jurisdictions, he will naturally choose the one in which he thinks his case can be most favourably presented: this should be a matter neither for surprise nor for indignation.

(4) English courts are normally confined to examining the statutes giving effect to a treaty or international convention, and precluded from scrutinising the treaty itself. But where public policy and international comity are invoked (as they were here by the appellants, in their endeavour to persuade your Lordships to depart from the rule of English law heretofore established and accepted), it is permissible (indeed, incumbent) to examine our formal international obligations. As Lord Atkin said in *The Arantzazu Mendi*¹: 'Our state cannot speak with two voices . . . the judiciary saying one thing, the executive another.' (Though Lord Atkin was speaking of recognition of foreign sovereignty, his observations must be of general application with a unitary state in cases such as the instant: see *Adams v Adams* (Attorney-General intervening²).

(5) Article 1 of the International Convention on Certain Rules concerning Civil Jurisdiction in matters of Collision³, signed at Brussels on 10th May 1952, by a number of states, including Great Britain and Belgium, reads as follows:

'(1) An action for collision occurring between seagoing vessels, or between seagoing vessels and inland navigation craft, can only be introduced: (a) either before the Court where the defendant has his habitual residence or a place of business; (b) or before the Court of the place where arrest has been effected of the defendant ship or of any other ship belonging to the defendant which can lawfully be arrested, or where arrest could have been effected and bail or other security has been furnished; (c) or before the Court of the place of collision when the collision has occurred within the limits of a port or inland waters.

'(2) It shall be for the plaintiff to decide in which of the Courts referred to in (1) of this Article the action shall be instituted.

'(3) A claimant shall not be allowed to bring a further action against the same defendant on the same facts in another jurisdiction, without discontinuing an action already instituted.'

(6) This country duly ratified the 1952 convention; and was thereupon bound to give effect to it in municipal legislation. This was done by the Administration of Justice Act 1956. All that the 1956 Act had to do (and did) in this respect was to confine the English Admiralty jurisdiction in personam so as to conform with art 1 (1) (a) and (c) of the convention (s 4) and to extend the English Admiralty jurisdiction in rem to a sister ship in accordance with art 1 (1) (b) of the convention (s 3 (4) (b)).

(7) To covenant in art 1 (2) that it shall be for the plaintiff to decide in which of the various courts open to him the action shall be instituted, and then to proceed to stay his action if he chooses the one most convenient to himself but not to everyone else, is to take back with one hand what we are by international treaty bound to give him with the other.

(8) Ships are elusive. The power to arrest in any port and found thereon an action in rem is increasingly required with the custom of ships being owned singly and sailing under flags of convenience. A large tanker may by negligent navigation cause extensive damage to beaches or to other shipping: she will take very good care to keep out of the ports of the 'convenient' forum. If the aggrieved party manages to arrest her elsewhere, it will be said forcibly (as the appellants say here): 'The defendant

¹ [1939] 1 All ER 719 at 722, [1939] AC 256 at 264

² [1970] 3 All ER 572 at 577, [1971] P 188 at 189, per Sir Jocelyn Simon P

³ Cmnd 1128

has no sort of connection with the forum except that she was arrested within its jurisdiction.' But that will frequently be the only way of securing justice. a

(9) 'Forum-shopping' is, indeed, inescapably involved with the concept of maritime lien and the action in rem. Every port is automatically an admiralty emporium. This may be very inconvenient to some defendants; but the system has unquestionably proved itself on the whole as an instrument of justice.

(10) If, as I believe, English law does not know the doctrine of forum conveniens, but rather allows any plaintiff bona fide seeking relief to have unrestricted access to the seat of judgment, it would, in my respectful submission, be wrong to hinder such access by marginal alteration of the criteria hitherto prevailing. That would be to admit by the back door a rule that your Lordships consider cannot be welcomed at the front. b

(11) My own view is, I confess, that the rule which, as my noble and learned friend, Lord Morris of Borth-y-Gest, has shown, is firmly established in English law is, on balance, the one best suited to general advantage and justice. But, certainly, it has sufficient to commend it, it is so firmly settled, and it is so intricately involved with this country's international obligations, that if it is to be changed, it must be for Parliament and not for the courts to make the change. c

I would therefore dismiss the appeal. d

LORD KILBRANDON. My Lords, I have had the advantage of reading the speech prepared by my noble and learned friend, Lord Wilberforce, with which I entirely agree: it is therefore not necessary that I should give my views at length. First, the circumstances in which the application for an order to stay is made must be briefly set out, because it is on their distinctive character that the decision will depend. e

As a consequence of a collision in the River Scheldt between the ship *Atlantic Star* (the appellants), and two moored barges, the *Bona Spes* (the respondents), and the *Hugo van der Goes*, all Dutch vessels, there are now pending the following actions against the *Atlantic Star*: A. In the Commercial Court at Antwerp: (i) By the owners of the *Hugo van der Goes*; (ii) by the cargo (part) of the *Hugo van der Goes*; (iii) by the dependants of certain deceased members of the crew of the *Hugo van der Goes*; (iv) by the cargo of the *Bona Spes*; (v) by the owners of the *Bona Spes*; B. In the High Court in London: (i) by the owners of the *Bona Spes*. It is agreed that action A(v) was brought after B(i), but only in order to protect the respondents against the running of the Belgian time limitation, and that, should B(i) be allowed to proceed, A(v) will be abandoned. Actions A(i) to A(iv) cannot be abandoned with a view to the claims in them being adjudicated in London, since they are now time-barred here. So they will in any event have to go on in Antwerp. As between the respondents and the appellants, the Belgian and the British courts have unimpeachable jurisdiction, the former arising from the place of the accident, the latter in consequence of the *Atlantic Star* having given bail in order to avoid arrest in London. No doubt all the actions could also have been prosecuted in the courts of the Netherlands, the forum of the owners of the *Atlantic Star*, the *Holland-America Line*. f
g
h

One other feature must be mentioned because it is important. On 29th January 1970, that is, two days after the accident, the *Hugo van der Goes* made application to the Commercial Court at Antwerp for the appointment of a surveyor. This functionary, an experienced master mariner, is charged with the duty of investigating the circumstances of an accident, with the assistance of legal representatives of those who have been concerned in it, who have the right to question in his presence witnesses who may be called by him in order to give evidence as to what happened. A day or two later the respondents, in ignorance that a prior application had already been made, also applied for a surveyor to be appointed. The consequence was that the surveyor, Captain Van Clemen, made a full and careful investigation, in which the i

a legal advisers to the present parties were participants, and reported to the Commercial Court his conclusions, including those concerning salvage, on 23rd February 1971, that is within one year and one month of the accident. The affidavit evidence of Belgian law leads us to understand that, if the experience of precedent is a guide, it is probable that the Commercial Court at Antwerp will accept the opinion arrived at by the surveyor. That opinion appears to be favourable to the Atlantic Star.

b Ignoring action A(v), which, if the stay asked for is refused, is of an ephemeral character, it will be seen that in all but a technical sense the merits of the dispute between the present parties are the subject-matter of *lis alibi pendens*—but not technically so, since that subject-matter is to be debated *alibi* between non-identical parties. There has thus been set up the possibility, if not the probability, of contradictory decisions being arrived at on the same facts in two different courts of competent jurisdiction: the mere statement of that situation should be enough to invite the contemplation of some remedy for it. The question is, should the action B(i) be stayed to await the decision of the Antwerp actions?

c It is with such cases of double, or multiple, jurisdiction as this that the plea of *forum non conveniens* has been designed to cope. The idea lying behind the plea is that it is desirable, in such circumstances, to find some way of reconciling the general rule that, jurisdiction being for any reason exercisable by a particular court, the judge of that court cannot refuse to exercise it, with another general rule, that the plaintiff ought to pursue the defendant in the court to which the defendant is normally subject, possibly because of his physical presence within reach of the judge's arm, or perhaps *ratione domicilii*. Obviously this conflict is likely to occur where one of the competing jurisdictions has been constituted in some court which would have had no jurisdiction over the defendant but for some special power conferred through the presence of his property within the jurisdiction. Examples are, by arrestment *ad fundandem jurisdictionem* in Scotland, or, in the several countries in which such a procedure is competent, arrestment *in rem* to found jurisdiction against a ship, and thus against her owners.

d f Since the plea of *forum non conveniens* is not only familiar but seems to have been sustained more liberally in Scotland than in England, it was inevitable that your Lordships should have had a full explanation of its use in that system. I do not think it is necessary to examine the Scottish practice in detail, since I am satisfied that it has not been adopted as part of the law of England. In *Sim v Robinow*¹ Lord Kinnear, in a widely quoted passage, after pointing out that the court would not refuse to exercise its jurisdiction 'upon the ground of a mere balance of convenience and inconvenience', went on to say that:

g '... the plea can never be sustained unless the Court is satisfied that there is some other tribunal, having competent jurisdiction, in which the case may be tried more suitably for the interests of all the parties and for the ends of justice.'

h In *La Société du Gaz de Paris v La Société Anonyme de Navigation, "Les Armateurs Français"*² Lord Sumner put the rule rather differently, in what may now be taken to be its authoritative form, when he said:

j 'I do not see how one can guide oneself profitably by endeavouring to conciliate and promote the interests of both these antagonists, except in that ironical sense, in which one says that it is in the interests of both that the case should be tried in the best way and in the best tribunal, and that the best man should win. The real proposition is, I think, that the Court has to consider how best the ends

1 (1892) 19 R 665 at 668

2 1926 SC (HL) 13 at 22

of justice in the case in question and on the facts before it, so far as they can be measured in advance, can be respectively ascertained and served . . . The object, under the words "*forum non conveniens*" is to find that *forum* which is the more suitable for the ends of justice, and is preferable because pursuit of the litigation in that *forum* is more likely to secure those ends.' a

And in the same case Lord Dunedin¹ pointed out that the proper translation of 'conveniens' was not 'convenient' but 'appropriate'. One can, I think, leave the Scottish law by expressing the opinion that, on the additional authority of *Sheaf Steamship Co Ltd v Compania Transmediterranea*², there is no doubt that the Court of Session would sustain the plea on facts identical with those in the present case. b

There may, however, be a good reason for a significant difference between the two practices. In a large proportion of the cases in Scotland in which the plea has been taken, the case has come before the Scottish court by the exercise of what is widely regarded as an exorbitant jurisdiction, namely, that founded by arresting the moveable property in Scotland of a foreigner. The *Société du Gaz*³, although an Admiralty action, was such a case. When that jurisdiction is exercised, there may be the greater need for care lest injustice be done by overriding another competent and appropriate court. In fact the plea of *forum non conveniens* is always, in Scotland, the appropriate plea, and *lis alibi pendens* is inappropriate, where the competing forum is a foreign court: *Martin v Stopford-Blair's Executors*⁴ per the Lord President (Inglis). I have also been struck by the fact that a doctrine somewhat resembling the Scottish is applied by the English courts when they in their turn are exercising an exorbitant jurisdiction, namely, that under RSC Ord 11, r 4 (3), it is provided that on an application for leave— c d

'to serve a writ in Scotland or Northern Ireland, if it appears to the Court that there may be a concurrent remedy there, the Court, in deciding whether to grant leave, shall have regard to the comparative cost and convenience of proceeding there or in England . . .'

But the Admiralty jurisdiction in rem founded by arrestment of a ship, or substituted bail, is not exorbitant; it is widely recognised and is accepted in international agreements. This may be a distinction which justifies a greater reluctance in the English than in the Scottish courts to defer, by staying or dismissal of an action in rem, to another competent forum. It can also be argued that the liberality of the Scottish procedure may as easily lead to injustice as may an insistence on a more chauvinistic attitude; an example is perhaps *Williamson v North-Eastern Railway Co*⁵. f

The courts of the United States appear more favourably disposed to the plea than do the English. Frankfurter J in *Baltimore & Ohio Railroad Co v Kepner*⁶ described it as a manifestation 'of a civilized judicial system . . . firmly imbedded in our law'. Comparably wide general language was used in the latest United States case cited to us, *The Chaparral*⁷. This case dealt with a forum selection clause in a towage contract, not with a plea of *forum non conveniens*. The contract provided for disputes to be decided in London; the incident between tug, a German vessel, and tow, an American barge, took place in the Gulf of Mexico. The tug was arrested in Tampa, Florida. The Supreme Court refused an application to restrain the defendants, the g h

1 1926 SC (HL) at 18

2 1930 SC 660

3 1926 SC (HL) 13

4 (1879) 7 R 329 at 331

5 (1884) 11 R 596

6 (1941) 314 US 44 at 55, 56, cited in Anton on Private International Law, p 149

7 [1972] 2 Lloyd's Rep 315 j

gug, from proceeding in the English courts; in the course of his judgment Burger CJ used language which looks to the present rather than to the past, and to the facts of modern commercial geography rather than to the amour propre of one court insisting on its jurisdiction in competition with that of another¹:

'The argument that such clauses are improper because they tend to "oust" a Court of jurisdiction is hardly more than a vestigial legal fiction. It appears to rest at core on historical judicial resistance to any attempt to reduce the power and business of a particular Court and has little place in an era when all Courts are overloaded and when businesses once essentially local now operate in world markets. It reflects something of a provincial attitude regarding the fairness of other tribunals.'

There is also a good deal to be said for the view taken in the United States (see *Mobil Tankers Co SA v Mene Grande Oil Co*²) that forum non conveniens is more likely to be applicable when the suit is between foreigners than where citizens are involved.

My noble and learned friend, Lord Wilberforce, has made a full examination of the English cases and, since I agree with his analysis, I do not embark on one myself. The law could have developed in either of two ways; the line of approach of the majority, let alone the dissenting speech of Lord St Leonards, in *Carron Iron Co v Maclaren*³ might have influenced English law in the direction in which Scots law was moving. The late 19th century cases influenced the law in another direction. But for my part I am content to accept the view of my noble and learned friend that the judgment of Scott LJ in *St Pierre v South American Stores (Gath & Chaves) Ltd*⁴ must, after its general acceptance over the years in England and in the Commonwealth, be regarded as an authoritative exposition of the lines which should guide a court, when called on to exercise its discretion whether or not to stay. That that is a matter of judicial discretion is not in doubt; referring to *The Janera*⁵, Langton J said in *The London*⁶:

'I do not think I can shelter myself under Hill J.'s judgment, and say that he has laid this matter down as law. Indeed, no judgment can conclude this Court as a matter of law ...'

And Lord Merriman P was to the same effect in *The Monte Urbasa*⁷.

The rule was stated by Scott LJ in the *St Pierre* case⁸ as follows: first that a plaintiff will not be deprived of his action on a mere balance of convenience and second, that—

'(a) the defendant must satisfy the Court that the continuance of the action would work an injustice because it would be oppressive or vexatious to him or would be an abuse of the process of the Court in some other way; and (b) the stay must not cause an injustice to the plaintiff.'

There are plenty of earlier examples of the use of the words 'oppressive' and 'vexatious' in this context. But the words have, at all events today, certain shades of meaning which make it difficult to accept an uncritical construction as appropriate to all circumstances in which guidelines—and they are nothing more—may be required. 'Oppressive' is an adjective which ought to be, and today normally is,

1 [1972] 2 Lloyd's Rep at 320

2 (1966) 363 F 2d 611

3 (1855) 5 HL Cas 416

4 [1936] 1 KB 382, [1935] All ER Rep 408

5 [1928] P 55

6 [1931] P 14 at 20

7 [1953] 1 Lloyd's Rep 587

8 [1936] 1 KB at 398, [1935] All ER Rep at 414

confined to deliberate acts of moral, though not necessarily legal, delinquency, such as an unfair abuse of power by the stronger party in order that a weaker party may be put in difficulties in obtaining his just rights. 'Vexatious' today has overtones of irresponsible pursuit of litigation by someone who either knows he has no proper cause of action, or is mentally incapable of forming a rational opinion on that topic. Either of these attitudes may amount to an abuse of the process of the court; but in my opinion a defendant moving for a stay cannot be compelled to bring the plaintiff's conduct within the scope of one of these grave allegations.

In the present case, Brandon J¹ has pointed out that as far as convenience is concerned, the Commercial Court at Antwerp is by far the most convenient forum; the position of Phillimore LJ is that, had it not been for the weight of authority, he would have held 'that in the interests of justice regarded objectively a stay should be granted so that this case in all its aspects can be disposed of in the Commercial Court of Antwerp.' These opinions support me in my view that (a) the competing claims in that court; (b) the fact that in a real sense the respondents, by asking for the appointment of a surveyor, appealed to that jurisdiction (I ignore the Belgian action at their instance for the reasons I have given); (c) the usual averments as to convenience of witnesses and parties; (d) the entirely unnecessary expense to which the English action would subject the appellants; (e) the total absence of physical connection between England and the subject-matter of the action, are factors which can, and in this case do, make the continuance of the case in England oppressive or vexatious to the appellants, within the morally neutral meaning which these words should, I think, in this context bear.

It was said that to grant an application to stay proceedings was to drive a plaintiff from the judgment seat. Of course that is true, and the grounds on which it can be done are very narrowly circumscribed. But the literary character of the phrase reminds one that when Gallio drove the Jews from his judgment seat² he did so, not as a declination of jurisdiction, which would have been unlikely in a judge in his position, but because he thought another forum was more appropriate for the determination of 'a question of words and names, and of your law'. 'See ye to it', said he.

In my opinion also the other requirement of the rule is satisfied, namely, that a stay will not work injustice to the plaintiff. As it was put in the (unsuccessful) argument for the defendants in *Telford Panel & Engineering Works Pty Ltd v Elder Smith Goldsbrough Mort Ltd*³, 'there is available another court, offering equal advantage to the plaintiff'. I am not moved by the suggestion that, from a preliminary estimate of the effect of the surveyor's report, it may appear that the respondents are likely to lose the advantage of a rule said to be exemplified by *The Merchant Prince*⁴, to the effect that prima facie a moving ship colliding with a stationary ship properly at anchor and properly lighted is held to blame. We have not been told, and I would have been surprised to have been told, that such a conclusion is not normally reached by Belgian, and other, maritime courts. From the account of the inquiry given in the case, the facts on which responsibility for the instant collision will depend will not present quite so simple a picture. But in any event, I doubt whether a plaintiff can say that he is disadvantaged by not being allowed to litigate in a court which might take a different view of the facts from that which, on his estimate, has provisionally been arrived at in another competent court to which he has himself appealed, in the sense I have indicated.

1 [1972] 1 Lloyd's Rep 534

2 Acts 18, 14-16

3 [1969] VR 193 at 195

4 [1892] P 179, [1891-94] All ER Rep 396

a It may be that if a plaintiff could point to some advantage of a juridical kind which he would enjoy in one court but not in another, he might be said to be disadvantaged by being confined to the latter. Examples might be, more favourable terms for the limitation of liability, or possibly longer time-limits to actions. But nothing of that kind has been shown here. Some suggestions have been made as to the innate superiority of British methods of trial over those available elsewhere. I think it is impossible to substantiate this; English proceedings in Admiralty are undoubtedly widely admired b (though they were criticised, for example, by Scrutton LJ in *The Tovarisch*¹), but the Belgian methods which have been described to us appear to have virtues of their own, and it is hard to make a fair discrimination between the two systems. I do not consider the fact that the plaintiffs have the security of bail in England to be significant, partly because of the commercial standing of the appellants, but more because the appellants have offered security in Belgium. And I do not, at present, appreciate the reason why c foreign security which has been offered is said to be irrelevant in a plea to stay here, whereas security which has been exacted is not.

Finally, reference was made to the International Convention on Certain Rules concerning Civil Jurisdiction in matters of Collision². In my opinion the convention does not touch the present controversy. It is concerned solely with jurisdiction, as its name implies, and as its terms indicate; the existence of two or more competent fora d each with jurisdiction to hear a particular dispute is a condition precedent to an application to stay being entertained. The convention itself (to which the Netherlands are not a party) is of no standing in a municipal matter such as the present. No doubt the Administration of Justice Act 1956 goes some way towards giving statutory effect to the provisions of the convention, but it has no reference to motions to stay, nor could it have without amendment to s 41 of the Supreme Court of e Judicature (Consolidation) Act 1925.

On the other topics which were discussed I agree with my noble and learned friend and have nothing to add.

I would allow this appeal.

f *Appeal allowed.*

Solicitors: *Clyde & Co* (for the appellants); *Alsop, Stevens, Batesons & Co* (for the respondents).

S A Hatteea Esq Barrister.

g
1 [1930] P 1 at 7, 8
2 Cmnd 1128

Tzu-Tsai Cheng v Governor of Pentonville Prison

HOUSE OF LORDS

LORD WILBERFORCE, LORD HODSON, LORD DIPLOCK, LORD SIMON OF GLAISDALE AND LORD SALMON

5th MARCH, 16th APRIL 1973

Extradition – Political offence – Offence of political character only as between offender and state other than requesting state – Offence committed in United States – Offence committed in course of dispute between governing regime of Taiwan and movement dedicated to its overthrow – Offence committed in furtherance of purposes of movement – United States requesting extradition of offender – Whether offence ‘one of a political character’ – Extradition Act 1870, s 3 (1).

The appellant was a member of a Taiwanese organisation in the United States of America, which was dedicated to the overthrow of the existing regime in Taiwan. The organisation planned a demonstration in the State of New York against the visit of a prominent member of the regime. The appellant was present when, in the course of the demonstration, a shot was fired. The appellant was charged with, and convicted of, the attempted murder of the Taiwanese visitor. He was granted bail pending sentence. While on bail, he fled to Sweden. Sweden acceded to a request for his extradition and he was in the process of being returned by air to the United States when he fell ill. He was landed at London airport and taken to a prison hospital where he was detained pursuant to the Aliens Order 1953^a. A request was made by the United States for his extradition. He was brought before the chief metropolitan magistrate at Bow Street, who ordered him to be detained in prison pending his extradition. The applicant applied for a writ of habeas corpus, contending that the offence in respect of which his extradition was sought was ‘one of a political character’ within the meaning of s 3 (1)^b of the Extradition Act 1870. The Divisional Court^c dismissed the application. On appeal,

Held (Lord Wilberforce and Lord Simon of Glaisdale dissenting) – The description of the offence as being ‘of a political character’ had reference to a relationship of political conflict between the offender and the government of the state which was seeking extradition and within whose territory the offence had been committed. Accordingly the offence committed by the appellant was not ‘one of a political character’, within s 3 (1), since it had not been directed against the government of the United States but against the government of Taiwan; the appeal would therefore be dismissed (see p 207 c to e, p 209 c to g, p 210 c d and f, p 222 a, p 223 b c and d and p 224 d e, post).

Dictum of Viscount Radcliffe in *Schtraks v Government of Israel* [1962] 3 All ER at 540 applied.

Decision of the Divisional Court of the Queen’s Bench Division sub nom *R v Governor of Pentonville Prison, ex parte Tzu-Tsai Cheng* [1973] 1 All ER 935 affirmed.

Notes

For restriction under the Extradition Act 1870 on surrender of criminals for political offences, see 16 Halsbury’s Laws (3rd Edn) 578, para 1198, and for cases on the subject, see 24 Digest (Repl) 993, 994, 36–38.

For the Extradition Act 1870, s 3, see 13 Halsbury’s Statutes (3rd Edn) 252.

^a SI 1953 No 1671, as amended

^b Section 3 (1) is set out at p 208 f, post

^c [1973] 1 All ER 935

Cases referred to in opinions

- a** *Artemiou v Procopiou* [1965] 3 All ER 539, [1966] 1 QB 878, [1965] 3 WLR 1011, CA, Digest (Cont Vol B) 483, 7417jca.
- Becke v Smith* (1836) 2 M & W 191, 2 Gale 242, 6 LJEx 54, 150 ER 724, 44 Digest (Repl) 213, 270
- Capper v Baldwin* [1965] 1 All ER 787, [1965] 2 QB 53, [1965] 2 WLR 610, 129 JP 202, 63 LGR 163, DC, Digest (Cont Vol B) 320, 316c.
- b** *Castioni, Re* [1891] 1 QB 419, [1886-90] All ER Rep 640, 60 LJMC 22, 64 LT 344, 55 JP 328, 17 Cox CC 225, DC, 24 Digest (Repl) 993, 36.
- Kolczynski, Re* [1955] 1 All ER 31, sub nom *R v Brixton Prison Governor, ex parte Kolczynski* [1955] 1 QB 540, [1955] 2 WLR 116, 119 JP 68, DC, 24 Digest (Repl) 993, 37.
- Meunier, Re* [1894] 2 QB 415, 63 LJMC 198, 71 LT 403, 18 Cox CC 15, DC, 24 Digest (Repl) 994, 38.
- c** *Pavelic and Kwaternik, Re* (1934) Annual Digest, 1933-34, Case no 158, Court of Appeal of Turin.
- Schtraks v Government of Israel* [1962] 3 All ER 529, [1962] 3 WLR 1013, sub nom *R v Governor of Brixton Prison, ex parte Schtraks* [1964] AC 556, HL, Digest (Cont Vol A) 575, 4a.
- d** *Thompson v Gooltd & Co* [1910] AC 409, 79 LJBK 905, 103 LT 81, HL, 34 Digest (Repl) 652, 4494.

Appeal

- Tzu-Tsai Cheng appealed against an order of the Divisional Court of the Queen's Bench Division¹ (Lord Widgery CJ, James LJ and Eveleigh J) dated 24th January 1973 dismissing an application on behalf of the appellant for a writ of habeas corpus directed to the respondent, the governor of Pentonville Prison, to bring the appellant before the court and to quash a warrant issued by the chief metropolitan magistrate (Sir Frank Milton) on 30th November 1972 at Bow Street Magistrates Court, at the request of the government of the United States of America, ordering the appellant to be committed to prison to await his return to the United States pursuant to the Extradition Act 1870. The facts are set out in the opinion of Lord Hodson.
- f**

J B R Hazan QC and *Brian Capstick* for the appellant.
Richard Du Cann and *Colin Nicholls* for the respondent.

Their Lordships took time for consideration.

16th April. The following opinions were delivered.

- g** **LORD WILBERFORCE.** I have had the benefit of reading in advance the opinion prepared by my noble and learned friend, Lord Simon of Glaisdale.
- I agree with it, and would allow the appeal.

- h** **LORD HODSON.** The question before your Lordships is whether an offence committed within the jurisdiction of a state requesting extradition of an offender is 'one of a political character' within the meaning of those words in the Extradition Act 1870, s 3 (1), so as to stop the offender from being surrendered, his offence having been committed in the course of a dispute with the governing party of a state other than the requesting state. The requesting state is the United States of America which by treaty embodied in a statutory rule and order², agreed with His Majesty to make more adequate provision for the reciprocal extradition of criminals.
- i**

The appellant was, on 17th May 1970, convicted of attempted murder, an offence named in the list of crimes contained in Sch 1 to the 1870 Act. These are referred to in

¹ [1973] 1 All ER 935

² United States of America (Extradition) Order in Council 1935 (SR & O 1935 No 574)

the Act as extradition crimes. They are normal crimes, not crimes such as treason or sedition which might well be of a political character. After conviction the appellant failed to surrender to his bail and left for Sweden which acceded to the request of the United States for his extradition from that country. In the course of his journey he fell ill and landed at London airport in September 1972. He is now detained in Her Majesty's Prison at Pentonville pursuant to an order of the chief metropolitan magistrate and is awaiting delivery to the United States. The Divisional Court¹ rejected his application for habeas corpus and from that refusal this appeal is taken on the ground that his offence is 'one of a political character'.

The appellant is an architect and a permanent resident, not a citizen, of the United States where he has lived for several years. He is a Formosan and a member of an organisation known as World United for Formosan Independence ('WUFI') of which he is the executive secretary. The purpose of WUFI as stated by him is to try and expose the corruption and oppressiveness of the Chiang Kai-Shek regime to the public, especially the American public, and to overthrow the regime and establish a government based on the principle of self-determination. The WUFI has affiliated organisations in Japan, France and Canada and one underground organisation in Taiwan. On 24th April 1970 Chiang Ching-Kuo, the son of the ageing General Chiang Kai-Shek and said to be his heir apparent and head of the Taiwan secret police, was on a visit to New York. The WUFI knew of the intended visit and planned a demonstration of protest.

The demonstration took place outside the hotel which Chiang Ching-Kuo was visiting. A pistol was drawn and a shot was fired in the course of the demonstration. The appellant was arrested. He had been concerned with the acquisition of the pistol and instructions as to its operation but did not actually fire the shot himself, he being engaged in a diversionary campaign shouting and waving papers in the neighbourhood.

The contention that the offence of which he was convicted was of a political character can only be supported by giving the word 'political' a wider meaning than has hitherto been given to it in this connection. The appellant was not engaged in any political activity directed against the United States. His extradition is requested on the footing that his is an ordinary case contemplated by the treaty to which I have referred. I emphasise the adjective reciprocal which is used to qualify extradition and points to criminals who have committed crimes against each of the parties to the treaty.

The object of the WUFI movement was stated by the applicant to be wholly directed to the overthrow of Chiang Kai-Shek's regime and to establish a free and democratic Republic of Taiwan. The objective was not hostile to the United States although the movement sought to persuade the American government to change its policy towards Taiwan. There is no authority which supports the argument of the appellant that his political activity vis-à-vis the Taiwan regime gives the crime committed in the United States which is an offence against that state a political character so as to prevent an extradition order being made.

His argument must I think be based on the undoubted fact that the words 'of a political character' have so far defied precise definition. As Viscount Radcliffe said in *Schtraks v Government of Israel*²:

'Generally speaking, the courts' reluctance to offer a definition has been due, I think, to the realisation that it is virtually impossible to find one that does not cover too wide a range. This is seen in the very full consideration which was given to the question in *Re Castioni*³ ...'

1 [1973] 1 All ER 935

2 [1962] 3 All ER 529 at 539, [1964] AC 556 at 589

3 [1891] 1 QB 149, [1886-90] All ER Rep 640

a I pass on to the passage in the same speech which reads as follows¹:

'In my opinion the idea that lies behind the phrase "offence of a political character" is that the fugitive is at odds with the state that applies for his extradition on some issue connected with the political control or government of the country. The analogy of "political" in this context is with "political" in such phrases as "political refugee", "political asylum" or "political prisoner". It does indicate, I think, that the requesting state is after him for reasons other than the enforcement of the criminal law in its ordinary, what I may call its common or international aspect.'

I respectfully agree with this expression of opinion and in effect said so in my speech in the same case. My noble and learned friend, Lord Reid, said, I think, nothing inconsistent with it in his speech.

c To take the wide view contended for by the appellant, losing sight of the idea of political opposition as between fugitive and requesting state, would create an impossible situation. As Viscount Radcliffe pointed out, members of political organisations may commit all sorts of infractions of the criminal law in the belief that by so doing they will further their political ends, but these crimes do not automatically become offences of a political character within the meaning of the Extradition Act 1870. Political character in its context, in my opinion, connotes the notion of opposition to the requesting state. The appellant was not taking political action vis-à-vis the American government and the American government is not concerned with the relations between America and Taiwan in asking for extradition but is concerned only with enforcing the criminal law. I would dismiss the appeal.

e **LORD DIPLOCK.** The appellant committed in the United States of America the crime of attempted murder. He was duly convicted there by a court of competent jurisdiction. It is conceded, on the one hand, that his sole purpose in committing this offence was to promote the downfall of the government of Taiwan and, on the other hand, that it was no part of his purpose to influence the policy of the government of the United States. He is a fugitive criminal from the United States, not from Taiwan. It is the government of the United States, not the government of Taiwan, that seeks his extradition under the Extradition Treaty of 22nd December 1931, between the United Kingdom and the United States of America. The short question in this appeal is whether the appellant's offence was one 'of a political character' within the meaning of the Extradition Act 1870.

g In public international law there is no general obligation on any state to surrender to another state persons who have taken refuge in its territory to avoid trial or punishment for crimes which they have committed within the territorial jurisdiction of the courts of that other state. The extradition of a fugitive criminal is a bilateral transaction between the state where he has taken refuge and the state where he has committed the crime. It takes place pursuant to the terms of an extradition treaty made between the two states and providing for reciprocal rights to requisition the surrender of fugitive criminals and reciprocal obligations to surrender them.

i The practice of making extradition treaties was pioneered by Belgium in 1833, three years after it had itself achieved independence—a fact which may have influenced its exclusion of extradition for offences of a political character. The government of the United Kingdom was slow to follow this example, but nevertheless in 1842 and 1843 extradition treaties dealing with a limited number of serious crimes were made with the United States of America and France. Crimes which were on the face of them political offences, such as treason and sedition, were not included.

¹ [1962] 3 All ER at 540, [1964] AC at 591

A similar treaty was made with Denmark in 1862. Compliance with the obligations assumed by the government under these treaties involved the arrest and detention in the United Kingdom of the fugitive criminal whose surrender was applied for. For this the authority of an Act of Parliament was required. Separate Acts of Parliament were passed to give effect to the provisions of the treaties with the USA, France and Denmark. Despite the precedent set by Belgium in 1833, none of these treaties or Acts of Parliament contained any exclusion of offences which, though falling within the description of offences for which extradition was to be granted, were nevertheless 'of a political character'.

Such was the state of the law of extradition in this country when the Extradition Act 1870 was passed. It is relevant to recall that during the preceding 50 years new independent states had emerged in Europe and in Latin America as a result of throwing off the yoke of foreign powers and that in the immediately preceding years the risorgimento had been successful in Italy. It had attracted the enthusiastic sympathy of the public in the United Kingdom and of the Liberal Party which formed the government in power at the time the Act was passed.

The Extradition Act 1870 did two things. First, it provided machinery for giving effect in the law of the United Kingdom to any extradition treaties into which the government might thereafter enter with other sovereign states. Secondly, it restricted the discretion of the government as to the terms of extradition treaties entered into with foreign states, since effect could not be given to such a treaty in this country save by an order in council directing that the Act should apply in the case of that foreign state, and s 3 (b) of the Act prohibits the making of such an order in council unless the treaty 'is in conformity with the provisions of this Act and in particular with the restrictions on the surrender of fugitive criminals contained in this Act'.

The restriction which governs the instant appeal is that contained in s 3 (1) of the Act:

'A fugitive criminal shall not be surrendered if the offence in respect of which his surrender is demanded is one of a political character, or if he prove to the satisfaction of the police magistrate or the court before whom he is brought on habeas corpus, or to the Secretary of State, that the requisition for his surrender has in fact been made with a view to try or punish him for an offence of a political character.'

The list of 'extradition crimes' contained in Sch 1 to the Act in respect of which alone surrender may be demanded is to be construed according to the law existing in England. It comprises ordinary serious crimes in English law but like the earlier treaties includes none which on the face of it is of a political character as respects the requisitioning state, such as treason or sedition. It is evident, therefore, that the draftsman contemplated that there might be circumstances in which an ordinary crime, such as murder or attempted murder, might be 'an offence of a political character'. From the second part of the restriction it is also evident, to put it bluntly, that the draftsman contemplated that a foreign government in its eagerness to revenge itself on a political opponent might attempt to misuse an extradition treaty for this purpose.

My Lords, the noun that is qualified by the adjectival phrase 'of a political character' is 'offence'. One must, therefore, consider what are the juristic elements in an offence, particularly one which is an extradition crime, to which the epithet 'political' can apply. I would accept that it applies to the mental element: the state of mind of the accused when he did the act which constitutes the physical element in the offence with which he is charged. I would accept, too, that the relevant state of mind is not restricted to the intent necessary to constitute the offence with which he is charged; for, in the case of none of the extradition crimes, can this properly be described as being political. The relevant mental element must involve some less immediate object which the accused sought to achieve by doing the physical act. It is unnecessary

a for the purposes of the present appeal, and would, in my view, be unwise, to attempt to define how remote that object might be. If the accused had robbed a bank in order to obtain funds to support a political party, the object would, in my view, clearly be too remote to constitute a political offence. But if the accused had killed a dictator in the hope of changing the government of the country, his object would be sufficiently immediate to justify the epithet 'political'. For politics are about government. 'Political' as descriptive of an object to be achieved must, in my view, b be confined to the object of overthrowing or changing the government of a state or inducing it to change its policy or escaping from its territory the better so to do. No doubt any act done with any of these objects would be a 'political act', whether or not it was done within the territory of the government against whom it was aimed. But the question is not simply whether it is political qua 'act' but whether it is political qua 'offence'.

c Criminal jurisdiction is territorial. A crime is an offence against the state within whose territory the prohibited act has been committed. To the trial and punishment of a criminal offence there are two parties only: the offender and that state. In the context of the trial and punishment of a criminal offence committed outside the United Kingdom, one would suppose that any description of the offence as being d 'of a political character' had reference to a relationship of political conflict between the offender and the government of the state within whose territory the offence was committed and not to any political conflict between the offender and the government of any other state. So, even apart from authority, I would hold that prima facie an act committed in a foreign state was not 'an offence of a political character' unless the only purpose sought to be achieved by the offender in committing it were to change the government of the state in which it was committed, or to induce it to change its policy, or to enable him to escape from the jurisdiction of a government e of whose political policies the offender disapproved but despaired of altering so long as he was there. I would not hold that an act constituted an 'offence of a political character' in the ordinary meaning of that phrase appearing in a statute dealing with the trial and punishment of crimes committed in a foreign state if the only 'political' f purpose which the offender sought to achieve by it was not directed against the government or governmental policies of that state within whose territory the offence is committed and which is the only other party to the trial and punishment of the offence.

This prima facie view of the meaning of the expression of 'offence of a political character' derived from a consideration of the juristic nature of a criminal offence is, in my view, confirmed by a consideration of the purpose for which Parliament g in 1870 imposed this restriction on the surrender of fugitive criminals. Ex hypothesi the restriction only applies to an offender against whom a prima facie case has been proved that he has committed an act in a foreign state which would have been a serious crime if it had been committed in the United Kingdom. If committed in the United Kingdom, the offender would have been convicted and punished for it h irrespective of any political motive directed against the government of any foreign state which inspired the offender to do it. It therefore cannot be supposed that the purpose of Parliament in imposing the restriction was to provide complete immunity for offences committed for political motives directed against the government of a foreign state, wherever those offences happened to be committed. The immunity intended to be provided was at most a qualified immunity depending on where the offence was committed.

i The purpose of the restriction, as it seems to me, was two-fold. First, to avoid involving the United Kingdom in the internal political conflicts of foreign states. Today's Garibaldi may well form tomorrow's government. And, secondly, the humanitarian purpose of preventing the offender being surrendered to a jurisdiction in which there was a risk that his trial or punishment might be unfairly influenced by political considerations. As indicated by the inclusion of the second part of the

restriction it was suspicion of the motives of requisitioning states in seeking the surrender of fugitive criminals who were political opponents of the government of that state which underlay both the requirements of s 2 (1) of the Act. Such suspicion was understandable in 1870 in the light of the recent history of the struggle for the unification of Italy. But there could be no similar grounds for suspicion of the motives of a requisitioning state in seeking the surrender of a fugitive criminal who, though a political opponent of the government of some other state, was not a political opponent of the state demanding his surrender. Nor would there appear to be any greater risk that his trial or punishment for the offence in such a state might be unfairly influenced by political considerations than if he had committed the same offence in the United Kingdom and been tried and punished for it here. So if a purposive construction of the Act is adopted this, too, leads to the conclusion that an offence of a political character for the purposes of the restriction was intended to be confined to offences in which the political purpose sought to be achieved by the offender was directed against the government of the state seeking his surrender.

My Lords, as respects the authorities I am content to express my agreement with what has been said about them in the speech of my noble and learned friend, Lord Hodson. The speeches in this House in *Schtraks v Government of Israel*¹ and in particular that of Viscount Radcliffe² are in accord with the conclusion which I have reached as to the construction of the Act. I can discern no significant difference in this respect between the meaning ascribed to the phrase 'an offence of a political character' by Viscount Radcliffe and that ascribed to it by my noble and learned friends, Lord Reid and Lord Hodson.

In *Schtraks's* case¹ the only political purpose which it was alleged the fugitive criminal sought to achieve was directed against the government of the requisitioning state. The precise question for determination in the present appeal did not arise, and in expressing their views as to the meaning of the restriction in s 3 (1) of the Act their Lordships' minds were not directed to it. But though the reasoning in *Schtraks's* case¹ does not compel your Lordships to dismiss this appeal, it is persuasive authority of the highest order in support of the construction which I, in agreement with the majority of your Lordships, would place on the restriction on the surrender of fugitive criminals contained in s 3 (1) of the Extradition Act 1870.

So I, too, would dismiss this appeal.

LORD SIMON OF GLAISDALE. My Lords,

The facts

Taiwan (formerly called by its Portuguese name of Formosa) is a large island off the mainland of China. Its population is of mixed origin; but it was principally settled from mainland China after the Ming Empire was overrun by the Manchus in the 17th century. In 1683 the island fell to the Ch'ing (Manchu) Empire and became part of Fukien Province; in 1886 it became a separate province of China. In 1895 China ceded Taiwan to Japan; but after the Japanese defeat in 1945 Taiwan was handed over to the Chinese Nationalist government (under generalissimo Chiang Kai-Shek), pursuant to the Cairo Agreement of 1943. The Nationalist government thereafter suffered a succession of defeats by Chinese Communist armies on the mainland; and during 1949-50 a stream of Nationalist troops, government officials and other refugees, numbering some two million persons, poured into Taiwan, which, indeed, became thereafter the main effective territory of the Nationalist government; though, according to the evidence filed in this case, that government claims to be the rightful government of all China and to be perpetually at war with the Communist government on the mainland. It has maintained martial law in Taiwan continuously since 1949. Today Taiwan contains two major populations

¹ [1962] 3 All ER 529, [1964] AC 556

² [1962] 3 All ER at 540, [1964] AC at 591

a —12 million of native Taiwanese origin and about two million of recent mainland origin. An independence movement arose during the 1960s claiming to represent the native Taiwanese majority; it is now called the World United for Formosan Independence ('WUFI'). This resistance movement does not apparently have a common political ideology; but it is united in asserting that the Nationalist government is unrepresentative of its sole authentic body of subjects (the Taiwanese) and that it is oppressive and corrupt. The independence movement is at one in seeking the overthrow of the Nationalist government. The evidence contains allegations of a massacre of about 20,000 Taiwanese in 1947, and of continuing summary imprisonments and suppression of civil liberties. Your Lordships have no means of knowing how far such allegations are justified, nor is such knowledge necessary for the decision of this appeal; the mere fact that there is a large organised party making such allegations and agitating against a hated regime constitutes the classic situation in which offences of a political character are committed. It appears that resistance to the regime takes the form of a partisan movement in Taiwan itself and of organised groups of exiles. They claim that the detested government is only able to maintain itself in power owing to the political, military, diplomatic and economic support of the government of the United States. By 1970 Chiang Kai-Shek's son, Chiang Ching-Kuo, was 'Vice-Premier' of the Nationalist government in Taiwan, and was regarded as his aged father's 'heir apparent'. In his evidence before the chief metropolitan stipendiary magistrate the appellant described Chiang Ching-Kuo as, in addition, 'head of the secret police and also responsible for the execution of about 200 political prisoners each year in Taiwan'. He added: 'I regarded him as the symbol of the regime oppressive to the Taiwanese.' In 1970 Chiang Ching-Kuo visited the United States: his opponents regarded this visit as being for the purpose of strengthening United States support for his regime.

The appellant was born in Taiwan in about 1937. It appears that during his teens he became opposed to the Chiang Kai-Shek regime. After some military incident which is left obscure he decided to go into exile. He went to the United States, where he had a distinguished academic career, culminating in his qualification and practice as an architect. There are about 10,000 Taiwanese in the United States; and, from his arrival, the appellant became politically active in the United States branch of WUFI; by 1970 he had become its executive secretary. In evidence before the chief metropolitan stipendiary magistrate the appellant described the organisation's long-term objective as 'to overthrow Chiang Kai-Shek's regime and to establish a free and democratic Republic of Taiwan'. A secondary, short-term, immediate, objective was to try to change the American government's policy towards Taiwan.

g On 24th April 1970 the appellant took part in a demonstration outside the hotel where Chiang Ching-Kuo was staying during his visit to the United States. The appellant had leaflets for distribution. These denounced both the Nationalist government and Chiang Ching-Kuo personally; but they also included passages protesting against United States support for the Taiwan regime—for example:

h 'It is our urgent plea that the United States discontinue its support of the Chiang regime and refrain from providing the Chinese Nationalists with weapons of terror . . . These weapons are ultimately aimed at suppressing the legitimate aspirations of the people of Taiwan . . .'

i The question of attempting to assassinate Chiang Ching-Kuo during his visit had been discussed in the executive committee of the United States branch of WUFI, but rejected. However, during the demonstration the appellant's brother-in-law, Peter Huang, drew a pistol and fired, though without causing injury. The appellant was observed to be conducting a diversionary campaign: and it was later given in evidence in the United States that he was implicated in procuring the pistol which Peter Huang had used. Both the appellant and Peter Huang were indicted for attempted murder. Peter Huang pleaded 'Guilty'. The appellant pleaded 'Not Guilty', but was convicted.

He was remanded for sentence on bail, but failed to appear, having fled the country. He was extradited from Sweden in the summer of 1972; but, having fallen ill during the journey to the United States, he was landed in this country, where he was ultimately detained pursuant to the Aliens Order 1953¹. The United States requested his extradition, and on 30th November 1972 the chief metropolitan stipendiary magistrate ordered him to be detained pending extradition. The appellant then applied in the Queen's Bench Division for a writ of habeas corpus, which was refused. The Divisional Court² gave leave to appeal to your Lordships' House, the question of law being whether the appellant's extradition crime was an offence of a political character within the meaning of s 3 (1) of the Extradition Act 1870. Counsel for the respondent contends that it was not—on the grounds that the appellant's offence was against the criminal code of the United States, whereas his political dispute was not with the United States but with Chiang Kai-Shek's government. The appeal therefore depends on the meaning of the words 'offence of a political character' in s 3 (1) of the Extradition Act 1870.

The Extradition Act 1870

Section 3 (1) reads as follows:

'A fugitive criminal shall not be surrendered if the offence in respect of which his surrender is demanded is one of a political character, or if he prove to the satisfaction of the police magistrate or the court before whom he is brought on habeas corpus, or to the Secretary of State, that the requisition for his surrender has in fact been made with a view to try or punish him for an offence of a political character.'

It is significant that the phrase 'offence . . . of a political character', which recurs almost obsessively through the Act, is not defined. 'Fugitive criminal' is defined by s 26 to mean 'any person accused or convicted of an extradition crime committed within the jurisdiction of any foreign state who is in or is suspected of being in some part of Her Majesty's dominions'. Parliament therefore contemplated the escape of a person who, like the appellant, had been actually convicted of an extradition crime; though providing that he should not be extradited if the offence in respect of which his surrender is demanded was one of a political character. 'Extradition crime' is defined as 'a crime which, if committed in England or within English jurisdiction, would be one of the crimes described in the first schedule' to the Act. Schedule 1 sets out the list of extradition crimes. They include attempt to murder, and other serious crimes. They do not include such crimes as treason, sedition or lèse majesté; this indicates that 'offence . . . of a political character' does not mean merely the type of political offence which is necessarily committed against the state seeking extradition, since such offences are in any event unscheduled crimes. Here is an important internal linguistic guide to interpretation.

The first or 'golden' rule of construction

English law provides a number of guides to statutory interpretation, or 'canons of construction'. A difficulty arises that various canons could return conflicting answers; since English law has not yet authoritatively established any complete hierarchy among the canons. Fortunately, this presents no difficulty in the instant case; because all the many relevant canons of statutory construction in question here return the same answer—in favour of the appellant's construction.

What Maxwell³ calls 'The first and most elementary rule of construction' is that (except in technical legislation) it is to be assumed the words and phrases are used in their ordinary and natural meaning. Moreover⁴:

¹ SI 1953 No 1671, as amended

² [1973] 1 All ER 935

³ *Interpretation of Statutes* (12th Edn, 1969), p 28

⁴ *Ibid*, p 33

a 'It is a corollary to the general rule of literal construction that nothing is to be added to ... a statute unless there are adequate grounds to justify the inference that the legislature intended something which it omitted to express.'

'It is a strong thing to read into an Act of Parliament words which are not there and in the absence of clear necessity it is a wrong thing to do.' (Lord Mersey in *Thompson v Goult & Co*¹.) If Parliament had intended to say 'offence ... of a political character *against* (or *in respect of*) *the foreign state demanding such surrender*', nothing would have been easier than to have inserted such words. Since they are not there, it is not for the courts to supply them.

b This primary rule of construction is so fundamental that it is sometimes called 'the golden rule'². It was so stated by Parke B in *Becke v Smith*³:

c 'It is a very useful rule, in the construction of a statute, to adhere to the ordinary meaning of the words used ... unless that is at variance with the intention of the legislature, to be collected from the statute itself, or tends to any manifest absurdity or repugnance, in which case the language may be varied or modified, so as to avoid such inconvenience, but no further.'

The primary or golden canon of construction, always potent, is particularly so in two sets of circumstance. First, if Parliament is likely to have envisaged the actual forensic situation, she will use plain words in the expectation that the courts will, in pursuance of the primary canon of construction, apply them to that situation in the way that Parliament intended. Secondly, if Parliament considers that it is difficult to frame a definition which may not either go too far or fall too short in various situations (whether envisaged or merely hypothetical), Parliament will use plain words in the expectation that the courts will apply them in their natural sense (without omissions or additions) to various forensic situations as they occur.

e Did Parliament in 1870 envisage the situation that, say, an attempt on the life of a ruling figure of state A might be made in the territory of state B? It seems highly likely. In the third quarter of the last century various movements liable to use violent methods to overturn established authority were notoriously operating internationally —from Mazzini's republican nationalists to the anarchists. There had been a number of recent attempts to assassinate heads of state, members of their families or prominent ministers, many successful (see e.g. Oppenheim⁴). Such persons were frequently at risk abroad, either on business in diplomatic congress, or on holiday at the watering places which they frequented.

f It is not to be thought that the British Parliament in 1870 approved political violence, whether committed in the assassin's home country or abroad. Nevertheless, the privilege of asylum for offences, however atrocious, of a political character was paramount; and this country never included in any extradition treaty the so-called 'attentat' clause pioneered by Belgium in 1856.

g But, even if Parliament or her draftsman did not have the instant forensic situation in contemplation, the primary rule of construction that plain words should be given their ordinary, literal and natural meaning, without addition or omission, is still of even more than ordinary potency. In advisedly refraining from defining a crucial phrase in the statute, Parliament left it to the courts to apply the statutory words to forensic situations as they arose, in the expectation that they would be so applied in their ordinary, natural and literal sense, without addition or omission. The difficulty of providing a definition of crimes which were to be non-extraditable because they were of a political character was already notorious. By 1870 France had entered into 53 extradition treaties, as compared with this country's three. All the

i [1910] AC 409 at 420

2 Maxwell, *op cit*, p 43

3 (1836) 2 M & W 191 at 195

4 International Law (3rd Edn, 1920), vol 1, p 518

French treaties (including those entered into during the dictatorship of Napoleon III, against whose life several attempts had been made) contained an exception for political offences ('crimes ou delits politiques'); and in none was the concept defined, France leaving it entirely to the state to whom the extradition request was made to decide whether the offence was of a political character (see the evidence of Sir Thomas Henry, chief metropolitan magistrate, to the Select Committee on Extradition 1868¹): such evidence is available to show the facts which must be assumed to have been within the contemplation of the legislature when the statute was passed: Halsbury's Laws of England². (For the difficulty of definition see also the Appendix, 'Notes on Political Offences', to Clarke on Extradition³, dealing with the English political history and citing some of the French provisions; and Sir Charles Russell QC *arguendo* in *Re Castioni*⁴.)

By reason of this primary and golden rule, therefore, the words 'offence . . . of a political character' must be read in their natural ordinary and literal sense, without the addition of the words 'against (or, in respect of) the foreign state demanding such surrender', which are not in the Act. Asked whether the appellant's crime was an 'offence of a political character', even the most harassed commuter from Clapham would, I think, undoubtedly answer, 'Of course'. Indeed, I cannot conceive that it would occur to anyone except a lawyer that the appellant's offence could possibly be described as other than of a political character.

But this is too harsh a reflection on the law. Legal analysis, in fact, returns the same answer as common sense. Oppenheim's International Law⁵ has a chapter significantly entitled 'Principle of Non-Extradition of Political Criminals'. In § 334 Oppenheim wrote⁶:

'Although the principle became, and is, generally recognised that political criminals should not be extradited, serious difficulties exist concerning the conception of "political crime" . . . many writers consider a crime "political" [i] if committed from a political motive, others call "political" [ii] any crime committed for a political purpose; again, others recognise such a crime only as "political" [iii] as was committed both from a political motive and at the same time for a political purpose; and, thirdly, some writers confine the term "political crime" to [iv] certain offences against the State only, such as high treason, *lèse majesté*, and the like.'

So far as the 1870 Act is concerned, [iv] cannot be the meaning, since these are not scheduled extradition crimes at all. Such crimes may be included in 'offence . . . of a political character', especially for the purpose of the second limb of s 3 (1) of the 1870 Act: see *Re Kolczynski*⁷. But 'offence . . . of a political character' cannot be confined to such crimes. Therefore, except for those who favour this fourth (excluded) category, no jurist stipulates that the political character of the crime must be judged vis-à-vis the state seeking extradition. The appellant satisfies the most exacting relevant test, namely [iii]—his crime was committed both from a political motive and for a political purpose. So the leading jurists in this field would concur with the man in the street that the appellant's crime was 'an offence . . . of a political character'.

Construction according to historical setting and the 'mischief' rule

A second leading canon of statutory construction reinforces here the primary or golden rule that words of a statute are to be read in their natural and ordinary sense,

1 See the Report from the Select Committee on Extradition (1868) HC Paper 393, Minutes of Evidence, pp 31, 33, qq 577, 578, 623, 640

2 3rd Edn, vol 36, p 411, para 622, and cases cited at note (d)

3 4th Edn (1903)

4 [1891] 1 QB 149 at 153

5 8th Edn (1955), by Lauterpacht, vol 1, Part II ch 3 (x), p 704

6 Ibid, p 707

7 [1955] 1 All ER 31 at 34, 36, [1955] 1 QB 540 at 548, 550

a without omission or addition, unless some secondary meaning must be preferred, or some omission or addition must be made, in order to make sense of the provision. This second canon of construction consists in ascertaining, first, the general situation in which Parliament was legislating and, secondly, the particular situation for which Parliament was providing a remedy. These are really different aspects of the same canon of construction; though the former is sometimes called construction according to 'historical setting'¹, the latter 'the mischief rule'².

b Historical examination can leave no doubt what was Parliament's object and attitude in enacting s 3 (1). In other than exceptional cases, criminal law operates territorially only. A foreigner who commits an extradition crime abroad does not infringe the English criminal code. Nevertheless, the 1870 Act conferred on the Crown the right to implement by order in council treaties stipulating that persons who had committed crimes abroad and taken refuge here might be handed over to the state where the crime was committed, in return for that state reciprocally engaging to hand over to Her Majesty's government persons who had committed crimes in this country and taken refuge in the territory of that other power. The general purpose of the Act is therefore not difficult to discern: it was to enable states to co-operate in the suppression of crime. But from the general power of extradition and in derogation from this purpose of international co-operation in the suppression of crime, Parliament, in conformity with general international law, made an exception. Perpetrators of extradition crimes were nevertheless not to be extradited if their offence was of a political character. Why should Parliament have made such an exception? The explanation was given by my noble and learned friend, Lord Reid, in *Schtraks v Government of Israel*³:

e 'In reading the Act of 1870 one is entitled to look through mid-Victorian spectacles. Many people then regarded insurgents against continental governments as heroes intolerably provoked by tyranny, who ought to have asylum here, although they might have destroyed life and property in the course of their struggles. But, although such views may have given rise to s. 3 (1) of the Act of 1870, I do not think that its scope can be limited to such cases. We cannot
f inquire whether a fugitive criminal was engaged in a good or a bad cause. A fugitive member of a gang who committed an offence in the course of an unsuccessful putsch is as much within the Act as the follower of a Garibaldi; but not every person who commits an offence in the course of a political struggle is entitled to protection. If a person takes advantage of his position as an insurgent to murder a man against whom he has a grudge, I would not think that
g that could be called a political offence. So it appears to me that the motive and purpose of the accused in committing the offence must be relevant, and may be decisive. It is one thing to commit an offence for the purpose of promoting a political cause, and quite a different thing to commit the same offence for an ordinary criminal purpose.'

h If, as Lord Reid says, the motive and purpose of the offence is relevant and may be decisive, the appellant's was certainly an offence of a political character.

The insight of my noble and learned friend is fully borne out by an examination of the preceding history. Even Lord Castlereagh, no friend of subversives, denounced in 1816 the practice of handing over political refugees (Wheaton's *International Law*⁴, where it is also stated to be 'an almost universal rule that no State will surrender political refugees'). Garibaldi and Kossuth, criminals in the eyes of the absolute governments of Europe, had been subjects of wild enthusiasm on their visits to London; and it is inconceivable that this country would have handed the

1 Maxwell, *op cit*, p 47

2 *Ibid*, p 40

3 [1962] 3 All ER 529 at 535, [1964] AC 556 at 582, 583

4 6th Edn (1929), vol 1, p 217

former over to King Bomba on the ground that he had been responsible for the death, not of a Neapolitan, but of an Austrian, soldier or official in the Kingdom of the two Sicilies. Only a few years before the 1870 Act there had occurred the Orsini affair. Orsini was an Italian republican follower of Mazzini. He had thrown a bomb at Napoleon III. He was discovered to have had links with some Italian refugees in London and the explosives had been made in England. In response to French protests Palmerston proposed to introduce a Conspiracy to Murder Bill to make it a felony, instead of merely a misdemeanour, to plot in England to murder someone abroad. This aroused such indignation that Palmerston, normally a highly popular and powerful minister, suffered parliamentary defeat, and his government fell. (See Jasper Ridley, *Lord Palmerston*¹.)

Then again, the reason why Great Britain had only three extradition treaties by 1870, as against France's 53, was because of the difficulty of getting the necessary enabling bill through Parliament, in view of that body's jealousy of any infringement of this country's traditional freedom of political asylum. None of the three treaties or enabling Acts contained any express reservation relating to political crimes. This was because Parliament took it for granted that the government would not hand over criminals whose offence was of a political character or who were liable to be tried or punished for such an offence if handed over for some other extradition crime; and that was the way the treaties were in fact operated (see Sir Thomas Henry's evidence²).

'... the question no doubt would be, whether there was a motive that showed it was a political offence ... it is so well understood abroad now, that anything savouring of the political is not to be the subject of surrender ... if there were no clause whatever, it is left to each Government to determine ... They have nothing to do but say, 'We consider this political, we will not give him up'.'

Similarly the legal adviser to the Colonial Office³: 'Surrender was refused on the ground that the acts [murder, robbery, etc] ... were done by him in a political capacity ... if there was any political character in the offence he would not be surrendered ... a very slight political character would prevent the surrender.').

Against such an historical background it is impossible to suppose that Parliament intended s 3 (1) to be construed other than benevolently in favour of the fugitive offender: certainly an artificially narrow construction is quite inadmissible.

It was suggested on behalf of the respondent that the intention behind s 3 (1) was the fear that a fugitive offender might not get a fair trial if he were handed over to the very government against whom he had offended politically. I cannot accept this. First, 'the intention of Parliament must be deduced from the language used' (*Capper v Baldwin*⁴, per Lord Parker CJ). Secondly, by international law a fugitive offender was not to be handed over if he would not get a fair trial in the country seeking extradition, whether his offence was political or not (see Sir Thomas Henry⁵ on French practice; legal adviser to the Colonial Office⁶ on judicial torture). Thirdly, it is absurd to suppose the legislature contemplated that, though someone in the position of the appellant would get a fair trial in the United States, President Lincoln's assassin, say, would not.

Presumption against changes in the common law

'Few principles of statutory interpretation are applied as frequently as the presumption against alterations in the common law. It is presumed that the

¹ (1970), pp 479-482.

² See the Report from the Select Committee on Extradition (1868), HC Paper 393, Minutes of Evidence, pp 27, 30, 38, 39, qq 489, 559, 714, 732.

³ Ibid, pp 45, 49, qq 884, 887, 901, 902, 980.

⁴ [1965] 1 All ER 787 at 791, [1965] 2 QB 53 at 61.

⁵ Loc cit, p 31, q 577.

⁶ Ibid, p 49, q 980.

legislature does not intend to make any change in the existing law beyond that which is expressly stated in, or follows by necessary implication from, the language of the statute in question. It is thought to be in the highest degree improbable that Parliament would depart from the general system of law without expressing its intention with irresistible clearness.' (Maxwell¹.)

International lawyers were not unanimous whether comity required a state to extradite offenders against the criminal law of a foreign state, Grotius and Pufendorf being ranged on opposite sides of the argument; but the overwhelming modern view is that any international obligation to extradite is imperfect, needing treaty to perfect it (Wheaton²). There can be no question, though, what answer the English common law returned: no English authority had the right to extradite (Clarke on Extradition³, citing Coke⁴; Wheaton⁵ citing Lord Denman⁶ speaking in your Lordships' House). This was indeed the inevitable result of the following fundamental principles of English common law: (1) no one can be deprived of his liberty except for an offence against English law; (2) this liberty is vindicated by the writ of habeas corpus, statute in this respect merely embodying the common law; (3) criminal law being (other than exceptionally) territorial, an offence against a foreign criminal code is no offence against English law; (4) therefore anyone taken into custody for the purpose of delivery to a foreign state in respect of an offence against the criminal code of that foreign state could secure his release by habeas corpus proceedings.

A fugitive offender against the criminal law of a foreign state being thus protected by the common law from arrest for the purpose of extradition, the Extradition Act 1870 and the orders in council implementing it were necessarily in derogation from the common law. It follows that the positive powers under the Act should be given a restrictive construction and the exceptions from those positive powers a liberal construction. Even if it were otherwise permissible to read s 3 (1) as allowing the implication that 'offence . . . of a political character' refers only to an offence which is of a political character as regards the state seeking extradition, the presumption against changes in the common law would preclude such an implication and demand the construction proposed by the appellant. The construction proposed by the respondent cannot possibly be said to be a 'necessary' implication from the language of the statute, nor can it possibly be said that Parliament has expressed 'with irresistible clearness' the intention that the political character of the offence should be limited to the politics of the state seeking extradition.

Since the common law, as so often, favours the freedom of the individual, the rules enjoining strict construction of a penal statute or of a provision in derogation of liberty (Maxwell⁷) merely reinforce the presumption against change in the common law.

Presumption in favour of conformity with international law

'... every statute is interpreted, so far as its language permits, so as not to be inconsistent with . . . the established rules of international law, and the court will avoid a construction which would give rise to such inconsistency unless compelled to adopt it by plain and unambiguous language.' (Maxwell⁸.)

¹ Interpretation of Statutes (12th Edn, 1969), p 116

² International Law (6th Edn, 1929), vol 1, p 212

³ 4th Edn (1903), pp 6, 7

⁴ 3 Co Inst (1644), ch 84, p 180

⁵ Op cit, pp 213, 214

⁶ See Forsyth, Cases and Opinions on Constitutional Law (1869), p 369

⁷ Op cit, p 238

⁸ Op cit, p 183

I have already cited Oppenheim¹ and Wheaton² as showing the general consensus that political crimes are not the subjects of extradition, though both indicate the difficulties of definition. But there is no need to rely on abstract statements of the principles of international law. A case has occurred which is indistinguishable from the instant. In 1934 two Croatians named Pavelic and Kwaternik were alleged to be implicated in the murder of King Alexander of Yugoslavia and M Barthou, the French Foreign Minister, in Marseilles while the King was on a state visit to France. There were other, incidental victims (see *Foro Italiano*³). The alleged assailants fled to Italy, and the French government requested their extradition. The extradition treaty between France and Italy of 1870 excluded political crimes from the category of extraditable offences; and the accused pleaded before the Court of Appeal of Turin that the alleged crimes were of a political nature. This plea was upheld.

The report of the case to which your Lordships were referred (*Annual Digest of Public International Law*⁴) might be susceptible of the suggestion that the case depended purely on the provision in the Italian Criminal Code defining 'political crime'. But the original report in the *Foro Italiano* makes it clear that this was not so; the headnote⁵ reads in translation:

'(1) In Italy extradition is regulated by Italian penal law, by treaty, and by international usage; (2) and in this field international treaties should be applied in so far as they are not abrogated or modified by Italian penal law; (3) therefore, extradition should not be allowed for a political crime if the treaty between Italy and the State requiring extradition excludes political crimes; (4) the assassination of a sovereign (soverano) is a political crime if it is prompted by political motives [moventi; the body of the report uses *motivo* or *motiv*] and offends against a political interest of a foreign State; so [also] are political [those] crimes committed or attempted in the course of the said regicide.'

(In other words, the principal motive of the crime, especially the 'regicide', not the murder of M Barthou, being political, the offences constituted by the incidental injuries to the other victims were deemed to be also of a political character⁶.) If the respondent were right in his construction of the English Act, Pavelic's alleged complicity in the murder of M Barthou was an 'offence of a political character', but not his alleged complicity in the murder of King Alexander. Yet extradition was refused unconditionally by the Italian court and not conceded on condition that proceedings should only be taken in respect of King Alexander's death.

That the case has relevance to public international law, and was not merely a matter of Italian municipal law, is also shown by its subsequent repercussions, which are treated in Oppenheim⁷:

'... the Council of the League of Nations, in pursuance of a proposal made by France, took steps to bring about an international convention for the prevention and punishment of crimes of a political character described as acts of political terrorism';

though the consequent convention only had limited adherence. But unless the decision of the Court of Appeal of Turin were in accord with general international law there was no need of the suggested international convention at all.

1 *International Law* (8th Edn, 1955), vol 1, ch 3 (x), p 704

2 *International Law* (6th Edn, 1929), vol 1, p 217

3 (1935), Part II, col 21

4 (1934) *Annual Digest*, 1933-1934, Case no 158

5 (1935), Part II, cols 20, 21

6 *Ibid* col 21

7 *Op cit*, vol 1, p 710, §§ 338-340a

- a Just as international law precluded Pavelic's extradition for the alleged murder of King Alexander in France, so it also precludes the appellant's extradition for the attempted murder of Chiang Ching-Kuo in the United States; and the 1870 Act should be construed accordingly, in the absence of contrary indication.

Presumption against anomaly or absurdity

- b This presumption is an application of the canon of statutory construction enjoining an interpretation most agreeable to justice and reason (Maxwell¹). 'An intention to produce an unreasonable result is not to be imputed to a statute if there is some other construction available' (Danckwerts LJ in *Artemiou v Procopiou*²). This is, it is true, a secondary canon of construction, subordinate to the 'golden' rule that the words of a statute should prima facie be read in their ordinary, natural and literal sense, without addition or omission; but in the instant case the presumption against anomaly and absurdity reinforces the 'golden' rule, and precludes the interpretation advocated by the respondent, whereby the political character of the offence must be as regards the state seeking extradition.

- c Take the *Pavelic* case³, and suppose the suspects had fled to England and not Italy. On the respondent's construction of the 1870 Act King Alexander's murder would have been an extraditable offence, but not that of M Barthou; though the acts were virtually simultaneous, their common motives and purposes were political, and their political character was only distinguishable in that Barthou symbolised French support for the Yugoslav regime whereas King Alexander symbolised that regime itself. If it could be ascertained which assassin killed which victim, one would be extradited and the other not.

- e Then take the hypothetical case of an attempted assassination, not of the Vice-Premier of Nationalist China, but of the Vice-President of the United States. Counsel for the respondent accepted that this would be 'an offence of a political character' if committed solely in protest against United States support of Chiang Kai-Shek's government and if perpetrated on United States territory—say, at the United States end of the Niagara Bridge. But if the purporting assailant followed the Vice-President across the bridge, and made the attempt at the Canadian end of the bridge, it would in some extraordinary way cease to be 'an offence . . . of a political character'. Its correct characterisation if the attempt were made laterally as the Vice-President was actually crossing the frontier would, I think, strain the subtlety even of a scholastic metaphysician.

- f Take, finally, two other actual assassinations, and apply the respondent's argument. In 1898 an Italian anarchist, Lucheni, murdered the Empress Elizabeth of Austria at Geneva. Asked why, he replied, 'As part of the war on the rich and great . . . It will be Humbert's turn next.' In 1900 another Italian anarchist, Bresci, duly murdered King Humbert of Italy near Milan. Between these two events, at an international conference in Rome, Great Britain (together with Belgium and Switzerland) refused to give up her traditional privilege of asylum or to agree to surrender suspected anarchists on demand of their native countries⁴. Yet, if both assassins had taken refuge in England, on the respondent's argument Bresci's crime would have been an offence of a political character under s 3 (1) and non-extraditable, while Lucheni's, similar in all respects except the fortuitous and temporary location of the victim, was not an offence of a political character and was therefore extraditable. (Like the Divisional Court, I consider that the criterion laid down in *Re Meunier*⁵ that—

- j

1 Op cit, ch 10, p 199

2 [1965] 3 All ER 539 at 544, [1966] 1 QB 878 at 888

3 (1934) Annual Digest, 1933-1934, Case no 158

4 See Barbara Tuchman, *The Proud Tower* (1966), pp 100-104

5 [1894] 2 QB 415 at 419, per Cave J

'there must be two or more parties in the State, each seeking to impose the Government of their own choice on the other, and that, if the offence is committed by one side or the other in pursuance of that object, it is a political offence, otherwise not'

—so that the offences of anarchists, whose quarrel is with established society at large, are excluded—is too narrow in the light of *Re Kolczynski*¹, and that the later authority is to be preferred.)

Such anomalies and absurdities would pose a serious problem of interpretation even if the phrase 'in respect of the state seeking extradition' were actually found in the statute following the words 'offence . . . of a political character'. Certainly they preclude such a phrase being merely implied, even if other canons of construction did not do so.

The cases

None of the judicial authorities cited to your Lordships had the instant situation in contemplation, except for the Italian case of *Pavelic*². I accept that the passage which I cited from the speech of my noble and learned friend, Lord Reid, in *Schtraks v Government of Israel*³ must be read with those of my noble and learned friends, Lord Radcliffe and Lord Hodson; and that none of my noble and learned friends was addressing his mind to the problem confronting your Lordships.

There is, however, one case which is of particular value: *Re Castioni*⁴. Its importance is that the decision turned on the meaning of 'offence of a political character', and that the Divisional Court adopted the meaning suggested in Sir James Stephen's *History of the Criminal Law*⁵ (see especially Hawkins J⁶ and Stephen J⁷, who adopted his previously suggested meaning on the ground that it did not give 'too wide an explanation'). Stephen was not only a great institutional writer; he was a particular expert on the subject of extradition, having been a member of the powerful Royal Commission on Extradition headed by Sir Alexander Cockburn CJ which reported in 1878. Stephen's *History* was published in 1883, and it contains a full discussion of the meaning of the expression 'an offence . . . of a political character'⁸. He did not discuss the specific situation which arose in *Pavelic's* case² and here; although, in view of his powers of juristic speculation and his experience, it is at least possible that he had envisaged it. Certainly his preferred meaning of the phrase 'an offence . . . of a political character', which was that adopted in *Castioni's* case⁴, is apt to cover the *Pavelic*² and the instant situation. It was as follows⁹:

'I think, therefore, that the expression in the Extradition Act ought (unless some better interpretation of it can be suggested) to be interpreted to mean that fugitive criminals are not to be surrendered for extradition crimes if those crimes were incidental to and formed a part of political disturbances.'

It could hardly be gainsaid that the crime of which the appellant was convicted was incidental to and formed a part of a political disturbance, even if this were an essential criterion (cf *Re Kolczynski*¹⁰).

1 [1955] 1 All ER 31, [1955] 1 QB 540

2 (1934) Annual Digest 1933-1934, Case no 158

3 [1962] 3 All ER at 535, [1964] AC at 582, 583

4 [1891] 1 QB 149, [1886-90] All ER Rep 640

5 (1883), vol 2, p 71

6 [1891] 1 QB at 165, [1886-90] All ER Rep at 648, 649

7 [1891] 1 QB at 167, [1886-90] All ER Rep at 650

8 Vol 2, pp 70-72

9 Ibid, p 71

10 [1955] 1 All ER at 36, [1955] 1 QB at 551

a Denman J in *Castioni's* case¹, though referring approvingly to the passage from Stephen's *History*, gave his own explanation as follows:

‘ . . . it must at least be shewn that the act is done in furtherance of, done with the intention of assistance, as a sort of overt act in the course of acting in a political matter . . . ’

b That also neatly covers the instant case.

Moreover, your Lordships will recollect from the passages of the evidence to which I referred at the beginning of this speech that the political disturbance to which the appellant's offence was incidental and of which it was part, that the political matter which the appellant's offence furthered and was intended to assist, were to some extent directed against or involved with the policy of the United States.

c *Conclusion*

My Lords, it must be rare for so many canons of statutory construction and an authoritative treatise, forensically approved in this regard, to concur in pointing to a particular interpretation.

d It is unlikely that the world will ever be free of political crime: subjects will always tend to feel grievance against their governors, there will always be conflicts of ideology, and some people seem to have a natural propensity to express themselves in violence. But there is the less excuse for, and therefore will be the less public condonation of, political violence if there is institutional power to influence the decisions of government and if substantial freedom of expression is safeguarded by the law. This country prides itself on its tradition of constitutional government and freedom under the law. Our tradition of asylum for political criminals is closely associated

e with our cherishing of our own rights.

I am, my Lords, naturally conscious that this instant appeal takes place at a time when horrifying acts of political terrorism are much in the public mind. Although it is, perhaps, more acute today, the problem how to reconcile a policy of asylum for political criminals with the curbing of terrorism is not new, as can be seen from the discussions in Wheaton² and Oppenheim³, and it has so far defied a generally

f acceptable solution. Oppenheim himself proposed a way of dealing with the matter⁴. Although these paragraphs have been omitted from recent editions, Oppenheim's distinguished editor has this to say of the proposed Convention against Terrorism consequent on the assassination of King Alexander of Yugoslavia⁵:

g ‘ It is doubtful whether States wedded by their law and tradition to the principle of non-extradition of political offenders will acquiesce in any conventional regulation impairing the asylum hitherto granted to political offenders. Such acquiescence on their part is unlikely at a time when the suppression of individual freedom and the ruthless persecution of opponents in many countries tend to provoke violent reactions of a treasonable character against the Governments concerned.’

h Bashi-bazouks had nothing to teach the SS or the NKVD, nor is the world yet emancipated from tyranny. In view of the increase in power of weapons of destruction and the greater likelihood of innocent persons suffering, it may well be that the time has come to seek once again a solution to the problem. But this will be for governments in international conclave: there is no advantage in marginal and anomalous judicial erosion of traditional immunities.

i I would allow the appeal.

1 [1891] 1 QB at 156, [1886-90] All ER Rep at 643, 644

2 International Law (6th Edn, 1929)

3 International Law (8th Edn, 1955)

4 3rd Edn (1920), vol 1, pp 521-523, §§339, 340

5 8th Edn (1955), vol 1, 710

LORD SALMON. My Lords, I agree with my noble and learned friends, Lord Hodson and Lord Diplock, that this appeal should be dismissed broadly for the reasons which they give and I desire to add only a few observations of my own. a

The 1870 Act is based on the assumption of a bilateral treaty between the holding state and the requesting state. With certain immaterial exceptions the criminal law of each state is territorial only. A crime committed in state A cannot be tried in state B. Yet it is in the international interest that criminals shall be brought to justice wherever their crimes may be committed. Hence the treaties relating to extradition and the consequent legislation enacted to give them the force of law in the courts of each of the contracting states. b

If a crime listed in the extradition treaty between state A and state B is committed in one or other of these states, the treaty will ensure that, subject to certain restrictions, the criminal shall, as a rule, be surrendered by the state to which he has fled at the request of the state in which he has committed the crime. As my noble and learned friend, Lord Diplock, points out, the Extradition Act 1870, s 3 (1), in effect imposes certain restrictions on the treaty-making powers of the executive and the circumstances in which a fugitive criminal may be surrendered. This appeal raises an important question about the nature of these restrictions. This question turns on whether the words 'offence . . . of a political character' in s 3 (1) of the Extradition Act 1870 mean offences 'of a political character' quoad the requesting state only or quoad any other state also. To my mind the words as used in the second limb of s 3 (1) clearly have the former and not the latter meaning. The second limb is designed to cover a case in which the requesting state is seeking surrender of a fugitive by tendering what seems to be prima facie evidence of some crime without any political flavour whereas there is evidence which establishes that in reality the true purpose of the requesting state is to lay its hands on the fugitive in order to punish him for some political act against its own régime: see *Re Kolczynski*¹. I can see no reason for giving the words 'of a political character' in the first limb of s 3 (1) any wider meaning than that which they bear in the second limb of that section. The historical reason for their introduction in 1870 was not primarily fear that the fugitive would not get a fair trial in the requesting state but because as my noble and learned friend Lord Reid pointed out in *Schtraks v Government of Israel*²: c

'Many people then regarded insurgents against continental governments as heroes intolerably provoked by tyranny, who ought to have asylum here, although they might have destroyed life and property in the course of their struggles.' d

No doubt the Act offered asylum to fugitives from oppression, real as well as imagined and to blackguards as well as to heroes. It is not for the courts of this country to inquire into the merits of those who have committed crimes against the requesting state to pass judgment on the political acts or policy of the government of that state. e

Section 3 (1) was, in my view, introduced into the 1870 Act solely to ensure that anyone who had committed a crime in some foreign state designed to overthrow its régime, could not be surrendered to that state after he had escaped to England and found asylum here. The idea of surrendering a fugitive in such circumstances was abhorrent not only to England but to many other countries who imposed the same restrictions on extradition as we did. No exhaustive definition of an offence of a political character is possible and none has been attempted. I do not believe that in 1870 or before or afterwards this country nor indeed any other country contemplated that a fugitive criminal should be immune from extradition unless his crime was a political offence directed against the requesting state. Many such cases are to be found in the books. This, however, is certainly the first time when the contrary f

¹ [1955] 1 All ER 31, [1953] 1 QB 540

² [1962] 3 All ER 529 at 535, [1964] AC 556 at 582, 583

a has been argued in our courts nor, save in *Pavelic's* case¹ with which I will presently deal, has the point so far as I can discover ever been considered in the courts of any other country. Certainly the well-known textbooks on international law do not refer to any such cases; nor do any of the learned authors express any opinions bearing directly on the point.

b It seems to me to be entirely unrealistic to suppose that any civilised state would ever have lent its support to a rule which would make its task of protecting visiting foreign rulers or statesmen even greater than it is. The violent political opponents and potential murderers of such visitors might be greatly encouraged by the knowledge that after murdering their victim they had only to escape abroad to avoid all risk of punishment. I cannot think that there is any valid reason for construing the 1870 Act as offering asylum to anyone other than a man who has committed a crime directed against the regime of the requesting state and which, in that sense, was a crime of a political character.

c In the present case the appellant had found asylum in the United States of America against the tyranny to which he had been subjected in Formosa. His crime was, admittedly, in no way directed against the United States or its politics or policy towards Formosa. The crime was an abuse of the asylum which he had enjoyed. In defiance of law and order in the country which had afforded him protection, he had there attempted murder. The fact that the motive for this murder was to overthrow a despotic regime elsewhere is, in my opinion, irrelevant.

d It seems to me that the benevolence with which it is said that the 1870 Act should be construed in favour of a fugitive offender must surely have some rational limits. Otherwise, persons could, e.g. bomb buildings or destroy civilian aircraft or murder visiting foreign politicians in, say, the United States or any other country with which we have an extradition treaty with the motive of obtaining some political end in a far off land, knowing that they could escape trial and punishment by escaping to England. This would act as an encouragement for the commission of crimes which would greatly endanger the lives of those who could be in no way concerned with or have any connection with the political ends for which the crimes were perpetrated. It would also mean that such crimes could be committed in this country with exactly similar results should the criminals escape to the United States or any other country which was party to an extradition treaty with the United Kingdom. Extradition is never granted except in a reciprocal basis. Accordingly, if such crimes were committed here and the criminals escaped abroad, there is no chance of them being surrendered if the 1870 Act really bears the construction for which the appellant contends.

e I can hardly regard that construction as favouring the liberty of the individual under the common law, but only as something totally different, namely, a licence to kill in a foreign state to the great peril of its citizens when neither they nor their government have any connection with the political motive or ends for which the crime was committed.

f We have been referred to the case¹ concerning the murder in France in 1934 of King Alexander of Jugo-Slavia and M Barthou, the French Foreign Minister by two Croats named Pavelic and Kwaternik who did not approve of the Jugo-Slav régime or of its support by France. The murder was intended as a political blow at that regime and at France for supporting it. The two Croats escaped to Italy. France requested their extradition which the Italian courts refused on the ground that their crime was of a political character. It is not for me to express any view about the correctness of that decision. If Italian law is the same as ours, the murder of M Barthou was clearly an offence of a political character within the meaning of those words in the treaty and the relevant Italian legislative enactment, but the murder of King Alexander was not. It is not plain from the somewhat attenuated reports of

this case what were the precise grounds for the Italian court's decision. It seems, however, that the court may have considered that any crime incidental to or arising out of an offence of a political character is deemed also to be such an offence and that therefore the assassins of King Alexander were entitled to the same immunity from extradition as they were in respect of the murder of M Barthou. This point has never been considered by our courts. But if it is a valid point, it underlines the necessity for construing the words 'of a political character' strictly in their context in the 1870 Act. a

I do not consider that any light is thrown on the present case by *Re Castioni*¹. That case concerned a request for extradition by Switzerland of a man who had escaped to England from that country having committed a murder there in the course and in furtherance of an insurrection to overthrow the Swiss government. On any view, that must have been an offence of a political character. The point arising in the instant case did not arise in *Re Castioni*¹ and none of the observations of the Divisional Court² throws any light on it. b

Nor did the point with which we are faced arise in *Schtraks v Government of Israel*³ but there are passages in that case which are of more general application particularly the passage cited by my noble and learned friend, Lord Hodson, from the speech of Viscount Radcliffe⁴ with which none of the other noble and learned Lords in that case disagreed. In my opinion, Lord Radcliffe's analysis extracts the principle underlying s 3 (1) of the 1870 Act. This passage from his speech and also the terms of the Act itself inherently presuppose and require that the political direction of the offence must be against the requesting state if a refusal of extradition is to be held justifiable. To hold otherwise would be to introduce a new and dangerous principle which the Act does not warrant. c

I cannot agree that this conclusion leads to any absurdity or offends any rule of the common law. On the contrary, it is, in my opinion, dictated alike by reason, principle and justice. d

My Lords, I would dismiss the appeal. e

Appeal dismissed.

Solicitors: *B M Birnberg & Co* (for the appellant); *Director of Public Prosecutions.* f

S A Hatteea Esq Barrister.

¹ [1891] 1 QB 149 [1886-90] All ER Rep 640

² [1973] 1 All ER 935

³ [1962] 3 All ER 529, [1964] AC 556 g

⁴ [1962] 3 All ER at 539, [1964] AC at 589

Stoneman v Brown

COURT OF APPEAL, CIVIL DIVISION

LORD DENNING MR, CAIRNS AND LAWTON LJJ

15th JANUARY 1973

Agriculture – Agricultural holding – Notice to quit – Validity – Service of notice by landlord requiring payment of rent due within two months – Failure by tenant to pay within two months – Payment after expiry of two months and before service of notice to quit – Whether landlord entitled to serve valid notice to quit after payment – Agricultural Holdings Act 1948, s 24 (2) (d).

Under a tenancy of an agricultural holding rent was payable twice yearly, on Lady Day and Michaelmas Day. The tenant failed to pay the rent due on Lady Day 1970. On 29th June the landlord served a notice on the tenant under s 24 (2) (d)^a of the Agricultural Holdings Act 1948 requiring him to pay the rent due within two months, i.e. by 29th August. On 1st September the tenant sent the landlord by post a cheque for the amount due; it was received by the landlord on 3rd September. Meanwhile, also on 1st September, the landlord had posted a notice to quit; it was received by the tenant on 2nd September. The tenant claimed that the notice to quit was invalid since he had already paid the rent on 1st September before the notice to quit was served on him.

Held – The notice to quit was valid and effective. If a tenant failed to pay rent due within two months after the service of the notice under s 24 (2) (d) requiring payment the landlord acquired an indefeasible right to serve a notice to quit. The landlord could thereafter bring the tenancy to an end by serving a notice to quit and it made no difference if the tenant paid the rent before the landlord had actually served the notice to quit (see p 227 f and h to p 228 a and d to f and p 229 a, post).

Dictum of Diplock J in *Price v Romilly* [1960] 3 All ER at 432 approved.

Notes

For the circumstances in which a notice to quit an agricultural holding is not restricted by the right of the tenant to serve a counter-notice, see 1 Halsbury's Laws (4th Edn) 575, 576, para 1055.

For the Agricultural Holdings Act 1948, s 24, see 1 Halsbury's Statutes (3rd Edn) 707.

Cases referred to in judgments

Price v Romilly [1960] 3 All ER 429, [1960] 1 WLR 1360, Digest (Cont Vol A) 15, 70b. *Shepherd v Lomas* [1963] 2 All ER 902, [1963] 1 WLR 962, CA, Digest (Cont Vol A) 15,

70c.

Appeal

By an order dated 2nd October 1972 his Honour Judge Goodall in Newton Abbott County Court answered Yes to the following question in a special case stated for the opinion of the court by Philip John Paul, the arbitrator appointed in an arbitration under the Agricultural Holdings Act 1948 between Thomas Hercules Langford Brown ('the landlord') and Stuart Alan Stoneman ('the tenant'):

'Whether or not, if rent was paid after the expiration of two months from the service of the notice requiring payment of rent, but before service on 2nd

September 1970 of the notices to quit dated 1st September 1970, the tenant, within the meaning of the wording s 24 (2) (d) of the Agricultural Holdings Act 1948, at the date of the giving of the notices to quit, had failed to comply with the notice in writing requiring payment of rent within two months of the service of the notice.' a

The tenant appealed against that decision on the ground that, on the true construction of s 24 (2) (d) of the 1948 Act, if after the expiration of two months from the service of a notice requiring payment of rent within the period but before the service of a notice to quit the tenant had paid the rent referred to in the notice requiring payment thereof then the tenant had not, within the meaning of s 24 (2) (d), at the date of the giving of the notice to quit, failed to comply with the notice in writing requiring such payment within two months of the service of the notice. The facts are set out in the judgment of Lord Denning MR. b
c

J A R Finlay for the tenant.

John Beveridge for the landlord.

LORD DENNING MR. Mr Stoneman is the tenant of market gardens called Kerswell Gardens, Kingskerswell, Newton Abbot, in Devonshire. He holds different parts of them under three tenancy agreements. He has held them since about the year 1960, the landlord being Mr Brown. According to the terms of the leases, the rent was payable quarterly; but by the course of dealing it had become payable half yearly on Lady Day and Michaelmas Day. The rent of all the premises together was £440 a year. The sum of £220 was payable every half year. The tenant was often very late in paying the rent. The landlord evidently got tired of this. On Lady Day, 25th March 1970, £220 was due. It was not paid. Three months later, on 29th June 1970, the landlord's agents served on the tenant a notice in respect of each lease, such as is required by the Agricultural Holdings Act 1948. By the notice the landlord required the tenant to pay within two months the rent which was due. Each notice was as follows: d
e
f

'As Agents for and on behalf of Mr. T. H. L. Brown we hereby give you NOTICE REQUIRING YOU TO PAY within two months from the service of this Notice the rent due in respect of the above holding as set out below'.

In each case it was the half-year's rent due on 25th March. g

The notice to pay was served on 29th June 1970. So Mr Stoneman was required to pay by 29th August 1970. Mr Stoneman did not comply with the notice within those two months. In so doing, he put himself in peril of having a notice to quit served on him. We all know that a tenant of an agricultural holding—and, of course, a market garden is an agricultural holding—has security of tenure in effect for his life, as long as he keeps the covenants of the lease and pays his rent. But he is in peril if he does not comply with the notices which the statute allows. h

One of the cases in which the landlord can serve a notice to quit is when the tenant does not pay his rent within two months after notice. The particular provision here is s 24 (2) (d) of the 1948 Act. It allows the landlord to give notice to quit if—

'at the date of the giving of the notice to quit the tenant had failed to comply with a notice in writing served on him by the landlord requiring him within two months from the service of the notice to pay any rent due in respect of the agricultural holding to which the notice to quit relates ...' i

So in this case Mr Stoneman had two months from 29th June (when he received the notice) until 29th August in which to pay his rent. He did not pay it within those

a two months. He wrote a letter on 1st September enclosing a cheque for £220, but he ante-dated it to 26th August, so as to make it appear as if he had written it within the two months. The letter was as follows:

'Kerswell Gardens
Torquay
26 Aug 1970

b

'Dear Sirs

'Cheque enclosed £220 being rent payment due on Kerswell Gardens.

Yours faithfully
S A Stoneman.'

c

He did not post the letter until 1st September. It was not received by his landlord until 3rd September.

d

Meanwhile the landlord's agents before they received that letter from the tenant, had already taken steps to give notices to quit. They prepared notices to quit, all in the proper form. Each notice gave the reason why it was being served. It was because the tenant had not paid his rent within the two months. The agents dated the notices on 1st September and posted them on that day by recorded delivery. They were received by the tenant on 2nd September. So those notices to quit were in good order.

e

In an attempt to avoid the notices to quit, the tenant claimed that he had paid the rent on 1st September when he posted his letter with the cheque in it. He said that the landlord had authorised him to make payment by cheque by post. So on this occasion he said that the rent was paid on 1st September and this payment was before notice to quit was served; because the notice to quit did not get to the tenant until 2nd September. I will assume that the tenant paid the rent on 1st September when he sent the cheque. Nevertheless I am afraid that was too late to save him. The two months had already expired on 29th August 1970. Once the

f

tenant allowed the two months to expire without payment, the payment thereafter could not save him. Even if he paid the rent *after* the two months, but *before* the notice to quit was given, he would still have to quit. The words of the statute are plain. There is no escape from them. That was the view expressed by Diplock J in *Price v Romilly*¹. In that case the landlord served a notice under s 24 (2) (d) requiring the tenant to remedy breaches within a reasonable period. Counsel for the tenant submitted that, if the tenant did the work *after* a reasonable period expired but *before* the notice to quit was given, the landlord was not entitled to give notice to quit. But Diplock J said²: 'I think that construction submitted by counsel for the tenant is plainly a wrong construction in law'.

g

h

j

Counsel for Mr Stoneman sought to overcome this strict construction by tracing the legislative history from the Agricultural Holdings Act 1923 (where the rent was to be paid within a reasonable period) to the 1948 Act (where the rent is to be paid within two months). But I am afraid he did not succeed. The words of the 1948 Act are too plain. If the tenant does not pay his rent within the two months required by the notice, then the tenant has no further right to be there; the landlord can serve his notice to quit; and even though the tenant should pay the rent before the landlord actually serves his notice to quit, still it does him no good; it does not get him out of his troubles, because he was already in breach, and the landlord's right to serve a notice to quit has accrued. If the landlord serves a notice to quit, the tenancy is ended. It does not survive even if the tenant pays the rent for a subsequent period

1 [1960] 3 All ER 429, [1960] 1 WLR 1360

2 [1960] 3 All ER at 432, [1960] 1 WLR at 1363

unless the proper inference is that there was an implied agreement for a new tenancy. a

I realise that this means that the tenant's security of tenure is forfeited by his non-compliance with the notice. In *Shepherd v Lomas*¹ Harman LJ regretted that there was no power to relieve against a forfeiture on this ground. I can imagine circumstances in which there might be some equity to relieve the tenant. But this is not such a case. It appears that the cheque which Mr Stoneman sent on 1st September was not met on presentation. The landlord's agents paid it in on 25th September and it was returned marked 'Refer to drawer'. It was re-presented on 2nd October and then paid. The plain fact is that Mr Stoneman has not paid his rent promptly. It does look as if he is a bad payer. That is what the statute is directed against. A tenant cannot expect to keep his security of tenure unless he complies with the elementary obligation to pay his rent, or at all events to pay his rent within two months after notice. On this point I agree with the judge. I think the notice to quit was perfectly good. It was properly given on the grounds provided for by the statute. This appeal should be dismissed. b
c

CAIRNS LJ. I agree that the tenant's appeal in this case fails. In my opinion if notice is given requiring payment of rent within two months and the rent is not paid within two months, the notice has not been complied with. I do not consider it can be said that the essential requirement of the notice is simply that rent is to be paid, treating the provision as to time as inessential so that the time can be extended up to the date of the notice to quit. d

Counsel for the tenant argued that because of the opening words of para (d) of s 24 (2) of the 1948 Act, the matter is to be looked at as at the date of giving notice to quit. In my view those words do not help the tenant in this case. At that date he had not complied with the notice to pay within two months. The effect of the words in question is I think to make it clear that the landlord could not serve notice to quit before the expiry of the notice to pay and then rely on a failure to comply with the notice to pay occurring after the date of the notice to quit. I agree with the view expressed obiter by Diplock J in *Price v Romilly*² that the construction contended for in that case and here would be plainly wrong. e
f

I see for my part no room for the introduction of any equity to modify what I regard as the clear meaning of the statute; and I notice that Harman LJ¹, in connection with the second part of this same paragraph, while expressing the view that there ought to be some power to relieve against forfeiture, added: 'but, as the Act of 1948 stands at present, there is no such relief.' g

There is nothing harsh about the provision of the statute interpreted in the way in which in my view it must be interpreted. The date for payment of the rent is that provided in the lease or, as in this case, the lease as modified by the express or implied agreement of the parties. Then under the 1948 Act the tenant does not lose the security of tenure given him by s 24 (1) merely because the rent is overdue. He is given a further period of not less than two months before he forfeits his rights under that subsection. Here in fact the rent was due on Lady Day. The two months' notice was not given until nearly the end of June; and the rent was not paid until after that notice had expired and after more than six months from the date when it fell due. h

I therefore agree that the learned judge reached the right conclusion on this matter and that we should dismiss the appeal. i

1 [1963] 2 All ER 902 at 907, [1963] 1 WLR 962 at 974

2 [1960] 3 All ER 429 at 432, [1960] 1 WLR 1360 at 1363

LAWTON LJ. I agree with both judgments which have been delivered and have nothing to add.

Appeal dismissed.

Solicitors: Gouldens, agents for Sargent & Probert, Exeter (for the tenant); Tuck & Mann & Geffen & Co, agents for Woolcombe, Watts & Co, Newton Abbot (for the landlord).

L J Kovats Esq Barrister.

Lewis v Averay (No 2)

COURT OF APPEAL, CIVIL DIVISION

LORD DENNING MR, PHILLIMORE AND SCARMAN LJJ

14th FEBRUARY 1973

Legal aid – Costs – Unassisted person's costs out of legal aid fund – Costs incurred by unassisted party – Incurred by – Unassisted party member of Automobile Association – Association undertaking proceedings on behalf of unassisted party and paying solicitors – Whether costs 'incurred by' unassisted party – Legal Aid Act 1964, s 1 (1).

Legal aid – Costs – Unassisted person's costs out of legal aid fund – Just and equitable – Refusal of legal aid – Unassisted party alleging legal aid unreasonably refused – Whether relevant in considering whether just and equitable to make order – Legal Aid Act 1964, s 1 (2).

The plaintiff brought an action against the defendant in the county court for the recovery of a motor car and obtained judgment. Both parties were legally aided. Judgment was given for the plaintiff. The defendant wished to appeal but he was refused legal aid on the ground that there was no reasonable ground of appeal. However he obtained assistance from the Automobile Association, of which he was a member. The association undertook the appeal. They instructed solicitors and paid them. The plaintiff was granted legal aid to resist the appeal. The defendant succeeded in his appeal^a and applied for an order under s 1^b of the Legal Aid Act 1964 for payment out of the legal aid fund of his costs on the appeal. The Law Society resisted the application on the grounds that the costs of the appeal had not been 'incurred by' the defendant but by the association and in any event it would not be 'just and equitable' to make an order since the costs had not been borne by the defendant.

^a See *Lewis v Averay* [1971] 3 All ER 907

^b Section 1, so far as material, provides:

(1) Where a party receives legal aid in connection with any proceedings between him and a party not receiving legal aid (in this Act referred to as "the unassisted party") and those proceedings are finally decided in favour of the unassisted party, the court by which the proceedings are so decided may, subject to the provisions of this section, make an order for the payment to the unassisted party out of the legal aid fund of the whole or any part of the costs incurred by him in those proceedings.

(2) An order may be made under this section in respect of any costs if (and only if) the court is satisfied that it is just and equitable in all the circumstances that provision for those costs should be made out of public funds; and before making such an order the court shall in every case (whether or not application is made in that behalf) consider what orders should be made for costs against the party receiving legal aid and for determining his liability in respect of such costs . . .

Held—The defendant was entitled to the order sought because—

(i) the costs of the appeal had been 'incurred by' him since he was the person legally responsible for the costs; the association had merely agreed to indemnify him (see p 231 f and h and p 232 d and g, post);

(ii) it was just and equitable that an order should be made; even though the defendant's costs had been borne by the association, he was a member of the association and might well wish to pay back into their funds the costs which they had provided for him (see p 231 j and p 232 a d and g, post).

Per Curiam. The question whether an unassisted party was unreasonably refused legal aid is not one that should be taken into account when considering whether it is just and equitable to make an order in his favour under s 1 of the 1964 Act (see p 232 b and e to g, post); dicta of Sir Jocelyn Simon P and Ormrod J in *Povey v Povey* [1970] 3 All ER at 617, 624, 625 doubted.

Notes

Reference should also be made to *Davies v Taylor* (No 2)^c in which judgment was given after the decision in this case.

For the award of costs to an unassisted party out of the legal aid fund, see the Supplement to 30 Halsbury's Laws (3rd Edn), para 933A.

For the Legal Aid Act 1964, s 1, see 25 Halsbury's Statutes (3rd Edn) 789.

Cases referred to in judgments

Hope, Re (1872) 7 Ch App 766, 27 LT 670, 43 Digest (Repl) 41, 221.

Lewis v Averay [1971] 3 All ER 907, [1972] 1 QB 198, [1971] 3 WLR 603, CA.

Povey v Povey [1970] 3 All ER 612, [1972] Fam 40, [1971] 2 WLR 381, DC.

Application

On 15th January 1971, in an action by Keith Loder Lewis against Anthony John Averay in Bromley County Court, his Honour Deputy Judge Ellison ordered Mr Averay to return to Mr Lewis an Austin Cooper 'S' motor car or pay the sum of £100, the value thereof, and £230 damages for its detention. Mr Lewis and Mr Averay were both legally aided and no order was made as to costs save that both parties' costs be taxed pursuant to Sch 3 to the Legal Aid and Advice Act 1949. Mr Averay appealed to the Court of Appeal. On 4th May 1971 the area committee of the no 14 (London West) Legal Aid Area refused Mr Averay's application for legal aid to pursue the appeal on the ground that 'you have not shown that you have reasonable grounds for taking steps to assert or dispute the claim or for taking, defending, or being a party to proceedings'. Mr Lewis was granted legal aid to resist the appeal. On 22nd July 1971 the Court of Appeal¹ allowed Mr Averay's appeal. Mr Averay applied for an order under s 1 (1) of the Legal Aid Act 1964 that the costs incurred by him in the proceedings on appeal be paid to him out of the legal aid fund. The facts are set out in the judgment of Lord Denning MR.

R N Titheridge for Mr Averay.

Jack Hames QC and *D J Ritchie* for the Law Society.

LORD DENNING MR. We had an appeal before us in 1971 in a case called *Lewis v Averay*¹. Mr Lewis was a post-graduate student in chemistry. Mr Averay was a student at the Imperial College. A rogue managed to get a car from Mr Lewis. The rogue gave a cheque which was dishonoured. Having got the car, the rogue sold it to Mr Averay, who in good faith paid £200 for it. Then the rogue disappeared. Mr Lewis sued Mr Averay in the county court. He got judgment against Mr Averay

^c [1973] 1 All ER 959

¹ [1971] 3 All ER 907, [1972] 1 QB 198

a for the return of the car or £100, its value, and £230 damages for its detention. Both were legally aided in the county court. Each had a nil contribution. Mr Averay wished to appeal to this court. He applied for legal aid. The local committee refused it. He appealed to the area committee. He submitted an opinion by counsel stating that an appeal stood a reasonable chance of success. Even so, the area committee refused him legal aid. The secretary wrote a letter in which he said that he believed the area committee—

b 'felt that they were justified in not authorising the expenditure of further public money in this case where both litigants undoubtedly suffered loss and the real culprit is not before the Court.'

After further consideration, the area committee refused legal aid on the ground that there was no reasonable ground for an appeal.

c So Mr Averay did not get legal aid for an appeal. But he then went and got legal assistance from the Automobile Association, of which he was a member. With their aid, he appealed to this court. By way of contrast Mr Lewis was given legal aid to resist the appeal. Mr Averay succeeded in his appeal. His counsel asked for costs. We did not make an order for costs against Mr Lewis because he had no money. He was legally aided with a nil contribution; but it was obviously a case where we would have made an order for costs if he had not been legally aided. So Mr Averay applied for his costs to be paid out of the legal aid fund. It is that application which comes before us this morning.

d The application is made under s 1 (2) of the Legal Aid Act 1964. It says that this court may make an order for costs out of the legal aid fund if, and only if, the court is satisfied that it is just and equitable in all the circumstances that the provision for those costs should be made out of public funds.

e Mr Hames has appeared for the Law Society and has been as helpful as ever. In the first place, he stresses the words 'costs incurred by him'. Those words appear in the Act in two or three places. Counsel suggests that in this case the costs were not incurred by Mr Averay, but were incurred by the Automobile Association; because the Automobile Association undertook the appeal and instructed their solicitors and paid them. I cannot accept this suggestion. It is clear that Mr Averay was in law the party to the appeal. He was the person responsible for the costs. If the appeal had failed, he would be the person ordered to pay the costs. If the costs had not been paid, execution would be levied against him and not against the Automobile Association. The truth is that the costs were incurred by Mr Averay, but the Automobile Association indemnify him against the costs. This is borne out by a letter of 11th April 1972 from Messrs Amery-Parkes & Co, Mr Averay's solicitors, to the area secretary of the Law Society. They say:

f '... we ... made it clear that Mr. Averay was indemnified in all respects by the Automobile Association so that no part of the cost of the appeal has or would have fallen on him.'

h The litigant, Mr Averay, is the person who is legally responsible vis-à-vis the other party; but he is indemnified by those standing behind him. That is sufficient to satisfy the requirement that the costs were 'incurred by him'.

j Next, counsel for the Law Society says that it is not just and equitable that the costs should be paid out of public funds; because the Automobile Association has borne them, and not Mr Averay. But, as Phillimore LJ pointed out, Mr Averay is one of the members of the Automobile Association. He might well wish to put back into the funds of the Automobile Association the costs which they had provided for him. It is rather like *Re Hope*,¹ to which counsel referred us. Or take a case where a litigant is helped by a friend or relative. If he recovers costs from the other side, he should reimburse the one who helped him.

In the circumstances of this case it seems to me entirely just and equitable that Mr Averay should have an order for his costs to be paid out of the legal aid fund, even though they were borne in the first instance by the Automobile Association. He can then reimburse the Automobile Association. a

There is one further point I would mention. Counsel for Mr Averay suggested that we should consider the circumstances in which Mr Averay was refused legal aid. He suggests that it was unreasonable for the area committee to have refused legal aid. But counsel for the Law Society urged us not to canvass this matter. I entirely agree with him. The area committee know far more about the circumstances—as it came before them—than we can know. If they went wrong—if they took irrelevant matter into account, or failed to take the right matter into account—the remedy would be by way of an application to the Divisional Court of the Queen's Bench Division for mandamus or certiorari. Nothing of that kind could be suggested here. So we ought not to go into the question of the rightness or wrongness of the refusal of legal aid. Suffice it that legal aid was refused. That is why Mr Averay went to the Automobile Association. But I would observe that if Mr Averay had been granted legal aid, the fund would have borne his costs. So it is plain enough that the fund should bear them now. In my opinion, it is just and equitable that Mr Averay should recover the costs from the legal aid fund. I would make an order accordingly. b
c
d

PHILLIMORE LJ. I agree, and on the last point I would briefly refer to *Povey v Povey*¹ where Sir Jocelyn Simon P² and Ormrod J³, in commenting on whether it was just and equitable that provision for the husband's costs should be made out of public funds, indicated that in their view one of the factors to be taken into consideration was that he ought to have been granted legal aid but had not been. I find difficulty in accepting those expressions of opinion. It seems to me that counsel for the Law Society is right when he says that after all the whole basis of this application is that he was not granted legal aid, and it really is impossible for this court to review a decision of the committee, not knowing exactly what materials they had before them and to try and reach some sort of decision on whether they were right or whether they were wrong. e
f

I would agree that this application is successful.

SCARMAN LJ. I agree, but, like Phillimore LJ, I take the view that an application for costs under s 1 of the Legal Aid Act 1964 is not the appropriate place to review a decision by an area committee refusing a would-be litigant the assistance of legal aid. In a sense this is a stronger case than *Povey v Povey*¹. In that case the refusal was put on two grounds listed as E and F⁴. g

'E. You have not shown that you have reasonable grounds for taking steps to assert or dispute the claim, or for taking, defending, or being a party to proceedings.

'F. It appears unreasonable that you should receive legal aid in the particular circumstances of the case.' h

F seems to be a much more general ground. In *Povey v Povey*¹ both those grounds were given as grounds for a refusal of legal aid. In the present case, as is made clear by the final letter of 28th April 1971, the area committee relied only on E, that is to say, a failure to show reasonable ground for taking the case to appeal. It is in my judgment right to emphasise that in proceedings constituted as these are and for i

1 [1970] 3 All ER 612, [1972] Fam 40

2 [1970] 3 All ER at 617, [1972] Fam at 48

3 [1970] 3 All ER at 624, 625, [1972] Fam at 56, 57

4 See [1970] 3 All ER at 625, [1972] Fam at 56

a this purpose the court has not the material to review, or even to comment on, the merits of the refusal by the area committee of legal aid.

One further matter I would add because I think it is of some public importance. We have been furnished with the correspondence that passed between Mr Averay's solicitors and the Law Society leading up to the final refusal of legal aid. I think it is right to say that the correspondence shows the area committee and the area secretary behaving with great consideration for Mr Averay even though at the end of the day they came to the conclusion that he was not to have legal aid. The refusal was first notified by letter. Mr Averay's solicitors queried it. The area secretary then said that there would certainly be another opportunity for the matter to be considered. That opportunity was seized. As I understand it, there was an oral hearing before the area committee and counsel's opinion was placed before them; and only at the end of all that was a final decision given in the terms that I have described on 28th April 1971.

c *Application granted. Order for costs of the appeal and of the application to be paid by legal aid fund.*

d Solicitors: Amery-Parkes & Co (for Mr Averay); The Law Society.

L J Kovats Esq Barrister.

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Practice Direction

f *Court – Jurisdiction – High Court of Justice – Divisions of High Court – Supreme Court of Judicature (Consolidation) Act 1925, s 57.*

In exercise of the powers conferred on him by s 57 of the Supreme Court of Judicature (Consolidation) Act 1925, the Lord Chancellor hereby directs that any Division of the High Court to which a cause or matter is assigned shall have jurisdiction to grant in that cause or matter any remedy or relief arising out of or related to or connected with any claim made in the cause or matter notwithstanding that proceedings for such remedy or relief are assigned by or under any Act to another Division of the court.

HAILSHAM OF ST MARLYBONE C

13th April 1973

h I concur WIDGERY CJ

17th April 1973

I concur GEORGE BAKER P

j 17th April 1973

Ex parte Meredith

QUEEN'S BENCH DIVISION

LORD WIDGERY CJ, PARK AND MAY JJ

16th FEBRUARY 1973

Crown Court – Supervisory jurisdiction of High Court – Orders of mandamus, prohibition or certiorari – Trial on indictment – High Court having no supervisory jurisdiction in matter relating to trial on indictment – Order of Crown Court relating to costs following trial on indictment – Certiorari – Whether High Court having jurisdiction to quash order – Courts Act 1971, s 10 (5).

By virtue of s 10 (5)^a of the Courts Act 1971 the High Court has no jurisdiction to make an order of certiorari with a view to quashing an order of the Crown Court relating to costs following a trial on indictment.

Notes

For supervisory jurisdiction of the High Court over the Crown Court, see Supplement to 9 Halsbury's Laws (3rd Edn) para 963D.

For the Courts Act 1971, s 10, see 41 Halsbury's Statutes (3rd Edn) 298.

Motion for certiorari

Eric Melvyn Meredith applied ex parte for an order of mandamus directed to his Honour Judge Da Cunha at Manchester Crown Court to try an issue as to costs after the applicant had been acquitted on three counts of an indictment (the prosecution offering no evidence on count 3 (taking a conveyance without the owner's consent), and the judge directing an acquittal on count 1 (theft of a 'krooklok') and count 2 (theft of a Volvo car)). At the hearing of the application it was conceded that mandamus was not the appropriate remedy and the applicant was given leave to move for certiorari instead

A M Hill for the applicant.

LORD WIDGERY CJ delivered the following judgment of the court. Counsel moves for certiorari to bring up and quash a decision of the Crown Court at Manchester relative to costs following a trial on indictment. In brief, the applicant was acquitted on indictment in the Crown Court; he was refused his costs, and he moves today for certiorari to set aside the refusal of an order for costs on the basis that the judge's discretion was either not exercised at all or was exercised on a palpably wrong principle. Counsel candidly, as one would expect, faces the initial difficulty of whether, in view of s 10 of the Courts Act 1971, certiorari can go to the Crown Court in respect of an order relative to costs following a trial on indictment. It seems to us clear that it cannot, and although it may seem a little illogical that before the Courts Act 1971 this case would probably have gone to quarter sessions, whence the decision would have been open to review on certiorari, now, by virtue of the amalgamation of assizes and quarter sessions in the single Crown Court, it seems to

^a Section 10 (5) provides: 'In relation to the jurisdiction of the Crown Court, other than its jurisdiction in matters relating to trial on indictment, the High Court shall have all such jurisdiction to make orders of mandamus, prohibition or certiorari as the High Court possesses in relation to the jurisdiction of an inferior court.'

- a* us that certiorari cannot go in respect of a judgment or other decision of that court relating to trial on indictment, and if one once reaches that conclusion, it is inescapable that the order complained of here was an order relating to trial on indictment. Accordingly, it seems to us that the application must be refused.

Application refused.

- b* Solicitors: *Allan Jay & Co*, agents for *Brian Taylor & Co*, Stockport (for the applicant).

N P Metcalfe Esq Barrister.

c

Arenson v Arenson and another

COURT OF APPEAL, CIVIL DIVISION

LORD DENNING MR, BUCKLEY LJ AND SIR SEYMOUR KARMINSKI

- d* 11th, 12th, 13th, 14th, 19th DECEMBER 1972, 22nd FEBRUARY 1973

Negligence – Duty to take care – Valuer – Valuation – Auditor appointed to value shares as expert and not as arbitrator – Shareholder selling shares to controlling shareholder in company on basis of valuation – Prospectus subsequently issued by company offering shares to public – Prospectus prepared by auditor – Value placed on shares six times greater than value previously given by auditor to shareholder – Whether shareholder having cause of action in negligence against auditor.

- f* In 1964 the first defendant took his nephew, the plaintiff, into his business, which was then a private company, and gave him a number of shares in the company. By a written agreement it was provided that if the plaintiff ceased to be employed in the business he would sell back his shares to the first defendant at a 'fair value', which was defined in the agreement as the value determined by the company's auditors 'whose valuation acting as experts and not as arbitrators shall be final and binding on all parties'. In April 1970 the plaintiff's employment in the business was terminated. The agreement thereupon came into operation and the plaintiff and first defendant asked the second defendants as the company's auditors to value the plaintiff's shares. They did so voluntarily; it was no part of their duty as the company's auditors to value the shares, and they were not under any duty, contractual or otherwise, to the plaintiff or the first defendant to value the shares. They knew that the valuation was required for the purpose of fixing the purchase price to be paid by the first defendant for the shares. They valued the shares at £4,916 13s 4d.
- g* In reliance on that valuation the plaintiff transferred the shares to the first defendant at the price given in the valuation. A few months later the company went public. In September 1970 a holding company was formed and in January 1971 the first defendant transferred all his shares, including those he had bought from the plaintiff, to the holding company. On 21st January 1971 the shares were offered to the public on the basis of a prospectus prepared by the second defendants. It set out the profits of the private company. It showed that the plaintiff's shares were worth £29,500, i.e. six times as much as the first defendant had paid for them.
- h* In August 1971 the plaintiff brought an action against the defendants. As against the first defendant he claimed that the valuation of the shares was not binding, that the shares should be revalued and that he should be paid their worth. As against the second defendants he claimed damages for negligence on the ground that their valuation was misconceived and erroneous in one or more fundamental respects and was made on the

wrong bases, by reason whereof he had suffered damage. There was no allegation of fraud or bad faith against the second defendants. They applied to have the statement of claim, as against them, struck out as disclosing no reasonable cause of action.

Held – (i) (Lord Denning MR dissenting) The plaintiff's claim, unless amended, disclosed no cause of action against the second defendants for the following reasons—

(a) Where a third party undertook, in a quasi-judicial or arbitral capacity, the role of deciding as between two other parties a question, the determination of which required the third party to hold the scales fairly between the opposing interests of the two parties, the third party was immune from an action for negligence in respect of anything done in that role if he acted honestly; the immunity was based on public policy for without it the third party might be inhibited from performing his arbitral function in the free exercise of his judgment (see p 246 e and f, p 248 e and f and p 250 f, post).

(b) The task of valuation undertaken by the second defendants was of the arbitral (or quasi-judicial) character which attracted immunity from suit, for in submitting the matter to the second defendants the plaintiff and the first defendant were seeking an adjudication and not merely delegating the ministerial function of ascertaining a matter of fact which, with the necessary skill and equipment, they could perform themselves. Where a third party was required to adjudicate on any matter in dispute between other parties or on which such parties had opposed interests on which they agreed to accept the third party's decision, the third party was performing a quasi-judicial function. It was not material that the third party was appointed to act as an expert and not an arbitrator, for the purpose of that formula was merely to exclude the operation of the Arbitration Act 1950. A vendor and purchaser of property who left the price of property to be determined by a third party necessarily had opposed interests even though there was no formulated dispute between them and it was unnecessary to find in terms an agreement to refer the price to the third party in default of agreement between the parties themselves (see p 248 h and j, p 249 b to e, and p 250 b and f, post).

(ii) The plaintiff might, however, submit an amendment for consideration (see p 245 j and p 250 c to e, post).

Pappa v Rose (1871) LR 7 CP 32, *Tharsis Sulphur and Copper Co Ltd v Loftus* (1872) LR 8 CP 1, *Stevenson v Watson* (1879) 4 CPD 148, *Chambers v Goldthorpe, Restell v Nye* [1900-3] All ER Rep 969, *Finnegan v Allen* [1943] 1 All ER 493 applied.

Hedley Byrne & Co Ltd v Heller & Partners Ltd [1963] 2 All ER 575 considered.

Jenkins v Betham (1855) 15 CB 168 distinguished.

Decision of Brightman J [1972] 2 All ER 939 affirmed.

Notes

For the liability of valuers acting as quasi-arbitrators, see 39 Halsbury's Laws (3rd Edn) 4-6, para 6, and for cases on the liability of arbitrators, see 2 Digest (Repl) 550-552, 854-871.

Cases referred to in judgments

Abalom (F R) Ltd v Great Western (London) Garden Village Society Ltd [1933] AC 592, [1933] All ER Rep 616, 102 LJKB 648, 149 LT 193, HL, 2 Digest (Repl) 650, 1718.

Boynton v Richardson [1924] WN 262, 69 Sol Jo 107, 47 Digest (Repl) 563, 25.

Chambers v Goldthorpe, Restell v Nye [1901] 1 KB 624, [1900-3] All ER Rep 969, 70 LJKB 482, 84 LT 444, CA, 7 Digest (Repl) 461, 480.

Clemence v Clarke (1879) 2 Hudson's BC (4th Edn, 1914), p 54, 7 Digest (Repl) 369, 125. *Collier v Mason* (1858) 25 Beav 200, 53 ER 613, 47 Digest (Repl) 566, 49.

Dean v Prince [1954] 1 All ER 749, [1954] Ch 409, [1954] 2 WLR 538, CA; *rvsg* [1953] 2 All ER 636, [1953] 2 Ch 590, [1953] 3 WLR 271, 47 Digest (Repl) 561, 12.

Drummond-Jackson v British Medical Association [1970] 1 All ER 1094, [1970] 1 WLR 688, CA, Digest (Cont Vol C) 1075, 510a.

- a* *Finnegan v Allen* [1943] 1 All ER 493, [1943] KB 425, 112 LJKB 323, 168 LT 316, CA, 47 Digest (Repl) 563, 26.
Gammel v Ernst & Ernst (1955) 72 NW 2d 364.
Glanzer v Shepard (1922) 233 NY 236.
Goodyear v Weymouth and Melcombe Regis Corp'n (1865) Har & Ruth 67, 35 LJCP 12, 7 Digest (Repl) 395, 225.
- b* *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1963] 2 All ER 575, [1964] AC 465, [1963] 3 WLR 101, [1963] 1 Lloyd's Rep 485, HL, Digest (Cont Vol A) 51, 1117a.
Hickman & Co v Roberts [1913] AC 229, 82 LJKB 678, 108 LT 436, HL, 7 Digest (Repl) 367, 116.
Hodgkinson v Fernie (1857) 3 CBNS 189, 27 LJCP 66, 140 ER 712, 2 Digest (Repl) 656, 1762.
Hoffman v Meyer 1956 (2) SA 752, 7 Digest (Repl) 369, *248.
- c* *Jenkins v Betham* (1855) 15 CB 168, 3 CLR 373, 24 LJCP 94, 24 LTOS 272, 139 ER 384, 47 Digest (Repl) 562, 14.
Jones (M) v Jones (R R) [1971] 2 All ER 676, [1971] 1 WLR 840.
Laidlaw v Hastings Pier Co (1874) 2 Hudson's BC (4th Edn, 1914), p 13, Ex Ch, 7 Digest (Repl) 395, 226.
- d* *Ministry of Housing and Local Government v Sharp* [1970] 1 All ER 1009, [1970] 2 QB 223, [1970] 2 WLR 802, 134 JP 358, 68 LGR 187, CA, Digest (Cont Vol C) 830, 926f.
Panamena Europea Navigacion (Compania Limitada) v Frederick Leyland & Co Ltd (J Russell & Co) [1947] AC 428, [1947] LJR 716, 176 LT 524, HL, Digest (Cont Vol B) 36, 289ff.
Pappa v Rose (1871) LR 7 CP 32, 41 LJCP 11, 25 LT 466; *aff'd* (1872) LR 7 CP 525, 41 LJCP 187, 27 LT 348, Ex Ch, 2 Digest (Repl) 550, 855.
- e* *Phillips v Evans* (1843) 12 M & W 309, 13 LJEx 80, 2 LTOS 171, 152 ER 1216, 2 Digest (Repl) 653, 1730.
Sanitary Farm Dairies Inc v Gammel (1952) 195 F 2d 106.
Stevenson v Watson (1879) 4 CPD 148, 48 LJQB 318, 40 LT 485, 43 JP 399, 7 Digest (Repl) 462, 484.
- f* *Tharsis Sulphur and Copper Co Ltd v Loftus* (1872) LR 8 CP 1, 42 LJCP 6, 27 LT 549, 1 Asp MLC 455, 2 Digest (Repl) 551, 856.
Weekes v Gallard (1869) 21 LT 655, 18 WR 331, 47 Digest (Repl) 566, 47.
Wright (Frank H) (Constructions) Ltd v Frodoor Ltd [1967] 1 All ER 433, [1967] 1 WLR 506, Digest (Cont Vol C) 1051, 12a.

Cases and authority also cited

- g* *Anon* (1748) 3 Atk 644, 26 ER 1170.
Archer v Moss, Applegate v Moss [1971] 1 All ER 747, [1971] 1 QB 406, CA.
Beaman v ARTS Ltd [1949] 1 All ER 465, [1949] 1 KB 550, CA.
Burden (R B) Ltd v Swansea Corp'n [1957] 3 All ER 243, [1957] 1 WLR 1167, HL.
Candler v Crane, Christmas & Co [1951] 1 All ER 426, [1951] 2 KB 164, CA.
Dutton v Bognor Regis Urban District Council [1972] 1 All ER 462, [1972] 1 QB 373, CA.
- h* *Gould v National Provincial Bank Ltd* [1960] 1 All ER 544, [1960] Ch 337.
Hamilton v Bankin (1850) 3 De G & Sm 782, 64 ER 703.
Home Office v Dorset Yacht Co Ltd [1970] 2 All ER 294, [1970] AC 1004, HL.
Hosier & Dickinson Ltd v P & M Kaye Ltd [1971] 1 All ER 301, [1970] 1 WLR 1611, CA; on appeal [1972] 1 All ER 121, [1972] 1 WLR 146, HL.
- i* *International Products Co v Erie R Co* (1927) 155 NE 662.
Lynall v Inland Revenue Comrs [1971] 3 All ER 914, [1972] AC 680, HL.
Minster Trust Ltd v Traps Tractors Ltd [1954] 3 All ER 136, [1954] 1 WLR 963.
Nippon Yusen Kaisha v Acme Shipping Corp'n [1972] 1 All ER 35, [1972] 1 WLR 74, CA.
Norwich Pharmacal Co v Comrs of Customs and Excise [1972] 3 All ER 813, [1972] 3 WLR 870, CA.
O'Brien v Perry & Daw (1940) 85 Sol Jo 142.

Padley v Lincoln Waterworks Co (1850) 2 Mac & G 68, 47 ER 1695, LC.

Parrott v Shellard (1868) 16 WR 928.

Proderport State Company for Foreign Trade v E D & F Man Ltd [1973] 1 All ER 355, [1972] 3 WLR 845.

Rondel v Worsley [1967] 3 All ER 993, [1969] 1 AC 191, HL.

Shaw v Shaw [1954] 2 All ER 638, [1954] 2 QB 429, CA.

State Street Trust Co v Ernst (1938) 15 NE 2d 416.

Stratford Borough v Ashman (J H) Ltd [1960] NZLR 503.

Texas Tunneling Co v City of Chattanooga, Tennessee (1962) 204 F Supp 821.

Turner v Goulden (1873) LR 9 CP 57.

Ultramares Corp v Touche (1931) 174 NE 441.

Hudson's Building and Engineering Contracts (10th Edn, 1970), pp 161, 164, 165, 166, 168, 169.

Interlocutory appeal

Ivor Gerald Arenson, the plaintiff in an action against the first defendant, Archy Arenson, and the second defendants, Casson Beckman Rutley & Co, appealed against the order of Brightman J made on 29th March 1972 whereby, on the hearing of an application by the second defendants under RSC Ord 18, r 19, it was ordered that as against the second defendants the statement of claim should be struck out as disclosing no reasonable cause of action against them, and that as against the second defendants the action should be dismissed. The facts are set out in the judgment of Lord Denning MR

Muir Hunter QC and *J L M Bowyer* for the plaintiff.

G B H Dillon QC and *D M Burton* for the second defendants.

The first defendant did not appear and was not represented.

Cur adv vult

22nd February. The following judgments were read.

LORD DENNING MR.

I. THE FACTS

Archy Arenson, the first defendant, is a furniture maker. He turned himself into a private company, A Arenson Ltd. In 1964 he took his nephew, Ivor Arenson, the plaintiff, into the business and gave him a small number of shares. The nephew agreed that, if he ceased to be employed in the business, he would sell the shares back to his uncle at a fair value. The agreement defined 'fair value' in these words:

'"Fair Value" shall mean in relation to the Shares in A. Arenson Limited the value thereof as determined by the auditors for the time being of the Company whose valuation acting as experts and not as arbitrators shall be final and binding on all parties.'

On 4th April 1970 the employment of the nephew was terminated, with the result that the agreement came into operation. He and his uncle asked the auditors of the company, Casson Beckman Rutley & Co, the second defendants, to value the shares. On 13th May 1970 they wrote this letter to the secretary of the company:

'Valuation of Shares—I. Arenson

'1. We refer to your verbal request to place a value on the shares held by Mr. I. Arenson in your company in accordance with the letters of the 18th March 1964 and the 1st October 1968.

'2. The shares held by Mr. I. Arenson in the company are as follows:—1,750 Ordinary Shares of £1 each, fully paid 500 6% Non-Cumulative Preference Shares of £1 each fully paid.

- a '3. In our view the fair value of these shares on the 4th day of April 1970 was as follows:—a) The 500 6% Non-Cumulative Preference Shares of £1 each fully paid at a valuation of £166.13.4. b) The 1,750 Ordinary Shares of £1 each fully paid at a valuation of £4,750.'

On 11th June 1970, in reliance on that valuation, the nephew transferred the shares to the uncle and received a cheque from the uncle for £4,916 13s 4d.

- b A few months later the private company went public. On 10th September 1970 a holding company was formed, called A Arenson (Holdings) Ltd. On 14th January 1971 the uncle transferred all his shares to the holding company, including those he had bought from his nephew. On 21st January 1971 the holding company made an offer of its shares to the public. It set out the profits of the private company and the report of the accountants. From these the nephew then got to know all about the value of the shares which he had sold to his uncle. He says that they were worth six times as much as his uncle had paid him. They were worth £29,500, whereas the uncle had only paid him £4,916 13s 4d.
- c The nephew felt that he had been unfairly treated. On 18th August 1971 he brought this action against his uncle and the auditors. He alleged that 'the said valuation was misconceived and erroneous in one or more fundamental respects and was made on a wrong basis or bases'. Amongst other things he said that the auditors had based their valuation on the last balance sheet for the year ended 31st July 1969 and had failed to take into account the great increase in the profits between 31st July 1969 and 4th April 1970. The profits had doubled in that time. He also said that the auditors had taken the goodwill at the book figure of £30,000, which was the figure at which it had stood since 1960, whereas it was worth far more. He also said that the auditors had failed to take into account the intention to 'go public' which must have been known to them at that time.

- d The nephew claimed, as against his uncle, that the valuation was not binding, that his shares ought to be revalued, and that he should be paid their worth. In the alternative, the nephew claimed as against the auditors that they 'were negligent in making the said valuation by reason whereof the plaintiff has suffered damage'.
- e The auditors now seek to strike out the statement of claim as against them. Let it be assumed, they say, that their valuation was wholly erroneous—in that it was only one-sixth of what it should have been—let it be assumed, they add, that they themselves were negligent, even grossly negligent—nevertheless there is no cause of action against them. What is more, they say, it is perfectly plain and obvious. So much so that the action against them should be thrown out straightaway without a trial.

- f The judge¹ accepted that proposition. He was ready to assume that every word of the statement of claim was true, but nevertheless he said that, short of fraud, the auditors were not liable. He dismissed the action as against them. But, in coming to that conclusion, he seems to have thought that the nephew would have a remedy against the uncle². Indeed before us counsel for the auditors put the following proposition in the forefront of his argument. He asserted that the nephew could set aside the valuation—as against the uncle—if the auditors 'made a mistake of a substantial character or materially misdirected themselves in the course of the valuation'. Any mistake would suffice, he said, which affected the outcome. Counsel quoted for this purpose the judgment of Sir John Romilly MR in *Collier v Mason*³; of Sir Raymond Evershed MR in *Dean v Prince*⁴ and of Roskill J in *Frank H Wright (Constructions) Ltd v Frodoor Ltd*⁵.

- g The judge¹ accepted that proposition. He was ready to assume that every word of the statement of claim was true, but nevertheless he said that, short of fraud, the auditors were not liable. He dismissed the action as against them. But, in coming to that conclusion, he seems to have thought that the nephew would have a remedy against the uncle². Indeed before us counsel for the auditors put the following proposition in the forefront of his argument. He asserted that the nephew could set aside the valuation—as against the uncle—if the auditors 'made a mistake of a substantial character or materially misdirected themselves in the course of the valuation'. Any mistake would suffice, he said, which affected the outcome. Counsel quoted for this purpose the judgment of Sir John Romilly MR in *Collier v Mason*³; of Sir Raymond Evershed MR in *Dean v Prince*⁴ and of Roskill J in *Frank H Wright (Constructions) Ltd v Frodoor Ltd*⁵.

1 [1972] 2 All ER 939, [1972] 1 WLR 1196

2 See [1972] 2 All ER at 948, [1972] 1 WLR at 1207

3 (1858) 25 Beav 200 at 204

4 [1954] 1 All ER 749 at 753, [1954] Ch 409 at 418

5 [1967] 1 All ER 433 at 454, 455, [1967] 1 WLR 506 at 526

Is that proposition of counsel for the auditors correct? I am myself very doubtful of it. I am not prepared to say that the nephew could, as against the uncle, set aside that valuation simply because the auditors made a mistake, even a serious mistake. That is not a matter which I would propose to decide in the absence of the uncle. I should have thought that, despite the mistake, the uncle would have good ground for submitting that the valuation was binding as between him and the nephew: If it was binding, then it would seem only fair and just that the nephew should have a remedy against the auditors. a

I feel this so strongly that I do not think we should strike out the claim against the auditors before we hear the uncle's side of it. Otherwise you might get this intolerable position. Assume, as we must, that the valuation was made on an entirely wrong basis due to the gross negligence of the auditors. The action would be struck out against the auditors on the ground that the remedy was against the uncle; and then afterwards, on hearing the uncle, the court might feel compelled to dismiss the claim against the uncle on the ground that as between nephew and uncle, the valuation was binding. b

Buckley LJ and Sir Seymour Karminski are, I gather, proposing to put on one side the question whether the nephew has any remedy against the uncle. They do not deal with it. But both counsel went into it before us, and I propose to deal with it; because I think it is vital to form a view about it before striking out the claim against the auditors. Moreover, it is of general importance in the law; and my researches may shorten the task of those who have to argue the matter in this, or other cases, or to write about it. c

2. THE BINDING FORCE OF THE VALUATION d

On reading all the cases, it seems to me that there is one dominant theme running through them. It is this. Whenever two persons agree together to refer a matter to a third person for decision, and further agree that his decision is to be final and binding on them, then, so long as he arrives at his decision honestly and in good faith, the two parties are bound by it. They cannot reopen it for mistake or error on his part or for any reason other than for fraud or collusion. The question has been considered in three spheres which are closely related. e

(i) Arbitration f

Take first arbitration. Two parties agree to submit their differences to an arbitrator, saying that his award is to be final and binding on them. The courts of common law always refused to upset an award on the ground that the arbitrator had made a mistake. In *Phillips v Evans*¹ Parke B said: g

'Although we may possibly do some injustice in particular cases, I think it better to adhere to the principle of not allowing awards to be set aside for mistakes, and not to open a door to inquire into the merits, or we shall have to do so in almost every case.'

The only exception is when the award contains an error of law on the face of it, and this has often been regretted. The position was well stated by Williams J in *Hodgkinson v Fernie*²: h

'The law has for many years been settled, and remains so at this day, that, where a cause or matters in difference are referred to an arbitrator, whether a lawyer or a layman, he is constituted the sole and final judge of all questions both of law and of fact. Many cases have fully established that position, where awards have been attempted to be set aside . . . The court has invariably met i

¹ (1843) 12 M & W 309 at 312

² (1857) 3 CBNS 189 at 202

a those applications by saying: "You have constituted your own tribunal; you are bound by its decision." The only exceptions to that rule, are, cases where the award is the result of corruption or fraud, and one other, which, though it is to be regretted, is now, I think, firmly established, viz. where the question of law necessarily arises on the face of the award, or upon some paper accompanying and forming part of the award. Though the propriety of this latter may well be doubted, I think it may be considered as established.'

b Those words were endorsed by Lord Wright in *F R Absalom Ltd v Great Western (London) Garden Village Society Ltd*¹.

(ii) Certificates

c Certificates are usually to be found in contracts for building work and engineering work. The contract often provides that the certificates of the architect, as to payment or as to the sufficiency of the work, are to be final and binding on the parties. The cases are many, but it is well established that, once the architect has issued his certificate, the parties must abide by it. Neither of them can impeach it on the ground that the architect made a mistake or made his calculations on a wrong basis. Even when the architect ignores the very provisions of the contract itself, the parties—as between themselves—cannot set the certificate aside. They have made their bed and must lie on it, no matter how uncomfortable it may be—for one or other of them. Thus when an architect, in disregard of the contract, certified for the payment of extras, even though they had not been ordered in writing, as the contract required, the building owner was held bound to pay for them: see *Goodyear v Weymouth and Melcombe Regis Corp*²; *Laidlaw v Hastings Pier Co*,³ a decision of the Exchequer Chamber; *Clemence v Clarke*⁴. Conversely, if he did not certify for payment of extras which had actually been ordered in writing, the contractor could not recover payment from the building owner: see *Goodyear's case*⁵ per Willes J. Of course, if the architect was dishonest or colluded with one of the parties, it would be another matter; or if, without actual collusion, the architect had acted on the instructions of one of the parties regardless of his own opinion, then the other party would not be bound by it. He could have it set aside: see *Hickman & Co v Roberts*⁶ as explained in *Panamena Europea Navigacion (Compania Limitada) v Frederick Leyland & Co Ltd*⁷. But, taking it by and large, the general rule is that the parties, having agreed that the certificate is to be final and binding, they must stand by their agreement.

(iii) Valuations

g This brings me to the subject in hand today—valuations. It often happens that, on a sale of land or of shares, or on the assessment of dilapidations, the parties are themselves unable to agree on the price or the figure. They agree to accept a valuation made by an expert as binding on them.

h At common law—as distinct from equity—the parties are undoubtedly bound by the figure fixed by the valuer. Just as the parties to a building contract are bound by the architect's certificate, so the parties are bound by the valuer's valuation. Even if he makes a mistake in his calculations, or makes the valuation on what one or other considers to be a wrong basis, still they are bound by their agreement to accept it. If his valuation is not a speaking valuation—if he gives no reasons or does not

j ¹ [1933] AC 592 at 614, [1933] All ER Rep 616 at 624, 625

² (1865) Har & Ruth 67

³ (1874) 2 Hudson's BC (4th Edn, 1914), p 13

⁴ (1879) 2 Hudson's BC (4th Edn, 1914), p 54

⁵ (1865) Har & Ruth at 83

⁶ [1913] AC 229

⁷ [1947] AC 428 at 438

explain the basis on which he has proceeded—clearly they are bound. The courts will not interfere any more than they would do with a certificate of an architect. Does it make any difference when he gives reasons? In *Dean v Prince*¹ Harman J said that if a valuer gave reasons, the court could enquire into their correctness. He equated a valuer with an arbitrator. This may be right, although I am not quite sure about it. In any event, that exception stated by Harman J does not apply in this case. Here the auditors did not give any reasons, nor did they state the basis on which they made their valuation. They kept silent. Undoubtedly at common law their valuation was final and binding and not open to be questioned by the parties, or either of them.

In equity, however, it may be different. Sir John Romilly MR once said that a court of equity might refuse specific performance if the valuation was influenced by fraud, mistake or miscarriage: see *Collier v Mason*². But some years later he said that 'The only defence to such a suit [for specific performance] would be fraud or collusion': see *Weekes v Gallard*³. Howsoever that may be, I have found no case in which equity has intervened on the ground simply that the valuer made a mistake. In *Collier v Mason*² itself, where the valuer fixed a price which appeared to Sir John Romilly MR to be a 'very high and perhaps an exorbitant figure'⁴, he compelled the purchaser to pay it. Conversely in *Weekes v Gallard*³, where it was probably 'too low', he compelled the vendor to accept it. In *Dean v Prince*⁵ and *Frank H Wright v Frodoor*⁶ the valuations were upheld. There is one case where a valuation was upset, but it was not on the ground of mistake. It was because the valuation had not been made by the expert stipulated in the agreement, but by someone else: see *Jones (M) v Jones (R R)*⁷.

Even if equity can intervene on the ground of mistake, there may be no room in the present case for the interposition of equity. There is no question of specific performance. The agreement has been fully executed. The shares have been transferred and the price paid. There can be no rescission. The shares have been resold to others. There cannot be *restitutio in integrum*.

The upshot of it all is that, as between the nephew and the uncle, there is quite a good argument for saying that, even if the valuation was wholly erroneous, it may be binding on them both, so that it cannot be upset by either of them. I would not, of course, pronounce finally on this because the uncle has not been represented before us. All I say is that, for the purpose of the present case, we ought not to assume that the nephew has a remedy against the uncle. On the contrary, we ought to assume that he may have no remedy against the uncle. If so, has he a remedy against the auditors?

3. THE LIABILITY OF THE AUDITORS

(i) As experts and not arbitrators

At the outset I would stress that the auditors were expressly engaged to act 'as experts and not as arbitrators'. So they cannot claim the immunity from liability which attaches to arbitrators. Nevertheless they say that, as experts, they are entitled to immunity. They rely on a long line of cases which appear to decide that, when a professional man is employed to decide a matter as between two others, fairly and impartially, using his own skill and judgment, then he is not liable for negligence

1 [1953] 2 All ER 636 at 638, [1953] 2 Ch 590 at 593

2 (1858) 25 Beav 200

3 (1869) 21 LT 655

4 (1858) 25 Beav at 204

5 [1954] 1 All ER 749, [1954] Ch 409

6 [1967] 1 All ER 433, [1967] 1 WLR 506

7 [1971] 2 All ER 676, [1971] 1 WLR 840

a in coming to his decision. The first case concerned a selling broker, *Pappa v Rose*¹. The next an average adjuster, *Tharsis Sulphur and Copper Co Ltd v Loftus*². The next two were architects, *Stevenson v Watson*³; *Chambers v Goldthorpe*⁴. The next a valuer, *Boynton v Richardson*⁵. The last an accountant, *Finnegan v Allen*⁶.

The judge felt impelled by those cases to strike out the claim against the auditors. He said⁷ that 'short of fraud' they were not liable.

b Counsel for the nephew challenged that line of cases. He suggested that they should be reconsidered in the light of *Hedley Byrne & Co Ltd v Heller & Partners Ltd*⁸. I agree with him. Those cases proceeded on the footing that a professional man, employed to decide between two others, was an arbitrator or in the position of an arbitrator, or was a quasi-arbitrator. He was so described in every one of those cases. But in our present case he was nothing of the kind. He was an expert, and not an arbitrator. The parties so stipulated. There is this great difference between the two. If an arbitrator makes a mistake of law, or is about to make it, it can be corrected. If he makes his award, or is about to make it, on the wrong basis, it can be put right. If he is guilty of misconduct, his award can be set aside. But, if a professional man, acting as an expert and not as an arbitrator, makes a mistake, it cannot be corrected. At any rate, if he gives no reasons. As between the two parties, they are bound by it. Short of fraud or collusion, they are stuck with it. So I ask this question: if a professional man, acting as an expert, is guilty of gross negligence—whereby one of the parties is greatly damnified—why should he not be liable to damages? Take a leading case where an incoming rector was entitled to payment for dilapidations from his predecessor. Each appointed a valuer with a view to agreeing the figure. The two valuers did agree on a figure, but they did it on the wrong principle. They both made the same mistake. The figure was much too low. The parties, as between themselves, were bound by that figure. But the party who lost by it was held entitled to damages from his valuer: see *Jenkins v Betham*⁹. If they had both employed that same valuer, and he had made the same mistake, would the loser have had no remedy? Surely even the one valuer would be under a duty of care—a duty of care to each of them. Why should he not be liable for breach of it?

f At any rate such seems to be the law in the United States of America. A man agreed to sell shares at a sum per share dependent on the 'net earnings' of the company. The 'net earnings' were to be determined by an auditor whose decision was to be 'controlling'. As between them his decision was binding. It could not be upset for mistake: see *Sanitary Farm Dairies Inc v Gammel*¹⁰. But the seller was held entitled to sue the auditor for negligence: see *Gammel v Ernst & Ernst*¹¹.

g (ii) *A professional duty and not a clerkly duty*

In *Stevenson v Watson*¹² Lord Coleridge CJ drew a distinction between a professional duty and a clerkly duty. If a professional man was called on to give a certificate or make a valuation, which was to be binding as between two others, using his professional judgment and skill, he was not to be liable for negligence in doing it. But, if a professional man was called on to do work which was purely a matter of arithmetical

1 (1871) LR 7 CP 32; *aff'd* (1872) LR 7 CP 525 in the Exchequer Chamber

2 (1872) LR 8 CP 1

3 (1879) 4 CPD 148

4 [1901] 1 KB 624, [1900-3] All ER Rep 969

5 [1924] WN 262

6 [1943] 1 All ER 493, [1943] KB 425

7 [1972] 2 All ER at 948, [1972] 1 WLR at 1207

8 [1963] 2 All ER 575, [1964] AC 465

9 (1855) 15 CB 168

10 (1952) 195 F 2d 106

11 (1955) 72 NW 2d 364

12 (1879) 4 CPD at 157

calculation, or was merely a ministerial or clerical duty, he would be liable for negligence in doing it. This distinction was endorsed in *Chambers v Goldthorpe*¹ by Sir A L Smith MR² and Collins LJ³. a

Lord Coleridge CJ was quite right in saying that, in carrying out a clerical duty, a professional man would be liable for negligence⁴. Later cases prove it beyond doubt. There is the famous decision of Cardozo J in *Glanzer v Shepard*⁵, where a firm of public weighers were called on to weigh 905 bags of beans. Their certified weight sheets were to be binding on both sellers and buyers. They certified wrongly. They put the weight of the beans too high, with the result that the buyers paid more than they should have done. The buyers were held entitled to recover damages for negligence against the public weighers. This decision was highly commended by Lord Reid in *Hedley Byrne v Heller*⁶. Since then we have had the case of a clerk in a land registry. His duty was to certify whether or not there were any entries against a plot of land. His certificate was conclusive as between incumbrancers and purchasers. The clerk wrongly gave a clear certificate, with the result that the incumbrancer was damnified. It was held that the clerk was liable in damages for negligence, and also the council who employed him: see *Ministry of Housing and Local Government v Sharp*⁷. b

Seeing that a clerk is liable for negligence in doing a clerical duty, why should not a professional man be likewise? Much of a professional man's duties are purely matters of arithmetical calculation. A quantity surveyor has to measure the area of a room and multiply it by the cost per square foot. An accountant has to get out figures from the books, add up the income and deduct the expenses. What is that but arithmetic? He may leave it to his clerk or he may do it himself. If the clerk does it and gets it wrong—due to his negligence—the clerk is liable. So is his principal. That is shown by *Ministry of Housing and Local Government v Sharp*⁷. If the professional man does it himself and likewise gets it wrong—due to the selfsame negligence—why should not he himself be liable? c

It may be said that the difference is between a certificate which requires skill and judgment and one which does not. But, if so, where do you draw the line? A public weigher must know his weights and measures and be accurate in his observations. A clerk in the Land Registry must be able to read maps, search files and note entries. Each of those has to undergo a course of instruction before entering on the work. Each of those is liable for negligence in exercising his skills. And his principal is answerable for it too. So should the professional man be liable for negligence in his skills, higher though they be. d

At any rate that is the law in South Africa. In *Hoffman v Meyer*⁸ in an illuminating judgment, summarised in Hudson⁹, the court declined to follow *Chambers v Goldthorpe*¹. It preferred the dissenting judgment of Romer LJ¹⁰. It held an architect liable for negligence in giving a certificate. e

(iii) *Liable for misconduct but not for negligence*

Suppose, however, that a professional man is not liable for negligence. Is he not f

¹ [1901] 1 KB 624, [1900-3] All ER Rep 969

² [1901] 1 KB at 635, [1900-3] All ER Rep at 973

³ [1901] 1 KB at 641, [1900-3] All ER Rep at 976

⁴ In *Stevenson v Watson* (1879) 4 CPD at 157

⁵ (1922) 233 NY 236

⁶ [1963] 2 All ER at 583, 584, [1964] AC at 488

⁷ [1970] 1 All ER 1009, [1970] 2 QB 223

⁸ 1956 (2) SA 752

⁹ *Building and Engineering Contracts* (10th Edn, 1970), p 166

¹⁰ [1901] 1 KB at 642, [1900-3] All ER Rep at 977 g

liable for misconduct? In *Clemence v Clarke*¹ Lord Coleridge CJ said that a professional man might be liable for misconduct in giving a certificate. He took the case where an architect gave a certificate in which he included payment to a contractor for extras which had not been ordered in writing. Lord Coleridge CJ said²:

'The [contractor] . . . having got [the certificates] in good faith and without any suggestion of collusion or fraud, has the right to rely upon them . . . If his architect had been guilty of anything like misconduct . . . I strongly think that the [building owner] would have had an action against his architect to recover damages from the architect, and, among those damages, any sum that he had improperly to pay to a contractor in consequence of his architect's misconduct.'

Lord Coleridge CJ proceeds on the assumption that there is no collusion between the architect and the contractor, but yet misconduct by the architect. He gives no instance of it. But one is to be found in the latest edition of Hudson³. Suppose that a builder submitted measurements and accounts to an architect which were altogether excessive; and the architect accepted them without any investigation and gave a certificate for much too much. I should have thought that the failure to investigate them was misconduct. But, if so, where is the line to be drawn between misconduct for which the architect is liable, and negligence for which he is not?

If the architect is guilty of gross negligence in certifying too much or too little, is that misconduct? If he is reckless in accepting the builder's figures without enquiry, is that misconduct? If his conduct is unconscionable, is that misconduct? Counsel for the nephew canvassed all these. He said that, short of fraud, there were some kinds of misconduct other than negligence for which the architect would be liable. Likewise the valuer.

I think that counsel for the nephew has a point here. Assuming that the valuer is not liable in damages for ordinary negligence, it may be that he is liable for misconduct worse than negligence but short of fraud. If the auditor says to himself: 'I know that I ought to make this valuation as at 4th April 1970, but I am not going to go to that trouble. I am going to make it on the last balance sheet of 31st July 1969', I should have thought that was misconduct. He was doing what he knew to be wrong. So also if he was reckless—careless—whether it was right or wrong. If he said: 'I know it may be wrong, but I don't care', that, too, would be misconduct, I should think.

4. Conclusion

It is commonplace that an action is not to be struck out except when it is obvious that the plaintiff has no case: see *Drummond-Jackson v British Medical Association*⁴. I think that the plaintiff ought to be able to keep both defendants in this action. According to him, he has been damnified by reason of the auditors making a serious mistake. He says that they have valued his shares at one-sixth their true value. He can properly ask that this mistake should be corrected in one way or another. Either the figure should be set aside and his uncle made to pay the proper figure; or, if it cannot be set aside and the uncle cannot be made to pay, then the auditors should be made to compensate him for his loss. The right solution cannot be determined except by hearing the case out against both defendants.

Buckley LJ and Sir Seymour Karminski do not agree. They think that, as the statement of claim stands at present, it discloses no cause of action; but that leaves the question whether it can be amended so as to disclose a cause of action. Counsel for the nephew sought leave to amend, but he did not submit to us the form of it. I would suggest that, before we make any order on this appeal, the nephew should submit to us the amendment which he seeks to make for our consideration.

1 (1879) 2 Hudson's BC (4th Edn. 1914), p 54

2 (1879) 2 Hudson's BC (4th Edn. 1914), p 69

3 Building and Engineering Contracts (10th Edn. 1970), p 168

4 [1970] 1 All ER 1094, [1970] 1 WLR 688

BUCKLEY LJ. As the pleadings stand, the plaintiff seeks to sue the second defendants, Messrs Casson Beckman Rutley & Co (whom I will call 'Cassons'), who valued the shares, for damages for negligence. There is no allegation of fraud or bad faith. The relevant passages in the statement of claim are:

'7. The said valuation was misconceived and erroneous in one or more fundamental respects and was made on the wrong bases ... 13 Further' or in the alternative [Cassons] were negligent in making the said valuation by reason whereof the Plaintiff has suffered damage.'

For the purposes of this application the truth of those allegations must be assumed.

In making the valuation Cassons acted voluntarily. It was no part of their duty as auditors to the company to value the shares nor were they under any duty, contractual or otherwise, to the vendor or purchaser of the shares or either of them to do so; but it is apparent from the terms of their valuation, and it is alleged in the statement of claim, that Cassons knew that the valuation was required for the purpose of fixing the purchase price to be paid for the shares. The first question for consideration is whether there is any established rule of law that anyone acting in a quasi-judicial or arbitral capacity is immune in respect of his actions in that capacity from being sued for negligence. If there is, the further question arises whether on the facts of the present case Cassons are entitled to such immunity. With deference to Lord Denning MR I do not think that the question what remedy, if any, the plaintiff may have against the first defendant has any relevance to these questions, and so I do not propose to discuss that aspect of the case.

It has been recognised in a series of decided cases extending over a period of 100 years that, where two parties agree to submit to the arbitrament of a third party some matter in which they have opposed interests, and the determination involves the third party in holding the scales fairly between those opposed interests, the third party's function is of an arbitral or quasi-judicial character, notwithstanding that the parties may not have constituted him an arbitrator within the terms of the Arbitration Acts and may have expressly agreed that he shall not act as such an arbitrator. The authorities further recognise a rule or principle that a person occupying a quasi-judicial position of this kind is immune from a claim for damages for negligence, although not for fraud or collusion.

Counsel has contended that the position has been changed by the decision of the House of Lords in *Hedley Byrne & Co Ltd v Heller & Partners Ltd*¹. This must, I think, depend on whether on a proper reading of the authorities they show that it was considered (a) that in such a case, apart altogether from any question of immunity, no cause of action could have arisen; or (b) that, even if there would but for immunity have been a cause of action at law against the quasi-arbitrator, he could not be sued on such cause of action because of a rule of immunity. In my judgment, the cases establish that the latter is the correct view.

In *Pappa v Rose*² Mr Rose, the defendant, was in contractual relations with both the sellers and the buyers of the goods involved. He was the agent of both parties in respect of the sale. By the terms of their agreement with one another the vendors and purchasers agreed that, in the event of any difference arising as to the quality of those goods, Mr Rose's decision should be binding and final. It is true that the judges discussed the case largely in the terms of Mr Rose's implied contractual obligations to his principals, but it is noteworthy that Keating J said³:

'... I am clearly of opinion that the nonsuit was right upon the second point, and that the defendant was in the position of a quasi arbitrator, and so was protected against an action for an error in judgment.'

¹ [1963] 2 All ER 575, [1964] AC 465

² (1871) LR 7 CP 32; *aff'd* (1872) LR 7 CP 525 in the Exchequer Chamber

³ (1871) LR 7 CP at 38

a The contractual relationship was of a kind that would normally attract a duty to act with skill and care. The allegation was that Mr Rose had failed to exercise sufficient skill. The reason why the judges refused to import such an implied term into the contract was that the law would not permit a quasi-arbitrator to be *ex parte* to such a claim. Bovill CJ¹ based this on 'general principles' and Blackburn J² emphasised that it would be 'extremely dangerous' to hold that either vendor or purchaser could bring an action.

b In the next case in the series, *Tharsis Sulphur and Copper Co Ltd v Loftus*³, the quasi-arbitrator, an average adjuster, was again in contractual relations with both parties who were in this case a shipowner and the owner of the freight carried in the ship. The claim was this time for lack of care. The court treated the case as covered by the decision in *Pappa v Rose*⁴. Bovill CJ⁵ drew attention to the inconvenience that would arise if someone in an arbitral position was exposed to claims in negligence for his acts in that capacity.

c In the third case, *Stevenson v Watson*⁶, the plaintiff was a building contractor and the defendant was the building owner's architect. The contract between the building owner and the plaintiff constituted the defendant a quasi-arbitrator for certain purposes. There was no contractual relation between the plaintiff and the defendant.

d The plaintiff sought to sue the defendant in negligence for giving an erroneous certificate. The case was not decided on the ground that in the absence of a contractual relationship between the plaintiff and the defendant the defendant owed the plaintiff no duty of care, but on the ground that the defendant's function in certifying was of an arbitral nature and that his duty in that function was limited to acting honestly and fairly.

e In *Chambers v Goldthorpe*⁷ the defendant was again an architect employed by a building owner and was sued for negligence in respect of a certificate, but on this occasion the plaintiff was the building owner. The majority in this court held that in giving the certificate the defendant had exercised a function of a judicial character and so was not liable for an action for negligence. Romer LJ, whose dissenting judgment⁸ stands alone in this country in differing from the many judicial opinions expressed in this series of authorities, held the defendant liable to the plaintiff for breach of a contractual duty of care in the performance of his duties as the plaintiff's agent. His view clearly was that the defendant was entitled to no immunity because of his arbitral role; but a contrary view has been taken in two more recent cases, *Boynton v Richardson*⁹ before Greer J, and *Finnegan v Allen*¹⁰ in this court, in each of which property was sold at a price to be fixed by a third party. Greer J, after citing *Pappa v Rose*¹¹, *Chambers v Goldthorpe*⁷ and *Tharsis Sulphur and Copper Co v Loftus*³, said⁹ that the principle there laid down applied to any person in the position of an arbitrator or quasi-arbitrator, who ought to be able to exercise his judgment free from the embarrassment of a possible action for negligence. This was cited with approval by Lord Greene MR in *Finnegan v Allen*¹². Lord Greene MR said¹³:

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- h
- 1 (1871) LR 7 CP at 42
 - 2 (1872) LR 7 CP at 529
 - 3 (1878) LR 8 CP 1
 - 4 (1871) LR 7 CP 32
 - 5 (1872) LR 8 CP at 7
 - 6 (1879) 4 CPD 148
 - 7 [1901] 1 KB 624, [1900-3] All ER Rep 969
 - 8 [1901] 1 KB at 642, [1900-3] All ER Rep at 977
 - 9 [1924] WN at 262
 - 10 [1943] 1 All ER 493, [1943] KB 425
 - 11 (1871) LR 7 CP 32; *affd* (1872) LR 7 CP 525 in the Exchequer Chamber
 - 12 [1943] 1 All ER at 498, [1943] KB at 434
 - 13 [1943] KB at 430, 431, cf [1943] 1 All ER at 496
- i

'The fundamental difficulty about the whole of the plaintiff's case lies in the circumstance that he is seeking to recover damages from a valuer who was employed to fix a price inter partes, by the use of his skill and knowledge, for not having made his valuation in the way contemplated by his instructions. There is no charge of bad faith. We have, therefore, to deal with the matter on the footing that the defendant, while honestly intending to carry out his instructions, has made an honest mistake which may have consisted in misunderstanding his instructions or in inadvertently failing to comply with some element in them. Can such an action be maintained? In my opinion it cannot, and this attempt to create a liability on an alleged warranty is really one to evade the well established rule that a person in the position of this defendant cannot be made liable for the sort of thing with which he is charged here.'

Goddard LJ said¹: 'It is clear from the cases cited that a valuer comes within the protection'—I draw attention to the word 'protection' which reflects the language used by Keating J in *Pappa v Rose*²—

'given to arbitrators when he occupies a position like that of the defendant in this case. The underlying principle is that, in accepting the task submitted to him, the valuer or arbitrator merely undertakes to give an honest decision between the parties.'

In my judgment, these authorities establish in a manner binding on us in this court that, where a third party undertakes the role of deciding as between two other parties a question, the determination of which requires the third party to hold the scales fairly between the opposing interests of the two parties, the third party is immune from an action for negligence in respect of anything done in that role. He may be liable for fraud or collusion with one of the opposed parties, but if he acts honestly he is immune. This immunity is based, in my judgment, on public policy, for without it the third party might be inhibited from performing his arbitral function in the free exercise of his judgment uninfluenced by the fear of a subsequent action by one or other of the opposing parties. I can myself see no reason for saying that the decision in *Hedley Byrne & Co v Heller & Partners*³ can have had any effect on this doctrine. If public policy requires that the third party should be immune from suit where his duty to act arbitrarily arises under a contract, it must equally so require if he acts arbitrarily as a volunteer.

Counsel for the plaintiff has contended that considerations of public policy should be reviewed from time to time. I cannot see that any change of circumstances has occurred that calls for such a review in the present case. The decision in the *Hedley Byrne* case³ does not seem to me to touch this aspect of the matter.

I turn now to the question whether, in the present case, the task undertaken by Cassons was a task of the arbitral character which attracts the immunity. I do not myself consider that the fact that Cassons were appointed to act as experts and not as arbitrators is of significance. This formula has long been used to prevent such an agreement from operating as a submission to arbitration for the purposes of the Arbitration Acts. In none of the authorities to which I have referred was the defendant a person who was an arbitrator in the full sense of the word. In all of them, however, with the possible exception of *Pappa v Rose*⁴, the defendant was evidently selected to perform his function because of expert qualifications. In *Tharsis Sulphur and Copper Co Ltd v Loftus*⁵ Brett J said:

¹ [1943] KB at 436, 437, cf [1943] 1 All ER at 500

² (1871) LR 7 CP at 38

³ [1963] 2 All ER 575, [1964] AC 465

⁴ (1871) LR 7 CP 32; *affd* (1872) LR 7 CP 525 in the Exchequer Chamber

⁵ (1872) LR 8 CP at 9

a 'I apprehend that the principle of law which forbids an action for want of skill or care against an arbitrator or a quasi arbitrator, is just as applicable to a skilled or professional arbitrator as to one that is unskilled and non-professional, and that the fact of its being his business makes no difference.'

b In my judgment, the authorities establish that where a third party is required to decide any matter which is in dispute between other parties or any matter on which such other parties have opposed interests on which they agree to accept the third party's decision, the third party is performing a quasi-judicial function and falls within the principle of the authorities which I have been discussing. It is true that in the present case there was no formulated dispute between the vendor and the purchaser, but in any case in which the vendor and purchaser leave the price of property which is to be sold to be determined by a third party they must necessarily have opposed interests. In any such case it is unnecessary to find in terms an agreement that they will refer the price to the third party in default of agreement between themselves, for this is precisely the effect of the agreement, even though there is no reference to failure to agree.

c In my judgment a clear distinction is to be drawn between the position of a third party who is required to adjudicate in such a way as this and one to whom the parties delegate the function of ascertaining some matter of fact. If a vendor and a purchaser of goods sold by weight delegate to a third party the function of ascertaining the weight of a particular parcel of such goods, they are not seeking an adjudication; they are delegating a ministerial function which with the necessary skill and equipment they could perform themselves and about which, if they did it accurately, no dispute could arise, for the weight of the parcel would be a pure question of fact allowing no room for difference of opinion. *Glanzer v Shepard*¹ was such a case. In my judgment, *Gammel v Ernst and Ernst*² is to be explained on the same ground. What the defendant firm had to ascertain in that case was the nett earnings per share of certain common stock for a particular period. Different accountants using different but acceptable methods of accountancy might well have arrived at different answers to that enquiry. The correctness of any one answer would not be by any means so demonstrably correct as the ascertainment of the weight of particular goods. Nevertheless it is clearly a tenable view that what Messrs Ernst and Ernst had to ascertain was a fact and that, since the parties selected Messrs Ernst and Ernst to ascertain it, they agreed to accept the accountancy methods selected by that firm as appropriate to those circumstances. The court proceeded on the view that the firm was employed to act not as an 'arbitrator' but as 'an accountant evaluator'.

g Attention was drawn to this distinction in *Stevenson v Watson*³, where Lord Coleridge CJ contrasted what he called a ministerial or clerkly function and the function of a quasi-arbitrator. He was not there, in my view, distinguishing between the status of a clerk and the status of a professional man. He was not saying that the one might be liable in negligence where the other would not. He was saying that the immunity from being sued in negligence depends on the nature of the function, not the status of the man. As Brett J said in *Thariss Sulphur and Copper Co Ltd v Loftus*⁴, in a passage already cited, the principle is just as applicable to a skilled or professional arbitrator as to one that is unskilled and unprofessional.

h In my opinion, *Jenkins v Betham*⁵ is clearly distinguishable from the line of authorities stemming from *Pappa v Rose*⁶. In that case each of the two parties with opposed interests appointed his own valuer to act on his behalf. The valuers arrived at an

j
1 (1922) 233 NY 236
2 (1955) 72 NWR 364
3 (1879) 4 CPD at 157, 158
4 (1872) LR 8 CP at 9
5 (1855) 15 CB 168
6 (1871) LR 7 CP 32; *affd* (1872) LR 7 CP 525 in the Exchequer Chamber

agreement, so there was no matter in dispute between the parties. Neither valuer acted as a quasi-arbitrator. Each acted merely as the agent of his principal and was liable to his principal in the ordinary way under a duty to exercise due skill and care. Both Keating J and Brett J distinguished *Jenkins v Betham*¹ in *Pappa v Rose*² and in the Exchequer Chamber Mellor J³ said that *Jenkins v Betham*¹ had no application to *Pappa v Rose*⁴.

The position of Cassons in the present case is in my view indistinguishable in essentials from the position of the defendant in *Finnegan v Allen*⁵. It follows in my judgment that they cannot be sued in negligence and that the statement of claim as it stands discloses no cause of action against them. The plaintiff did not ask the learned judge below for leave to amend his pleading but he has asked to do so here. He disclaims any intention of alleging fraud or bad faith against Cassons, but desires an opportunity to allege a degree of recklessness which he contends would found an argument that Cassons had not discharged their function 'honestly and fairly' or 'faithfully and honestly', to borrow two expressions used in the cases which I have discussed. Before deciding whether leave to amend should be given I should myself wish to see a draft of the proposed amendment. No such draft has been produced, but I think that the plaintiff should be given an opportunity to submit one. In any such amendment it would, in my view, be necessary for the plaintiff to plead with particularity the grounds relied on for saying that Cassons have been guilty of such a degree of recklessness as the plaintiff claims.

For these reasons I would dismiss this appeal unless the plaintiff can persuade the court to give him leave to amend his statement of claim in a way which discloses a reasonable cause of action on some ground other than negligence as at present alleged.

SIR SEYMOUR KARMINSKI. I agree with the judgment read by Buckley LJ. I also agree with the suggestion made by Lord Denning MR that before any order is made on this appeal the plaintiff should put before us the amendment which he wishes to make to his pleading. At present the statement of claim discloses no cause of action. The duty of a valuer or arbitrator in a case of this kind is to give an impartial judgment and an honest decision between the parties: see *Finnegan v Allen*⁶. So far it has not been suggested that the arbitrator here was either partial or dishonest. The allegation against him is that he was negligent in making his valuation of the shares, and in my judgment he cannot be sued for negligence here.

No order made on the appeal pending submission by plaintiff of proposed amendment to pleadings.

Solicitors: *Slowes* (for the plaintiff); *Reynolds, Porter, Chamberlain & Co* (for the second defendants).

Wendy Shockett Barrister.

¹ (1855) 15 CB 168

² (1871) LR 7 CP 32 at 38, 40

³ (1872) LR 7 CP at 529

⁴ (1872) LR 7 CP 525

⁵ [1943] 1 All ER 493, [1943] 1 KB 425

⁶ [1943] 1 All ER 403 at 496-499, [1943] 1 KB 425 at 430-436 (per Lord Greene MR), [1943] 1 All ER at 500, 501, [1943] 1 KB at 436, 437 (per Lord Goddard LJ)

Francis v Chief of Police

PRIVY COUNCIL

LORD WILBERFORCE, VISCOUNT DILHORNE, LORD PEARSON, LORD KILBRANDON AND LORD SALMON

22nd, 23rd NOVEMBER 1972, 5th FEBRUARY 1973

Privy Council – St Christopher, Nevis and Anguilla – Constitution – Fundamental rights and freedoms – Freedom of expression – Freedom to communicate ideas and information without interference – Law reasonably required in interests of public order not inconsistent with freedom – Public meeting – Use of loudspeaker – Statute making it offence to use ‘noisy instrument’ during course of public meeting without obtaining written permission of Chief of Police – Whether statute contravening provision in Constitution protecting freedom of expression – St Christopher, Nevis and Anguilla Constitution Order 1967 (SI 1967 No 228), Sch 2, s 10 (1), (2) – Public Meetings and Processions Act 1969 (St Christopher, Nevis and Anguilla), s 5 (1).

The accused was charged with using a ‘noisy instrument’, a loudspeaker, during the course of a public meeting in St Christopher, Nevis and Anguilla without having obtained the permission of the Chief of Police, contrary to s 5 (1)^a of the Public Meetings and Processions Act 1969. The accused submitted that s 5 (1) of the 1969 Act was unconstitutional in that (i) it contravened s 10 (1)^b of the Constitution^c by curtailing his freedom to ‘communicate ideas and information without interference’ and (ii) the unfettered discretion given by s 5 (1) to the Chief of Police to grant or refuse permission for the use of noisy instruments at public meetings ‘indicates that the legislation is an unreasonable restriction of the freedoms laid down’ in s 10 of the Constitution.

Held – Although a wrongful refusal of permission to use a loudspeaker at a meeting (e.g. if the refusal were inspired by political partiality) would be an unconstitutional interference with freedom of communication, some regulation of the use of loudspeakers was required in order to protect citizens against excessive noise, either as a necessary limitation inherent in the fundamental freedom of expression and communication guaranteed under s 10 (1) of the Constitution or as a limitation expressly allowed by the provisions of s 10 (2) permitting such laws as were ‘reasonably required in the interests . . . of public order’. Since the natural method of regulating ‘noisy instruments’ was a system of licensing the legislature were entitled to decide that the Chief of Police was the appropriate officer to act as the licensing authority. Furthermore, as it was apparent from the provisions of the 1969 Act that its object was to facilitate the preservation of public order, the Chief of Police was not given an unfettered discretion but was required to exercise his licensing power bona fide for the achievement of that object. Accordingly s 5 of the 1969 Act did not contravene the Constitution (see p 259 c to p 260 a, post).

Note

For the right to freedom of speech and of meeting, see 7 Halsbury’s Laws (3rd Edn) 197, 198, para 418 (3), (4).

Cases referred to in opinion

Cantwell v Connecticut (1940) 310 US 296.

^a Section 5 (1) is set out at p 256 a and b, post

^b Section 10, so far as material, is set out at p 253 j to p 254 c, post

^c See the St Christopher, Nevis and Anguilla Constitution Order 1967 (SI 1967 No 228), Sch 2

Chaplinsky v New Hampshire (1942) 315 US 568.

Chief of Police v Powell, Chief of Police v Thomas (1968) 12 WIR 403.

Collymore v Attorney-General of Trinidad and Tobago [1969] 2 All ER 1207, [1970] AC 538, [1970] 2 WLR 233, 15 WIR 229, PC; *affg* (1967) 12 WIR 5, Digest (Cont Vol C) 86, 322Ad.

Cox v New Hampshire (1941) 312 US 569.

Gopalan (A K) v State of Madras [1950] SCR 88.

Hague v Committee for Industrial Organization (1939) 307 US 496.

Indulal v The State AIR (50) 1963 Gujarat 259.

Kovacs v Cooper (1949) 336 US 77.

Lovell v City of Griffin (1938) 303 US 444.

Madras, State of v V G Row [1952] SCR 597.

New York, People of the State of, ex rel Lieberman v Van de Can (1905) 199 US 552.

Olivier v Buttigieg [1966] 2 All ER 459, [1967] AC 115, [1966] 3 WLR 310, PC, Digest (Cont Vol B) 91, 322Ab.

Roncarelli v Duplessis (1959) 16 DLR (2d) 689, [1959] SCR 121, Digest (Cont Vol A) 965, *1291b.

Safdar v Province of West Pakistan 1964 (WP) PLD Lahore 718.

Saia v New York (1948) 334 US 558.

Schneider v State (Town of Irvington) (1939) 308 US 147.

Thappar (Romesh) v State of Madras [1950] SCR 594.

Appeal

This was an appeal by special leave in forma pauperis by Arthur Francis against the judgment of the Court of Appeal of St Christopher, Nevis and Anguilla (Gordon CJ (Ag), Lewis JA and St Bernard JA (Ag)) dated 28th July 1970 which dismissed the appellant's appeal against a judgment of the High Court (Renwick J (Ag)) dated 10th March 1970, whereby it was held, on a reference by a magistrate under s 16 (3) of the Constitution of St Christopher, Nevis and Anguilla¹ ('the Constitution'), that s 5 of the Public Meetings and Processions Act 1969 did not contravene ss 10 and 11 of the Constitution. The appellant had been charged before the magistrate on a complaint by the respondent, the Chief of Police, with an offence against s 5 of the 1969 Act. The facts are set out in the opinion of the Board.

E Cotran for the appellant.

Stuart McKinnon for the Chief of Police.

LORD PEARSON. On Sunday, 29th June 1969, at a public meeting held in Basseterre in the State of St Christopher, Nevis and Anguilla the appellant used a loudspeaker without having obtained permission from the Chief of Police to do so. He was charged with an offence against s 5 of the Public Meetings and Processions Act 1969. At the hearing before the magistrate on 12th November 1969 the appellant by his counsel admitted the facts deposed to by the witnesses for the prosecution, but submitted that s 5 of the 1969 Act was unconstitutional, in that it purported to give to the Chief of Police an absolute, unfettered discretion to grant or refuse permission for the use of a loudspeaker, and that the effect was to curtail the fundamental rights of freedom of speech and of assembly laid down in ss 10 and 11 of the Constitution¹. The magistrate found that a prima facie case had been made out against the appellant but, at the request of the appellant by his counsel, referred to the High Court under s 16 (3) of the Constitution the question which had arisen as to the alleged contravention of ss 10 and 11 of the Constitution by s 5 of the 1969 Act. The question for determination of the High Court was stated, with some amplitude of explanation, as follows:

¹ See the St Christopher, Nevis and Anguilla Constitution Order 1967 (SI 1967 No 228), Sch 2

a 'Whether the legislation, by requiring police permission for the use of a micro-
phone or other similar instruments at a public meeting, offends against Sections
10 and 11 of the Constitution. In other words, given a situation where police
approval has already been obtained to hold a public meeting, should a speaker
for that meeting be put to the further requirement of having to seek police
b permission for the use of a microphone also? Does the legislation in question
have a restricting or qualifying effect on the free exercise of the freedoms guaran-
teed by the Constitution, such as freedom of speech and of assembly? Does the
said legislation get around, however unintentionally, these guarantees, or inhibit
these rights? Does freedom to speak lawfully at a lawful assembly of persons
cover only the use of one's mere voice, but not a speaking instrument used for
better—or even adequate—communication to the crowd? This is a nub of the
c issue raised by the defendant, as understood by the Magistrate. This is the
constitutional point on which the ruling of the High Court is sought.'

The contentions filed on behalf of the defendant, who is now the appellant, brought
out the main issue succinctly, contending:

d '1. That section 5 (1) of the Public Meetings and Processions Act 1969 No. 4
of 1969 contravenes against sections 10 and 11 of the St. Christopher Nevis and
Anguilla Constitution.

'2. That the unfettered discretion of the Chief of Police to grant or refuse
permission for the use of noisy instruments at a public meeting indicates that the
legislation is an unreasonable restriction of the freedoms laid down in sections
10 and 11 of the said Constitution.'

e In the High Court Renwick J gave a reasoned decision holding that s 5 of the Act
did not contravene the provisions of ss 10 and 11 of the Constitution. On appeal to
the Court of Appeal it was conceded on behalf of the appellant that no question arose
with regard to s 11 (which provides protection for freedom of assembly and associa-
tion) and the argument was confined to s 10 (which provides protection for freedom
f of expression). The Court of Appeal in separate judgments unanimously held that
s 5 of the Act did not contravene s 10 of the constitution and they dismissed the
appeal.

For the purpose of the present appeal the only provisions of the Constitution which
need to be set out are ss 1, 10 and 34. They are as follows:

g '1. Whereas every person in Saint Christopher, Nevis and Anguilla is entitled
to the fundamental rights and freedoms, that is to say, the right, whatever his
race, place of origin, political opinions, colour, creed or sex, but subject to respect
for the rights and freedoms of others and for the public interest, to each and all
of the following, namely—(a) life, liberty, security of the person and the pro-
tection of the law; (b) freedom of conscience, of expression and of assembly
and association; and (c) protection for the privacy of his home and other property
h and from deprivation of property without compensation, the provisions of this
Chapter shall have effect for the purpose of affording protection to those rights
and freedoms subject to such limitations of that protection as are contained in
those provisions, being limitations designed to ensure that the enjoyment of the
said rights and freedoms by any person does not prejudice the rights and
freedoms of others or the public interest.'

j '10.—(1) Except with his own consent, no person shall be hindered in the
enjoyment of his freedom of expression, including freedom to hold opinions
without interference, freedom to receive ideas and information without inter-
ference, freedom to communicate ideas and information without interference
(whether the communication be to the public generally or to any person or
class of persons) and freedom from interference with his correspondence.

'(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision—(a) that is reasonably required in the interests of defence, public safety, public order, public morality or public health; (b) that is reasonably required for the purpose of protecting the reputations, rights and freedoms of other persons or the private lives of persons concerned in legal proceedings, preventing the disclosure of information received in confidence, maintaining the authority and independence of the courts or regulating telephony, telegraphy, posts, wireless broadcasting or television; or (c) that imposes restrictions upon public officers, and except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society.'

'34. Subject to the provisions of this Constitution, the Legislature may make laws for the peace, order and good government of Saint Christopher, Nevis and Anguilla.'

Before coming to the 1969 Act itself some account should be given of the history leading up to it. There was a Public Meetings and Processions Ordinance 1948. Under s 3 where at any time it appeared to the Administrator in Council to be in the interest of good order or the public safety so to do, he might by proclamation prohibit in any public place (a) all meetings, gatherings and assemblies of persons, (b) all processions and marches, (c) all persons from organising, holding or speaking at or attending any meetings, gatherings and assemblies of persons. Such a proclamation was to remain in force for a period of not more than 15 days, though without prejudice to the issue of a further proclamation, and there were certain exemptions from the prohibitions. Section 4 provided that so long as such a proclamation was in force no person should within the area to which the proclamation applied (a) carry any lighted torch (b) beat any drum or blow or use any noisy instrument (c) without lawful excuse carry any weapons of offence. Then in 1967 there was an amending ordinance which inserted a new s 3A. By that section it was provided that (subject to certain exceptions) no person should—

'(a) organize, hold or speak at any meeting, gathering or assembly of persons; (b) organize or take part in any procession or march; (c) use any loudspeaker or other noisy instrument for the purpose of announcing or summoning any meeting, gathering or assembly of persons, procession or march, in any public place . . . without having first obtained permission in writing for such purpose from the Chief of Police (which permission it shall be discretionary in the Chief of Police to grant or withhold).'

The amending ordinance, which inserted the new s 3A, was passed on 21st February 1967 and came into force on 23rd February 1967. The Constitution came into force four days later on 27th February 1967.

In *Chief of Police v Powell* and *Chief of Police v Thomas*¹ the defendants were charged with having on 26th February 1967 spoken at a meeting without having first obtained permission in writing for such purpose from the Chief of Police contrary to s 3A. The defendants admitted the facts, but contended that para (a) of s 3A contravened s 10 and/or s 11 of the Constitution. In the High Court it was held by Glasgow J on 23rd July 1968 that para (a) of s 3A contravened the provisions of ss 10 and 11 of the Constitution, but that offences contrary to s 3A (a) of the Ordinance committed before 27th February 1967 were not affected by such contravention. Afterwards in March 1969 the Act was passed and came into force on 19th March 1969. It wholly repealed the former ordinance as amended and did not re-enact any of its provisions.

a The new provisions are quite elaborate, and it is reasonable to infer that they were drafted with great care in the light of the fate which s 3A of the former ordinance had suffered in the High Court, and also in the light of the conditions, known to the legislature, affecting the preservation of order in the state. The long title is:

b 'An Act to repeal the Public Meetings and Processions Ordinance and replace it with provisions calculated to facilitate police arrangements for the preservation of order at public meetings and processions.'

c Section 2 contains definitions, one of which is that 'noisy instrument' includes loud-speakers, loudhailers, megaphones, amplifiers, tape recorders and gramophones. Under s 3 (1) any person who desires to hold a public meeting in a public place must give previous notice to the Chief of Police of his intention to hold the meeting and of the time and place. Under sub-s (2) where notice has been given of the holding on the same date of two or more public meetings within half a mile of each other the Chief of Police may, having regard to the proximity of the meetings and of the times at which they are to be held, prohibit or impose restrictions on the holding of any such meeting, other than the public meeting in respect of which notice was first received, whenever he shall consider it desirable in the interest of public order or safety so to do. But in such a case the organiser of the proposed meeting may appeal to the governor. Under sub-ss (4) and (5) if a public meeting is held without adequate previous notice or contrary to a prohibition or restriction, any person holding the meeting or speaking at it is guilty of an offence and any member of the police force may stop the meeting and cause it to be dispersed. Under sub-s (6) any member of the police force not below the rank of corporal may as occasion requires direct the conduct of all meetings in public places and direct any public meeting to disperse if he has reasonable grounds for apprehending a breach of the peace as such meetings. Subsection (8) provides that it shall be the duty of all members of the police force to keep order in public places and prevent obstructions on the occasions of public meetings and in any case where public thoroughfares may be thronged or may be liable to be obstructed. It is to be noted that under s 3 a person who wishes to hold a public meeting, though he does have to give notice of it, does not have to ask permission, and the holding of the meeting cannot be prohibited or restricted except in special circumstances connected with the preservation of public order.

f Section 4 contains equally elaborate provisions relating to public processions. Subsection (1) provides that no person shall hold, organise or take part in any public procession unless the permission in writing of the Chief of Police has been first obtained. Subsection (2) provides that it shall not be lawful for any public procession to take place during the night. Subsection (3) requires previous notice to be given of any intended public procession. Subsection (4) provides:

g 'If the Chief of Police having regard to the time and place at which any public procession is intended to take place, the route proposed to be taken or any other relevant circumstances, apprehends that the procession may occasion serious public disorder, he may—(a) refuse to grant the application, or (b) give directions, imposing upon the persons holding or taking part in the procession, such conditions as appear to him to be necessary for the preservation of public order, including conditions prescribing the route to be taken by the procession and the hours between which it shall take place, and prohibiting the use of any noisy instrument and the entry of the procession into any specified street or other public place.'

j Under sub-s (5) if the Chief of Police refuses permission for the holding of a public procession, the applicant may appeal to the Governor. Subsections (6) to (10) contain ancillary provisions.

In contrast to the elaborate provisions of ss 3 and 4, s 5 deals shortly and simply with the subject of 'noisy instruments'. It provides as follows:

(1) Any person who in any public place or at any public meeting uses any noisy instrument for the purpose of announcing or summoning any public meeting or public procession or during the course of any public meeting or public procession, in any case without having first obtained the permission in writing of the Chief of Police so to do, shall be guilty of an offence against this Act and shall be liable on summary conviction to a fine not exceeding one hundred dollars. a

(2) The Chief of Police may in his discretion grant permission to any person to use a noisy instrument for the purpose of any public meeting or public procession upon such terms and conditions and subject to such restrictions as he may think fit. b

For the purpose of determining its constitutional validity, this rather summary provision relating to the use of loudspeakers and other noisy instruments should be taken in its context. It refers to the use of such instruments in connection with public meetings and public processions. The principal subjects are the public meetings and public processions, and they are dealt with at some length and in a liberal spirit. The use of loudspeakers and other noisy instruments is an adjunct or accessory, and can suitably be dealt with in a simpler way. c

A preliminary question arises as to the effect of s 1 of the Constitution, which is set out above. An almost identical provision in the Constitution of Malta was considered by the Judicial Committee in *Olivier v Buttigieg*¹ and in giving the judgment Lord Morris of Borth-y-Gest said²: d

‘It is to be noted that the section begins with the word “Whereas”. Though the section must be given such declaratory force as it independently possesses, it would appear in the main to be of the nature of a preamble. It is an introduction to and in a sense a prefatory or explanatory note in regard to the sections which are to follow. It is a declaration of entitlement—coupled however with a declaration that though “every person in Malta” is entitled to the “fundamental rights and freedoms of the individual” as specified, yet such entitlement is “subject to respect for the rights and freedoms of others and for the public interest”. The section appears to proceed by way of explanation of the scheme of the succeeding sections. The provisions of Part 2 are to have effect for the purpose of protecting the fundamental rights and freedoms, but the section proceeds to explain that, since even those rights and freedoms must be subject to the rights and freedoms of others and to the public interest, it will be found that in the particular succeeding sections which give protection for the fundamental rights and freedoms there will be “such limitations of that protection as are contained in those provisions”. Further words, which again are explanatory, are added. It is explained what the nature of the limitations will be found to be. They will be limitations “designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest”.’ e

Similarly in *A K Gopalan v State of Madras*³ Patanjali Sastri said: f

“Liberty,” says John Stuart Mill, “consists in doing what one desires. But the liberty of the individual must be thus far limited—he must not make himself a nuisance to others.” Man, as a rational being, desires to do many things, but in a civil society his desires have to be controlled, regulated and reconciled with the exercise of similar desires by other individuals. Liberty has, therefore, to be limited in order to be effectively possessed.” g

1. [1966] 2 All ER 459, [1967] AC 115

2. [1966] 2 All ER at 461, 462, [1967] AC at 128, 129

3. [1950] SCR 88 at 190, 191 h

- a In the same case Mukherjea J referred to the question of adjusting the conflicting interests of the individual and of the society. He said¹:

'What the Constitution, therefore, attempts to do in declaring the rights of the people is to strike a balance between individual liberty and social control.'

- b On coming to the question whether s 5 of the 1969 Act contravenes s 10 of the Constitution, one finds there are many relevant cases decided in the United States (*New York, ex rel Lieberman v Van de Carr*²; *Lovell v Griffin*³; *Hague v Committee for Industrial Organization*⁴; *Cantwell v Connecticut*⁵; *Cox v New Hampshire*⁶; *Saia v New York*⁷; *Kovacs v Cooper*⁸); and in Canada (*Roncarelli v Duplessis*⁹) and in India (*A K Gopalan v State of Madras*¹⁰; *Thappar v Madras*¹¹; *Madras v Row*¹²; *Indulal v The State*¹³); and in Pakistan (*Safdar v West Pakistan*¹⁴); and in the West Indies (*Collimore v Attorney-General of Trinidad and Tobago*¹⁵). There are in the judgments many passages which might be cited, but a long series of citations would not be appropriate in this case. Suffice it to say that there is a full review of relevant factors in the judgment of Miabhoy J in the *Indulal* case¹³.

- c The two conflicting considerations which have to be reconciled or mutually adjusted are stated in the differing opinions that were delivered in the United States Supreme Court in *Saia v New York*⁷ and *Kovacs v Cooper*⁸. By way of introduction it will be convenient to set out the First Amendment and the Fourteenth Amendment to the Constitution of the United States—taking these from the judgment of Hughes CJ in *Lovell v Griffin*¹⁶. The First Amendment is as follows:

- e 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble and to petition the government for a redress of grievances.'

The Fourteenth Amendment is as follows:

- f 'All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.'

- g In *Saia v New York*⁷ in the opinion of the court by Douglas J, which was a majority opinion, it was said¹⁷:

1 [1950] SCR at 254

2 (1905) 199 US 552

3 (1938) 303 US 444

h 4 (1939) 307 US 496

5 (1940) 310 US 296

6 (1941) 312 US 569

7 (1948) 334 US 558

8 (1949) 336 US 77

9 [1959] 16 DLR (2d) 689

10 [1950] SCR 88

j 11 [1950] SCR 594

12 [1952] SCR 597

13 AIR (50) 1963 Gujarat 259

14 PLD 1964 (WP) Lahore 718

15 (1967) 12 WIR 5; *aff'd* [1969] 2 All ER 1207, [1970] AC 538

16 (1938) 303 US at 448, 449

17 (1948) 334 US at 560, 561

'In *Hague v. C.I.O.*,¹ we struck down a city ordinance which required a licence from a local official for a public assembly on the streets or highways or in the public parks or public buildings. The official was empowered to refuse the permit if in his opinion the refusal would prevent "riots, disturbances or disorderly assemblage." We held that the ordinance was void on its face because it could be made "the instrument of arbitrary suppression of free enterprise of views on national affairs". The present ordinance has the same defects. The right to be heard is placed in the uncontrolled discretion of the Chief of Police. He stands athwart the channels of communication as an obstruction which can be removed only after criminal trial and conviction and lengthy appeal. A more effective previous restraint is difficult to imagine. Unless we are to retreat from the firm positions we have taken in the past, we must give freedom of speech in this case the same preferred treatment that we gave freedom of religion in the *Cantwell* case², freedom of the press in the *Griffin* case³, and freedom of speech and assembly in the *Hague* case¹. Loud-speakers are today indispensable instruments of effective public speech. The sound truck has become an accepted method of political campaigning. It is the way people are reached.'

On the other side (in the minority in that case, but in the majority in *Kovacs v Cooper*⁴) there was Frankfurter J, with whom Reed and Burton JJ concurred. He said⁵:

'The appellant's loud-speakers blared forth in a small park in a small city . . . The native power of human speech can interfere little with the self-protection of those who do not wish to listen. They may easily move beyond earshot, just as those who do not choose to read need not have their attention bludgeoned by undesired reading matter. And so utterances by speech or pen can neither be forbidden nor licensed, save in the familiar classes of exceptional situations, *Lovell v. Griffin*³; *Hague v. C.I.O.*¹; *Schneider v. Irvington*⁶; *Chaplinsky v. New Hampshire*⁷. But modern devices for amplifying the range and volume of the voice, or its recording, afford easy, too easy, opportunities for aural aggression. If uncontrolled, the result is intrusion into cherished privacy.'

In a subsequent passage he said⁸:

'It is not unconstitutional for a State to vest in a public official the determination of what is in effect a nuisance merely because such authority may be outrageously misused by trying to stifle the expression of some undesired opinion under the meretricious cloak of a nuisance. Judicial remedies are available for such abuse of authority, and courts, including this Court, exist to enforce such remedies. Even the power to limit the abuse of sound equipment may not be exercised with a partiality unrelated to the nuisance. But there is here no showing of either arbitrary action or discrimination.'

Jackson J, also in the dissenting minority, gave a separate judgment. He said⁹:

'But it is said the state or municipality may not delegate such authority to a Chief of Police. I am unable to see why a state or city may not judge for itself

1 (1939) 307 US 496

2 (1940) 310 US 296

3 (1938) 303 US 444

4 (1949) 336 US 77

5 (1948) 334 US at 562, 563

6 (1939) 308 US 147

7 (1942) 315 US 568

8 (1948) 334 US at 564, 565

9 (1948) 334 US at 571

- a whether a Police Chief is the appropriate authority to control permits for setting-up sound-amplifying apparatus. *Cox v. New Hampshire*¹. It also is suggested that the city fathers have not given sufficient guidance to his discretion. But I did not suppose our function was that of a council of revision . . . I disagree entirely with the idea that "Courts must balance the various community interests in passing on the constitutionality of local regulations of the character involved here." It is for the local communities to balance their own interests—that is politics—and what courts should keep out of. Our only function is to apply constitutional limitations.'
- b

- The American judgments show the principles and policy considerations involved, but may not be a guide to the detailed construction of s 10 of the Constitution of the State of St Christopher, Nevis and Anguilla, because the First and Fourteenth Amendments have no provision corresponding to s 10 (2). The American judges look for the inherent limitations which there must be in the fundamental freedoms of the individual if the freedom of others and the interests of the community are not to be infringed. There are two ways of construing s 10. One way is to read into sub-s (1) the necessary limitations as inherent in the fundamental freedoms of expression and communication. The other way is to look first at sub-s (1) to see whether according to the literal meaning of the words there is a *prima facie* hindering of or interference with the freedoms of expression and communication, and, if there is, look on to sub-s (2) to see whether such hindering or interference is justifiable. If the second way is adopted, the phrase 'public order' must be given a meaning wide enough to cover action taken for the avoidance of excessive noise seriously interfering with the comfort or convenience of a substantial number of persons. The phrase would of course cover action for the avoidance of any behaviour likely to lead to a breach of the peace, and perhaps excessive noise can be brought under that heading.
- c
- d
- e

- Whatever may be the exact construction of s 10, it must be clear that (1) a wrongful refusal of permission to use a loudspeaker at a public meeting (for instance if the refusal is inspired by political partiality) would be an unjustified and therefore unconstitutional interference with freedom of communication, because it would restrict the range of communication, and (2) some regulation of the use of loudspeakers is required in order that citizens who do not wish to hear what is said may be protected against 'aural aggression' if that might reach unbearable intensity.
- f

- As some regulation of 'noisy instruments' is required, and a system of licensing is the natural method, there must be some licensing authority to grant or refuse the permission. The legislature of the state concerned has decided that the Chief of Police is the suitable officer to be given this power and duty. There is convenience in that choice, as he is concerned with the preservation of public order and knows the prevailing conditions affecting it and therefore is able to give a quick decision. There is no evidence, and no reason to infer, that he has abused the power or would be likely to abuse it in any way. It is reasonable to assume that the legislature, knowing the local conditions, made a suitable choice of licensing authority.
- g

- h The final question is whether s 5 of the 1969 Act is so defective as to be unconstitutional because it does not expressly lay down guidelines for the exercise by the Chief of Police of his licensing power. Whether or not it might have been better to have some express provision as to the way in which his discretion should be exercised, he is not without guidance. It is plain from the preamble to the 1969 Act and from its provisions as a whole that its object is to facilitate the preservation of public order.

- j That being the object of the Act, he must exercise his powers *bona fide* for the achievement of that object. *Roncarelli v Duplessis*² per Rand J (with whom Judson J concurred), per Martland J³ (with whom Kerwin CJ and Locke J concurred) and

1 (1940) 312 US 569

2 (1959) 16 DLR (2d) at 705

3 (1959) 16 DLR (2d) at 742

per Abbott J¹. Section 5 is not defective, or at any rate not seriously defective, in this respect. It does not contravene the Constitution. a

Their Lordships will humbly advise Her Majesty that the appeal should be dismissed.

Appeal dismissed.

Solicitors: Wilson Freeman (for the appellant); Charles Russell & Co (for the respondent). b

S A Hatteea Esq Barrister. c

Trollope & Colls Ltd v North West Metropolitan Regional Hospital Board d

HOUSE OF LORDS

LORD PEARSON, LORD GUEST, VISCOUNT DILHORNE, LORD DIPLOCK AND LORD CROSS OF
CHELSEA

9th, 12th, 13th, 14th, 15th FEBRUARY, 10th APRIL 1973

Contract – Implied term – Implication of term to give business efficacy to contract – Circumstances in which term may be implied – Express term clear and unambiguous – Term unreasonable – Several alternative fair and reasonable terms which might be implied – Building contract – Work to be carried out in phases – Date for commencement of third phase fixed by reference to date of completion of first phase – Third phase to be completed by specified date – Delay in completing first phase leaving unreasonably short time to complete third phase by specified date – Whether term to be implied extending date for completion of third phase. e

The respondents, a hospital board, engaged the appellants as main contractors to carry out the work of building a hospital and clinical research centre. The contract provided for the work to be carried out in three phases. Phases I and II were to run contemporaneously. The date for completion of phase I was to be 30th April 1969. The contract provided for the architect extending the time for completion of the works for delay caused by certain specified events. Phase III of the contract was to commence 'Six months after the Date of issue of the Certificate of Practical Completion of Phase I'. The contract provided that the appellants 'shall complete [phase III] on or before the Date for Completion stated in the . . . appendix . . .' The date for completion stated in the appendix was 30th April 1972. In consequence, if the certificate of practical completion of phase I was issued on the specified date, i.e. 30th April 1969, the appellants would have a period of 30 months (31st October 1969 to 30th April 1972) for completing phase III. In the event there was a delay of 59 weeks in the completion of phase I, extensions having been granted by the architect under the provisions of the contract for 47 weeks. Accordingly the certificate of practical completion of phase I was not issued until 22nd June 1970 with the consequence that only 16 months (22nd December 1970 to 30th April 1972) were available for completing phase III. In the circumstances the respondents were unable to nominate sub-contractors who could conform to that time schedule. In proceedings f

a commenced by the appellants, the respondents contended that on the true construction of the contract the date for completion of phase III should be extended by the addition thereto of a period equal to the extension of time for phase I properly allowable under the provisions of the contract, i.e. 47 weeks. The Court of Appeal upheld the respondents' contention holding that, since the parties, in fixing the date for completion of phase III, must have overlooked the possibility that phase I would not be completed on time, it was open to the court to imply a term such as it considered the parties as fair and reasonable people would have made. On appeal,

Held – The appeal would be allowed for the following reasons—

(i) (Per Lord Pearson, Lord Guest, Lord Diplock and Lord Cross of Chelsea) An unexpressed term could only be implied if the court found that the parties must have intended that term to form part of their contract; it must have been a term necessary to give business efficacy to the contract, a term which, although tacit, formed part of the contract which the parties had made for themselves. If however the express terms of the contract were perfectly clear and free from ambiguity those terms were to be applied even if the court thought that some other term would have been more appropriate. Since the contract provided clearly and unambiguously that the date for completion of phase III was to be 30th April 1972 there was no room for the implication of a term that the time for completion should be extended so as to take account of delay in the completion of phase I. In any event, since there were various possible extensions of time that the parties might reasonably have provided for, the extension contended for by the respondents was not obviously what the parties must have intended and could not therefore be implied (see p 267 j to p 268 c, p 269 a and b, p 270 j, p 271 a, and p 272 b c and g, post).

e (ii) (Per Viscount Dilhorne) The contract was to be construed as providing that phase III was to commence six months after the date on which the certificate of practical completion of phase I was given, whatever that date might be, and that the work in phase III was to be completed 30 months after its commencement. Accordingly the contract could not be amended in the sense contended for by the respondents for to do so would be to rewrite the contract and not to construe it so as to give effect to the intentions of the parties (see p 269 j and p 270 c to f and h j, post).

Notes

For construction of a building contract, implied stipulations and variation, see 3 Halsbury's Laws (3rd Edn) 428, 434, 436, paras 815, 817, 820, and for cases on the subject, see 7 Digest (Repl) 341, 343-344, 350-353, 17-19, 23-27, 61-70.

Cases referred to in opinions

Dahl v Nelson, Doukin & Co (1881) 6 App Cas 38, [1881-85] All ER Rep 572, 50 LJCh 411, 44 LT 381, 4 Asp MLC 392, HL; *affg* sub nom *Nelson v Dahl* (1879) 12 Ch D 568, CA, 41 Digest (Repl) 415, 2021.

Dodd v Churton [1897] 1 QB 562, 66 LJQB 477, 76 LT 438, CA, 12 Digest (Reissue) 542, 3783.

Holme v Guppy (1838) 3 M & W 387, 150 ER 1195, 7 Digest (Repl) 343, 23.

Luxor (Eastbourne) Ltd v Cooper [1941] 1 All ER 33, [1941] AC 108, 110 LJKB 131, 164 LT 313, 46 Com Cas 120, HL, 1 Digest (Repl) 587, 1881.

Miller (James) and Partners Ltd v Whitworth Street Estates (Manchester) Ltd [1970] 1 All ER 796, [1970] AC 583, [1970] 2 WLR 738, [1970] 1 Lloyd's Rep 269, HL, Digest (Cont Vol C) 29, 1949a.

North West Metropolitan Regional Hospital Board v T A Bickerton & Son Ltd [1970] 1 All ER 1039, [1970] 1 WLR 607, HL, Digest (Cont Vol C) 58, 22b.

Reigate v Union Manufacturing Co (Ramsbottom) Ltd [1918] 1 KB 592, [1918-19] All ER Rep 143, 87 LJKB 724, 118 LT 479, CA, 12 Digest (Reissue) 752, 5399.

Appeal

By an originating summons dated 11th August 1971 the appellants, Trollope & Colls Ltd, claimed against the respondents, the North West Metropolitan Regional Hospital Board, a declaration—

‘that upon the true construction of the Building Contract dated 23rd March, 1966 made between the [respondents] as Employer and the [appellants] as Contractor for the erection and completion by the [appellants] in three Phases of a District Hospital and Clinical Research Centre at Northwick Park, Wembley, and in the light of events occurring prior to 6th July, 1971; the date provided in the Building Contract for the completion of Phase III of the Works, namely 30th April, 1972, does not fall to be amended by the addition thereto of a period equal to the extension of time for the completion of Phase I of the Works properly allowable under Conditions “A” of the said Building Contract.’

On 26th November 1971 Donaldson J granted the declaration sought. The respondents appealed. On 5th July 1972 the Court of Appeal (Lord Denning MR and Phillimore LJ, Cairns LJ dissenting) allowed the appeal and declared that the date for the completion of phase III—

‘does fall to be amended by the addition thereto of a period equal to the extension of time for the completion of Phase I of the works properly allowable under conditions “A” of the said Building Contract ...’

The court granted the appellants leave to appeal to the House of Lords. The facts are set out in the opinion of Lord Pearson.

K F Goodfellow QC and *K S Rokison* for the appellants.
Donald Keating QC and *A T K May* for the respondents.

Their Lordships took time for consideration.

10th April. The following opinions were delivered.

LORD PEARSON. My Lords, by a building contract dated 23rd March 1966 the appellants contracted to carry out for the respondents works of and connected with erecting and completing a district hospital and clinical research centre at Northwick Park, Wembley. The works were to be carried out in three phases—phase I on and subject to conditions ‘A’ for £6,691,878, phase II on and subject to conditions ‘B’ for £3,165,940 and phase III on and subject to conditions ‘C’ for £3,382,072. The three sets of conditions were very similar, but not identical. The respondents had an option to give to the appellants, at any time before the date of issue of the certificate of practical completion under conditions ‘A’, a notice to omit phase III. The question in this appeal arose out of the provisions for the timing of phase III, which was made to depend on the timing of phase I.

In conditions ‘A’, relating to phase I, there was cl 11 empowering the architect to issue instructions requiring or sanctioning variations, which might include the addition, omission or substitution of any work. Clause 21 (1) provided:

‘On the Date for Possession stated in the appendix to these Conditions possession of the site shall be given to the Contractor who shall thereupon begin the Works and regularly and diligently proceed with the same, and who shall complete the same on or before the Date for Completion stated in the said appendix subject nevertheless to the provisions for extension of time contained in clauses 23 and 33 (1) (c) of these Conditions.’

The date for possession stated in the appendix was 1st February 1966 and the date for completion stated in the appendix was 30th April 1969. Clause 22 provided for

a liquidated damages to be payable if the contractor failed to complete the works by the date for completion stated in the appendix to these conditions or within any extended time fixed under cl 23 or cl 33 (1) (c) and the architect certified in writing that in his opinion the same ought reasonably so to have been completed.

b Clause 23 provided for the architect extending the time for completion of the works for delay caused by certain specified events, which included exceptionally inclement weather, fire damage, strikes, architect's instructions for variations under cl 11 or certain other clauses, and delay on the part of nominated sub-contractors. Clause 33 (1) (c) related to war damage and is not relevant. Clause 35 was an arbitration clause.

In conditions 'C', relating to phase III, cl 21 (1) provided:

c 'On the Date for Possession stated in the appendix to these Conditions possession of the site shall be given to the Contractor. Six months after the Date of issue of the Certificate of Practical Completion of Phase I the Contractor shall begin Phase III and shall regularly and diligently proceed with the same, and shall complete the same on or before the Date for Completion stated in the said appendix subject nevertheless to the provisions for extension of time contained in clauses 23 and 33 (1) (c) of these Conditions.'

d The date for possession stated in the appendix was 1st February 1966 and the date for completion stated in the appendix was 30th April 1972. Clause 22 was a liquidated damages clause in the same terms as cl 22, of conditions 'A'. Clause 23 provided for the architect extending the time for completion of the works for delay caused by certain specified events, which did not include delay in the completion of phase I.

e Clause 33 (1) (c) related to war damage and is not relevant.

f Thus, the time for beginning work on phase III was six months after the certificate of practical completion of phase I, but the date by which work on phase III had to be completed (unless there was some extension of time under cl 23 of conditions 'C') was a specified date, 30th April 1972. If the certificate of practical completion of phase I was issued on the specified date for completion of phase I, which was 30th April 1969, the time for beginning work on phase III would be six months later, i.e. on 31st October 1969, and a period of 30 months would be available for completing phase III by the specified date, 30th April 1972. If, however, there was for any reason delay in reaching practical completion of phase I, the period for completing phase III would be curtailed.

g Clause 27 (a) of conditions 'C', relating to nominated sub-contractors, included a provision that the architect should not nominate any person as a sub-contractor—

'... who will not enter into a sub-contract which provides (*inter alia*) ... (ii) That the nominated sub-contractor shall observe, perform and comply with all the provisions of this Contract on the part of the Contractor to be observed, performed and complied with so far as they relate and apply to the sub-contract Works or to any portion of the same ... (v) That the sub-contract Works shall be completed within the period ... therein specified, that the Contractor shall not without the written consent of the Architect ... grant any extension of time for the completion of the sub-contract Works ... and that the Contractor shall inform the Architect ... of any representations made by the nominated sub-contractor as to the cause of any delay in the progress or completion of the sub-contract Works ...'

h

j

In the event there was a delay of 59 weeks in the completion of phase I. Extensions were granted under cl 23 for a total of 47 weeks, of which 25 weeks were for variations required or sanctioned by the architect on behalf of the respondents and 22 weeks were for causes (exceptionally inclement weather, fire damage, strikes and nominated sub-contractors' delays) which were not attributable to action of the respondents.

As to the remaining 12 weeks of delay, the architect considered that the appellants were at fault and he refused to grant extensions, but the appellants contended that they were not at fault and that the architect should have granted extensions. This dispute still subsists and will, or may be, submitted to arbitration, but is not a subject of the present action or the present appeal. a

The effect of the 59 weeks of delay, if the express provisions of the contract are to be construed literally and if there is no implied term, is this. The specified date for the completion of phase I was 30th April 1969 and if there had been no delay the time for beginning phase III would have been six months after 30th April 1969, that is, 31st October 1969. But in consequence of the delay the certificate of practical completion was not issued until 22nd June 1970. It followed that the time for beginning phase III was six months after 22nd June 1970, that is, 22nd December 1970. But phase III still had to be completed (unless there was some extension of time under cl 23 of conditions 'C') by the specified date, 30th April 1972, which was only about 16 months after 22nd December 1970. Thus the period available for completing phase III, which would have been 30 months if there had been no delay in completing phase I, was, by reason of such delay, only about 16 months. The respondents did not exercise their option to cancel phase III. b

In that situation a dispute arose as to the contractual position, and there was a curious reversal of the usual attitudes in such cases. The appellants were claiming that the express provisions of the contract were to be read literally and no implied term could be introduced, and so the appellants were not entitled to any extension of time and were bound to complete phase III by the specified date. They professed to be able to complete their part of the work by the specified date, and they called on the respondents to nominate sub-contractors who would enter into sub-contracts conforming to that time schedule. This the respondents were unable to do. The appellants were turning the situation to their own advantage, because, if the contract could not be carried out, a new arrangement would have to be made for the work to be done at the prices prevailing in or about 1971, which were considerably higher than the contract prices. The difference between the contract prices and the prices prevailing in or about 1971 is said to be in the region of one million pounds. c

The respondents, on the other hand, wished to have the work carried out at the contract prices. They contended that the appellants were entitled to an extension of the time for completion of phase III by 47 weeks, because, as the architect had rightly decided they were entitled to that much extension of time for completion of phase I. On that basis the total time for phase III would be about 16 months plus 47 weeks (say 11½ months) and it would be possible to nominate sub-contractors who would enter into sub-contracts conforming to that time schedule, and so the contract would be saved and the work would be carried out at the contract prices. d

To extricate themselves from the impasse, the parties on 6th July 1971 made an agreement, under which the phase III work would be carried out by the appellants and the question in dispute would be submitted to the court for decision and the prices to be paid would depend on the decision given. The question in dispute was precisely defined in the agreement of 6th July 1971. Recitals 4 and 5 were as follows: e

'4. The Employer contends that the Date for Completion for Phase III specified in the Appendix to Conditions "C" of the Building Contract as the 30th April 1972 must be read as amended by the addition thereto of such period as the Contractor is entitled to as an extension of time for the completion of Phase I and that in all the circumstances such period is 47 weeks. f

'5. The Contractor whilst contending that he is entitled to a greater extension of time for the completion of Phase I than 47 weeks contends that such extension of time is irrelevant to the Date for Completion of Phase III because the said date of the 30th April 1972 is not to be amended as claimed by the Employer or at all.' g

a Clause 2 (a) of the agreement provided:

'The Contractor shall commence proceedings against the Employer in the High Court of Justice for a Declaration that upon the true construction of the Building Contract and in the events which had occurred prior to this Agreement the Date for Completion of Phase III namely the 30th April 1972 does not fall to be amended by the addition thereof of a period equal to the extension of time for the completion of Phase I properly allowable under Conditions "A" of the Building Contract.'

In pursuance of this cl 2 (a) of the agreement of 6th July 1971 the appellants on 11th August 1971 commenced proceedings by originating summons in the commercial list for a declaration being, apart from immaterial details, in the terms set out in the clause.

c In the High Court before Donaldson J the appellants relied on the plain meaning of the contract literally interpreted, and the respondents' argument was, mainly at any rate, directed to the implication of a term. Donaldson J decided in favour of the appellants that no term could be implied. He cited a passage from the judgment of Scrutton LJ in *Reigate v Union Manufacturing Co (Ramsbottom) Ltd*¹:

d 'A term can only be implied if it is necessary in the business sense to give efficacy to the contract; that is, if it is such a term that it can confidently be said that if at the time the contract was being negotiated some one had said to the parties, "What will happen in such a case," they would both have replied, "Of course, so and so will happen; we did not trouble to say that; it is too clear." Unless the Court comes to some such conclusion as that, it ought not to imply a term which the parties themselves have not expressed.'

The learned judge then said:

f 'When I come to imagine the answers of the parties if asked as they signed the contract, "What happens about the time for completion of phase III, if completion of phase I is delayed?" I am quite unable to discern any certain answer.'

He went on to show there were several possible answers.

In the Court of Appeal and in the present appeal, the respondents' argument was based on both a 'point of construction' and on implication of a term. It has been convenient in this case to make the contrast between the two branches of the respondents' argument in this way, but I am doing so without prejudice to the question whether as a matter of correct theory the implication of a term may properly be considered as an aspect of the construction of the contract.

g Cairns LJ in a dissenting judgment rejected both branches of the respondents' arguments. As to the first, he said:

h 'Here we are being invited to construe the contract not by a restrictive interpretation nor by choosing between two possible meanings of a clause, but by adding words for which I can find no sort of warrant.'

As to the second, he cited a passage from the opinion of Lord Wright in *Luxor (Eastbourne) Ltd v Cooper*²:

j 'It is well-recognised, however, that there may be cases where obviously some term must be implied if the intention of the parties is not to be defeated, some term of which it can be predicated that "it goes without saying," some term not

¹ [1918] 1 KB 592 at 605, [1918-19] All ER Rep 143 at 149

² [1941] 1 All ER 33 at 52, 53, [1941] AC 108 at 137

expressed but necessary to give to the transaction such business efficacy as the parties must have intended. This does not mean that the court can embark on a reconstruction of the agreement on equitable principles, or on a view of what the parties should, in the opinion of the court, reasonably have contemplated. The implication must arise inevitably to give effect to the intention of the parties.' a

Then Cairns LJ said: b

'I do not consider that it is necessary in this case to imply any term to give business efficacy to the contract. The contractors were taking the risk of circumstances arising which might make it difficult for them to complete phase III by the contract date of completion. There is nothing exceptional about that.'

Later he said: c

'One reason why in my view it is impossible to imply the term contended for here is that I cannot find any means of determining, if the parties had considered there should be some extension in relation to phase II if phase I were not completed by the due date, what period of extension would have been agreed.'

On the other hand, the majority of the Court of Appeal, Lord Denning MR and Phillimore LJ, decided in favour of the respondents. d

Lord Denning MR decided first on a point of construction or perhaps on a rule of law which he derived from *Dodd v Churton*¹. I will set out a passage from the judgment of Lord Denning MR, inserting '(1)' and '(2)' to divide it into two parts:

'(1) It is well settled that in building contracts—and in other contracts too—when there is a stipulation for work to be done in a limited time, if one party by his conduct—it may be quite legitimate conduct, such as ordering extra work—renders it impossible or impracticable for the other party to do his work within the stipulated time, then the one whose conduct caused the trouble can no longer insist upon strict adherence to the time stated. He cannot claim any penalties or liquidated damages for non-completion in that time. e

'(2) The time becomes at large. The work must be done within a reasonable time—that is, as a rule, the stipulated time plus a reasonable extension for the delay caused by his conduct.' f

Then he said: 'That was established by *Dodd v Churton*¹.' Now *Dodd v Churton*¹ does establish the first part of that passage, which I have marked '(1)', but does not establish, or afford any support to, the second part of the passage which I have marked '(2)'. g

In *Dodd v Churton*¹, the contract provided for the whole of the works to be completed by 1st June 1892 under a penalty of £2 per week for every week that any part of the work remained unfinished after that date as liquidated damages. There was a provision that any authority given by the architects for any alteration or addition in or to the works was not to vitiate the contract. There was apparently no provision for extending the time for completion if additional work was ordered. Additional works were ordered which necessarily involved a delay in the completion of the works beyond the specified date. The works were not completed until 5th December 1892. Evidence was given on the part of the defendant to the effect that a fortnight was a reasonable time for the doing of the additional work, and the defendant, allowing a fortnight's additional time for the completion of the works, claimed £2 per week in respect of the delay of 25 weeks. The county court judge held that by giving the order for the additional works the defendant had waived the stipulation for h
i

a penalties in respect of non-completion of the work by 1st June. His decision was upheld in the Court of Appeal. Lord Esher MR said¹:

b 'The principle is laid down in Comyns' Digest, Condition L (6.), that, where one party to a contract is prevented from performing it by the act of the other, he is not liable in law for that default; and, accordingly, a well recognised rule has been established in cases of this kind, beginning with *Holme v. Guppy*², to the effect that, if the building owner has ordered extra work beyond that specified by the original contract which has necessarily increased the time requisite for finishing the work, he is thereby disentitled to claim the penalties for non-completion provided for by the contract.'

Lord Denning MR also said:

c 'There is another approach also available which leads to the same result. It is by way of an implied term. The parties, in framing cl 21, did not say what was to happen if phase I was not completed in the contract time. They must have overlooked it; for otherwise they would surely have provided for it.'

d Later, after referring to the above cited passage from the judgment of Scrutton LJ in the *Reigate* case³, he said:

e 'That is no doubt true when the parties may be taken to have contemplated the occurrence and not provided for it—each taking his chance on the meaning to be given by the court to the words. But when the parties have given no thought to the matter and something occurs for which they have not provided, then the court itself will imply a term such as it considers that the parties, as fair and reasonable persons, would have provided if they had thought about it. In short the court decides according to what is fair and reasonable.'

Later he said:

f 'Again, we must ask: what would the parties, as fair and reasonable men, have presumably agreed if they had such a possibility in view? To my mind, the fair and reasonable solution—to which they would presumably have agreed—is that, when the time for Phase I was extended by a legitimate extension certified by the architect, then the time for Phase III should be extended by a like amount.'

g Phillimore LJ also decided in favour of the implied term. Envisaging the situation which would arise if the work of phase I were to overrun by a long period the date for its completion, he said:

h 'I have no doubt whatsoever that if that had been pointed out to these parties, they would have said at once: "Well, of course, if that happens, phase III must be extended by a period which is, at any rate, equal to any period of the overrun of phase I for which the contractor is not to blame, in other words, 47 weeks".'

The words 'at any rate' bring in a factor of uncertainty. Would the extension be for this period or for some longer period? Which period is it that the parties must have intended at the time when they made their contract?

i Faced with the conflict of judicial opinion in this case, I prefer the views of Donaldson J and Cairns LJ as being more orthodox and in conformity with the basic principle that the court does not make a contract for the parties. The court will not even improve the contract which the parties have made for themselves, however

1 [1897] 1 QB at 566

2 (1838) 3 M & W 387

3 [1918] 1 KB at 605, [1918-19] All ER Rep at 149

desirable the improvement might be. The court's function is to interpret and apply the contract which the parties have made for themselves. If the express terms are perfectly clear and free from ambiguity, there is no choice to be made between different possible meanings: the clear terms must be applied even if the court thinks some other terms would have been more suitable. An unexpressed term can be implied if and only if the court finds that the parties must have intended that term to form part of their contract: it is not enough for the court to find that such a term would have been adopted by the parties as reasonable men if it had been suggested to them: it must have been a term that went without saying, a term *necessary* to give business efficacy to the contract, a term which, although tacit, formed part of the contract which the parties made for themselves. The relevant express term is entirely clear and free from ambiguity: the date for completion of phase III is the date stated in the appendix to conditions 'C', which is 30th April 1972. That term in itself can have only one meaning.

As to the alleged implied term, I am by no means convinced that the parties overlooked the possible effect of an 'overrun' of phase I on the time for completing phase III. Although cl 21 of conditions 'A' was in print and so, probably, in a common form, the dates in the appendix were entered in ink. In conditions 'B' cl 21 was in typescript and had special wording, and the dates in the appendix were entered in ink. In conditions 'C' cl 21 was in typescript and had special wording and the dates in the appendix were entered in ink. The parties were making the timetable which they considered suitable for the particular case. It is reasonable to suppose that they knew what they were doing, and that the appellants were taking the risk of an 'overrun' of phase I curtailing the time for phase III. They may have seen that the risk was not unduly great, because if the time for phase III were seriously curtailed the respondents would be unable to nominate sub-contractors willing to undertake the required obligation.

Suppose, however, that the parties did overlook the possible effect of an overrun of phase I on the time for completing phase III. What is the extension of time which they must have intended? There are at least four possibilities:

(a) One can say that the time for phase III should be extended by so much of the delay in phase I as was attributable to the acts of the respondents in requiring or sanctioning variations through their architect. That time was 25 weeks.

(b) The period of extension of the time for phase III might be the period of 47 weeks in fact allowed by the architect whether or not some further extension should have been allowed. This has the advantage of being ascertained at the time when the appellants would have to plan their work on phase III. But it is not the period for which the respondents have contended.

(c) The period of extension of the time for phase III might be a period equal to the extension of time for the completion of phase I properly allowable under conditions 'A'. That is the period for which the respondents have contended. There are at least two objections. First, the length of that period would, in a case where there was a dispute, not be known until the arbitrator decided what it should be, and therefore would not be known at the time when the appellants were planning their work in phase III. Secondly, it would not cover a situation which could arise in which delays attributable to the appellants would so curtail the time allowed for phase III that it would not be possible to nominate sub-contractors willing to undertake the required obligations.

(d) The period of extension of the time for phase III might be the total period of the delay in completing phase I—including the respondents' delay and the neutral delay (inclement weather etc) and the appellants' delay. This period of extension is at least as good a candidate as any of the others. It can be said to give business efficacy to the contract, because it would give the appellants

a and the sub-contractors a fair start with a full 30 months' period ahead of them for completion of phase III.

At any rate the period referred to in (c) is not obviously what the parties must have intended and, therefore, is not to be implied. In my opinion, the respondents' contention fails and the appeal should be allowed.

b **LORD GUEST.** My Lords, for the reasons given by my noble and learned friend, Lord Pearson, I too would allow the appeal.

VISCOUNT DILHORNE. My Lords, I have had the advantage of reading the speech of my noble and learned friend, Lord Pearson, and while I agree with him that this appeal should be allowed I reach that conclusion for different reasons.

c There was in this case one contract to which were annexed three sets of conditions based on the RIBA standard form with some variations. Each set of conditions related to the works contained in one phase. Phases I and II were to start on 1st February 1966, the date when possession of the site was to be given to the contractors, the appellants. These two phases were to be carried out at the same time, the date for completion specified in the conditions being for phase I, 30th April 1969, for phase II, 31st August 1970, and for phase III, 30th April 1972. Each phase was required to be completed on or before the stipulated date and the conditions provided that in certain events the architect might grant extensions of time for completion. Delay in completion beyond the dates stipulated and any extension of time granted by the architect rendered the contractors liable to liquidated damages. The conditions relating to phase III provided that work on that phase was to start six months after the date when the architect gave his certificate of practical completion of phase I.

e There can, I think, be no doubt that when the parties entered into the contract they considered and agreed on how long a period should be allocated for the completion of each phase of the contract works. The dates for possession of the site and for the completion of phase I allowed a period of three years and three months for the completion of that phase, and a longer period was allocated for the completion of phase II. I think it inconceivable that the parties having agreed on the time the work in phases I and II was to take failed to consider and to agree on the time to be taken for the work in phase III. If phase I was completed on the date specified for completion, then 30 months were allowed for the execution of the work in phase III, i.e. the period from 30th April 1969 to 30th April 1972 less six months. If the question to be decided was: how long were the contractors to have under the contract for the execution of phase III? I would say that the answer as a matter of construction of the contract was 30 months.

g The conditions relating to phase III unfortunately made no provision for the extension of time for the completion of that phase if there was delay in the completion of phase I. If there was delay in the issue of the certificate of practical completion of phase I, then the time for the execution of the works in phase III would, provided that the date of completion of phase III was not postponed, be reduced by the amount of the delay after 30th April 1969 in the giving of the certificate of practical completion of phase I. In this case there was delay of 59 weeks, with the consequence that on one view of the contract the contractors had to execute the works estimated to take 30 months in 16 months and the architect had to nominate sub-contractors who could do their work in a greatly reduced period of time.

h I regard it as inconceivable that the parties, when they entered into the contract, should have deliberately taken the risk that the period for the execution of phase III could be so cut down by delay in the issue of the certificate of practical completion of phase I as to render it impossible for the contractors to complete the works by the stipulated date, and for the architect to nominate sub-contractors who could fulfil their sub-contracts by the due dates. Both parties presumably wanted the phase III

works carried out and cannot, in my opinion, have intended to run the risk that neither of them would be able to fulfil their parts, the contractors by completing the works by the due date and the architect in nominating sub-contractors who could fulfil their sub-contracts as a result of delay in the completion of phase I. a

It is not without interest that in the agreement entered into on 6th July 1971 whereby it was agreed that the contractors should proceed with phase III, cl 1 (a) provided that in place of the date of completion originally provided, namely, 30th April 1972, there should be substituted 'as the Date for Completion such date as is 30 months after the date of this Agreement'. The fact that 30 months was provided in this agreement for the doing of the work cannot be relied on for the purpose of construing the original contract (*James Miller and Partners Ltd v Whitworth Street Estates (Manchester) Ltd*¹) and my conclusion as to the construction to be placed on the contract is based solely on consideration of its terms and the conditions attached thereto. b

Phase III was to start not six months after 30th April 1969, the date for completion of phase I plus the time taken to execute variations authorised under the contract and not six months after the date to which the date for completion was extended by architect's certificates, but six months after the date of the certificate of practical completion given by the architect under cl 15. For the purposes of that certificate it matters not whether there had been any delay, or whether if there was delay what were the causes of it. The certificate was to be given when the work in phase I was practically completed and the work on phase III was to start six months thereafter. c

That being so, if the certificate for practical completion was given after 30th April 1969 and it was the clear intention of the parties, as I think it was, that 30 months should be allowed for the completion of phase III, it follows that the date for completion of that phase is to be read as having been inserted in the contract on the basis that the certificate of practical completion would be given on 30th April 1969, the date for completion of phase I, and on the basis that, if it was not, the date for completion of phase III was to be extended by a period equivalent to that between 30th April 1969 and the date of the certificate of practical completion. I would so construe the contract, but to do so does not avail the respondents. d

The agreement entered into on 6th July provides that the contractors are to seek a declaration that the date for the completion of phase III, 30th April 1972, does not fall to be amended by the addition thereto of a period equal to the extension of time for the completion of phase I properly allowable under the conditions 'A' of the building contract. The agreement provided that if the proceedings were determined in favour of the contractors so that this date, 30th April 1972, did not fall to be so amended, there should be substituted for such of the contract bills as related to phase III new bills containing new rates and prices agreed or determined in accordance with the agreement. e

I agree with my noble and learned friend, Lord Pearson, that the building agreement did not fall to be so amended with the result that the contractors are, in my opinion, entitled to the declaration sought. So to amend the contract would be to substitute another starting date for that expressly provided in the contract. It would mean rewriting the contract, and that is a very different thing from construing the contract in such a way as to give it business efficacy and so to carry out what, in my view, are the intentions of both parties, namely, that 30 months should be allocated for the work in phase III. f

The respondents have accordingly failed in their contention and for the reasons I have stated in my opinion this appeal should be allowed. g

LORD DIPLOCK. My Lords, for the reasons given by my noble and learned friend, Lord Pearson, I, too, would allow the appeal. h

LORD CROSS OF CHELSEA. My Lords, I have had the opportunity of reading the speech of my noble and learned friend, Lord Pearson, and I agree with him that this appeal should be allowed.

Like him I approach this case on the footing that as a matter of construction the contract provides unambiguously that phase III is to be completed by 30th April 1972, subject, of course, to any extensions under cl 23 of conditions 'C' for delays occurring during the completion of phase III itself. If one approaches the case in that way then the argument for the respondents involves the acceptance of the following three propositions. The first is that when the parties said in cl 21 (1) of conditions 'C' that the contractor was to begin phase III six months after the issue of the certificate of practical completion of phase I and complete it by 30th April 1972, they had overlooked the possibility that the completion of phase I might for one reason or another be delayed and that had they borne that possibility in mind they would not have simply provided that the date for completion of phase III should be 30th April 1972, but would have qualified that provision in some way. The second proposition is that as the parties had overlooked the possibility of delay in the completion of phase I and had not qualified in any way the provision that phase III was to be completed by 30th April 1972, the court should read into cl 21 (1) that qualification of it which it considers that the parties as fair and reasonable persons would have introduced if their minds had been directed to the point. The third is that the qualification which the parties as fair and reasonable persons would have introduced was that contended for by the respondents—namely, that in the event of the completion of phase I being delayed the time allowed for the completion of phase III should be extended by a period equal to the extension of time for the completion of phase I properly allowable under conditions 'A' of the contract.

It is certainly odd that cl 21 (1) of conditions 'C' should contain no provision catering for the possibility that the completion of phase I might be delayed and the time allowed for the completion of phase III thereby curtailed and it may be that when the parties said that phase III was to be completed by 30th April 1972 they were saying what they did not really mean—though, like my noble and learned friend, Lord Pearson, I am by no means convinced that this is so. Assuming, however, in the respondents' favour that what I have called their first proposition is well founded I am unable to accept either the second or the third. This is not a case like *Dahl v Nelson, Doukin & Co*¹, referred to by Lord Denning MR, for there the language used by the parties was susceptible of more than one construction. The charterparty stipulated that a ship carrying a cargo of timber should proceed 'to London Surrey Commercial Docks or so near thereto as she may safely get, and lie always afloat and deliver the timber on being paid freight'. The ship reached the entrance to the Surrey Commercial Docks on 4th August 1877, but was refused entrance as the docks were full. The master then took her to Deptford Buoys, which was the nearest place to the docks where the vessel could lie safely afloat, and effected the discharge of the cargo by lighters which carried the timber into the docks by 31st August. The question was whether, on the true construction of the contract, the charterers were in these facts liable for demurrage. The charterers contended that the shipowners could only rely on the alternative 'or so near thereto as she may safely get' if the hindrance to the ship entering the dock was of a permanent nature, while the shipowners contended that they could rely on it if they could only get into the docks by waiting for an unreasonable time. This House held that the latter construction was the more reasonable and that on the facts the ship would have had to wait an unreasonable time in order to gain admittance to the docks. The passage in the speech of Lord Watson² to which Lord Denning MR refers in his judgment must be read in the context in which it was spoken, namely, in a case where not only had the parties not directed

¹ (1881) 6 App Cas 38, [1881-85] All ER Rep 572

² (1881) 6 App Cas at 59, [1881-85] All ER Rep at 582

their minds to the situation which in fact arose but also the language which they had used was susceptible of two different constructions. Similarly in *North West Metropolitan Regional Hospital Board v T A Bickerton & Son Ltd*¹, which was also relied on by the respondents, the language of the contract, as Cairns LJ points out, could mean either that the employer's duty to a sub-contractor was exhausted when it had been once exercised or that it fell to be exercised again if the first sub-contractor disappeared from the scene. In this case, by contrast, there is, as I see it, no ambiguity whatever in the wording of cl 21 (1) of conditions 'C' and what the respondents are asking the court to do is, in effect, to rectify the clause by the addition of some words which will make it accord not indeed with the actual intention of the parties but with the intention which the respondents say must be imputed to them. In such a case, as I have always understood the law, it is not enough for the party seeking to have the words varied to say to the court: 'We obviously did not mean what we have said, so please amend the clause so as to make it read in what you think is the most reasonable way'. He must establish not only that the parties obviously did not mean what they said but also that if they had directed their minds to the question they would obviously have framed the clause in the way for which he contends. In this case, as my noble and learned friend, Lord Pearson, points out, there are a number of different ways in which the clause might be varied so as to provide for the event of the completion of phase I being delayed. He instances four. I will add another—namely, that if the period of delay in respect of phase I allowed by the architect was accepted by the contractor as correct the time for the completion of phase III should be extended by that period, but that if it was not accepted by the contractor as correct the question what period of delay in respect of phase I ought to have been allowed should be submitted to arbitration during the six months' interval between the issue of the certificate of practical completion of phase I and the starting of the work on phase III so that the contractor would know when he started on phase III how long a time he would have in which to complete it—subject, of course, to any extension by reason of allowable delays occurring in the course of phase III itself. There is something to be said for and against each of these possible ways of dealing with the problem and one cannot say that the parties had they directed their minds to the question would, as reasonable people, at once have agreed that one of the ways was obviously the right way. If they had reached agreement on this point at all it would probably only have been after a process of negotiation in which the pros and cons of the various possibilities were canvassed in detail. Moreover if, contrary to my opinion, it is for the court in a case such as this to select what it considers to be on balance the fairest way of rewriting this clause, I would not in fact select that put forward by the respondents. In conclusion, I would say that I agree with what my noble and learned friend, Lord Pearson, has said with regard to *Dodd v Churton*².

Appeal allowed.

Solicitors: *Simmons & Simmons* (for the appellants); *J Tickle & Co* (for the respondents).

S A Hatteea Esq Barrister.

¹ [1970] 1 All ER 1039, [1970] 1 WLR 607

² [1897] 1 QB 562

a Sir Lindsay Parkinson & Co Ltd v Triplan Ltd

QUEEN'S BENCH DIVISION

MARS-JONES J

26th, 27th OCTOBER 1972

b COURT OF APPEAL, CIVIL DIVISION

LORD DENNING MR, CAIRNS AND LAWTON LJ

18th, 19th JANUARY 1973

Costs – Security for costs – Company – Limited company as plaintiff – Company likely to be unable to pay costs of defendant if successful in his defence – Discretion of court whether or not to order security – Exercise of discretion – Circumstances to be taken into account – Claim bona fide – Payment into court by defendant – Lateness of application by defendant – Companies Act 1948, s 447.

d Triplan, a small limited company, had done work for Parkinson, a large public company, as sub-contractors. Subsequently Triplan claimed that Parkinson owed them some £25,916 under the contract. The claim went to arbitration. In December 1971 Triplan delivered their points of claim and Parkinson then wrote them an open letter offering a sum in settlement, the offer being equivalent to a payment into court in High Court proceedings; the offer was not accepted. After points of defence had been delivered, the arbitrator fixed 3rd July 1972 as the date for the arbitration. In June 1972 Parkinson looked into the financial position of Triplan and, on 29th June, applied to the master under s 12 (6) of the Arbitration Act 1950 for an order that Triplan give security for Parkinson's costs under s 447^a of the Companies Act 1948. Parkinson adduced evidence that Triplan's financial position was precarious and that they would be unable to pay Parkinson's costs if Parkinson were successful. On that evidence the master held that he was required by s 447 to make the order sought and accordingly made an order in the sum of £1,500. Triplan appealed and **f** in consequence the arbitration had to be postponed. Triplan paid the arbitrator £300 as security for his fees and expenses. On appeal the judge held that he had a discretion whether or not to order security to be given and discharged the master's order. Parkinson appealed.

Held – The appeal would be dismissed for the following reasons—

g (i) when it was shown that there was reason to believe that a plaintiff company would be unable to pay the defendant's costs if the defendant were successful the court had a discretion under s 447 of the 1948 Act whether or not to order security for costs to be given (see p 285 c and f, p 286 f and p 287 h, post);

h (ii) (per Lord Denning MR and Lawton LJ) the court's discretion should be exercised considering all the circumstances of the case; in considering the circumstances the court could take into account a payment into court by the defendant, or an open offer, as tending to show that there was substance in the plaintiff company's claim and that it was made bona fide; accordingly the judge was entitled, taking into account Parkinson's offer and the lateness of the application for security, to refuse an order (see p 285 f and g, p 286 c and d and p 287 h, post);

j (iii) (per Cairns LJ) assuming that the court had a discretion which might be exercised in special circumstances to refuse an order for security, there were special circumstances in the instant case which justified a refusal; furthermore taking into account the amount of the offer made by Parkinson, and the fact that the information before the court showed that Triplan would be likely to recover more than £1,500,

^a Section 447 is set out at p 276 g, post

Parkinson had in effect obtained security to the extent of not less than £1,500 and therefore, as £1,500 would have been a proper sum to order, no order for security should be made (see p 286 f to h and p 287 b and c, post).

Dicta of James LJ in *Northampton Coal, Iron and Waggon Co v Midland Waggon Co* (1878) 7 Ch D at 503, 504, and of Denman J in *Pure Spirit Co v Fowler* (1890) 25 QBD at 237 not followed.

Notes

For security for costs by a company, see 6 Halsbury's Laws (3rd Edn) 451-453, para 875, and for cases on the subject, see 9 Digest (Repl) 731, 732, 4853-4864.

For the Companies Act 1948, s 447, see 5 Halsbury's Statutes (3rd Edn) 425.

For the Arbitration Act 1950, s 12, see 2 Halsbury's Statutes (3rd Edn) 444.

Cases referred to in judgments

Acrobin Ltd v Karstu Tenants' Association (1965) 110 Sol Jo 199.

City of Moscow Gas Co v International Financial Society Ltd (1872) 7 Ch App 225, 41 LJCh 350, 26 LT 377, 9 Digest (Repl) 731, 4859.

Cowell v Taylor (1885) 31 Ch D 34, 55 LJCh 92, 53 LT 483, CA, 5 Digest (Repl) 1061, 8567.

Demolition and Construction Co Ltd v Kent River Board [1963] 2 Lloyd's Rep 7.

Dominion Brewery Ltd v Foster (1897) 77 LT 507, 42 Sol Jo 133, CA, 9 Digest (Repl) 732, 4867.

Ebury Garages Ltd v Agard (1933) LJo 204, CA.

Evans v Bartlam [1937] 2 All ER 646, [1937] AC 473, 106 LJKB 568; sub nom *Bartlam v Evans* 157 LT 311, HL, 50 Digest (Repl) 169, 1458.

Gardner v Jay (1885) 29 Ch D 50, 54 LJCh 762, 52 LT 395, CA, 44 Digest (Repl) 316, 1468.

Gill All Weather Bodies Ltd v All Weather Motor Bodies Ltd (1934) 77 LJo 123, CA.

Hogan v Hogan (No 2) [1924] 2 IR 14.

Hope v Great Western Railway Co [1937] 1 All ER 625, [1937] 2 KB 130, 106 LJKB 563, 156 LT 331, CA, 51 Digest (Repl) 649, 2573.

Imperial Bank of China, India and Japan v Bank of Hindustan, China and Japan (1866) 1 Ch App 437, 35 LJCh 678, 14 LT 611, 12 Jur NS 493, 9 Digest (Repl) 732, 4866.

Jenkins v Bushby [1891] 1 Ch 484, 60 LJCh 254, 64 LT 213; subsequent proceedings 125 LJ 177, HL, 7 Digest (Repl) 282, 103.

McNeany v Maguire [1923] 2 IR 43.

Northampton Coal, Iron and Waggon Co v Midland Waggon Co (1878) 7 Ch D 500, 38 LT 82, CA, 9 Digest (Repl) 731, 4860.

Peppard and Co Ltd v Bogoff [1962] IR 180.

Pure Spirit Co v Fowler (1890) 25 QBD 235, 59 LJQB 537, 63 LT 559, DC, 9 Digest (Repl) 731, 4858.

Interlocutory appeal and cross-appeal

By an originating summons dated 19th June 1972, Sir Lindsay Parkinson & Co Ltd ('Parkinson') applied for an order that Triplan Ltd ('Triplan'), the claimants in pending arbitration proceedings in which Parkinson were respondents, give security for the costs of Parkinson to the satisfaction of the master under s 447 of the Companies Act 1948 and s 12 (6) of the Arbitration Act 1950. On 29th June Master Lubbock in chambers ordered that Triplan give security for the costs of Parkinson by paying into court within 42 days the sum of £1,500 and that in the meantime all further proceedings in the arbitration be stayed. Triplan appealed to the judge in chambers against that order and Parkinson cross-appealed on the ground that the security ordered was inadequate. Judgment was delivered in open court. The facts are set out in the judgment.

Gerald Levy for Triplan.

J A Tackaberry for Parkinson.

a **MARS-JONES J.** This is an appeal by the defendants against the decision of Master Lubbock given on 29th June 1972 ordering that there should be a stay of arbitration unless and until the defendants paid into court the sum of £1,500 by way of security for the plaintiffs' costs within 42 days. The plaintiff company cross-appeals against the master's decision on the ground that the security order was inadequate and that the sum of £1,500 should be increased to £3,500.

b The plaintiff company ('Parkinson') is a well-known public limited company which carries on business, inter alia, as building contractors. It has a nation-wide, indeed international, organisation and vast resources. The defendant company ('Triplan') is a small private limited company based on Manchester, which carries on a similar business on a very, very much smaller scale. The issued capital of that company is £10,000 made up of fully paid up ordinary shares of £1 each. They are almost entirely held by one Leonard Tibbey and his wife. They were, and are, the directors of Triplan and Mr Tibbey is and was the managing director. It was for all practical purposes his company. It had been in existence for upward of ten years and apparently carried on business successfully until recent times, providing employment for a considerable number of people in the building trade.

d On 21st October 1968 Triplan made an agreement with Parkinson to supply the labour necessary for the execution of certain joinery works included in a contract which Parkinson had already entered into with a property development company for the erection of an office block known as St Martin's House at Bootle. Triplan were sub-contractors for labour only; Parkinson were the main contractors. The specified price for the work was £8,219, but as a result of many extras and variations a great deal more work was done by Triplan than was originally contemplated, and Parkinson have already paid nearly £16,000 under that agreement.

e During the execution of the agreement, differences arose between Triplan and Parkinson and after an abortive attempt by Triplan to refer these differences to arbitration in 1969 they issued a writ against Parkinson in June 1971. In that action Triplan claimed some £25,900 on a quantum meruit for work done and materials supplied, alternatively as damages for breach of contract. Parkinson moved quickly. **f** They took out a summons to stay those proceedings under s 4 of the Arbitration Act 1950, and on 9th July, less than a month after the writ had been issued, a stay was ordered pending arbitration pursuant to an arbitration clause contained in the agreement. In November an arbitrator was appointed and the arbitration proceedings went on in the usual way. On 21st January 1972 Parkinson wrote an open letter to Triplan in these terms:

g 'My clients have considered this matter and are prepared to offer your clients the sum of [£x] and their reasonable costs in full satisfaction of their claim in this matter. It is intended that this offer shall be the equivalent to a payment into court in High Court proceedings with a corresponding effect on your clients' liability for costs should an award be made in your clients' favour below the figure mentioned. This offer will remain open for ten days.'

h An offer made in such terms is undoubtedly the equivalent of a payment into court (see *Demolition and Construction Co Ltd v Kent River Board*¹). It will be convenient to refer to this letter hereafter as 'the offer to settle'.

j On 7th April 1972 the arbitrator fixed 3rd July 1972 as the date for the hearing, which was estimated to last eight days. During the next two months Parkinson's legal advisers learned that Triplan were in financial difficulties and made further enquiries into the matter. In the event, on 19th June, Parkinson issued a summons asking for security for costs, and on Thursday, 29th June, Master Lubbock made the order which is the subject-matter of this appeal and cross-appeal. It will be observed that the order was made four days before the arbitration was to commence on the

Monday. The date had to be vacated and unfortunately this appeal and cross-appeal could not be disposed of before the long vacation. a

Having regard to the conclusions I have come to in this case, I can only express the hope that Triplan will not be called on to pay any part of the costs thrown away as a result of that date having to be vacated. It appears that they amount to nearly £600. One further material fact is that on 4th September 1972 Triplan paid the arbitrator £300 as security for payment of his fees and expenses. There was ample evidence before the master, which has also been placed before me, to show that the financial position of Triplan was and is precarious. Suffice it for the purposes of this judgment to read parts of the affidavit of Mr Albert Hague, a chartered accountant. Paragraph 2 states: b

‘I am familiar with the affairs and accounts of [Triplan], I have dealt with [Triplan’s] financial affairs since approximately 1962. Having examined the relevant records I verily believe that during the period of the contract to which the arbitration relates approximately £27,000 was paid by [Triplan] by way of wages to the men on site in relation to this contract which absorbed all the resources of this small company. This figure excludes any overhead profit or payment for materials that they were required to supply. I also believe that [Parkinson] have so far only paid the sum of approximately £15,000 in all against the above expenditure. On a purely cost basis therefore they are considerably out of pocket. It is within my knowledge that Triplan Limited have a further £27,000-odd owing to them by Messrs Tersons Limited and it is my belief that on settlement of the present action and this other action which is the subject of High Court proceedings to the extent of a little less than two-thirds Triplan’s creditors including the Inland Revenue, who are the largest creditors in relation to PAYE on the said wages, would be paid up and full scale trading would be resumed.’ c

It is well established that insolvency or poverty of an individual plaintiff is no ground for requiring him to give security for costs (see *Cowell v Taylor*)¹. But the position is different where the plaintiff is a limited company. Section 447 of the Companies Act 1948 provides: d

‘Where a limited company is plaintiff or pursuer in any action or other legal proceeding, any judge having jurisdiction in the matter may, if it appears by credible testimony that there is reason to believe that the company will be unable to pay the costs of the defendant if successful in his defence, require sufficient security to be given for those costs, and may stay all proceedings until the security is given.’ e

Counsel for Parkinson, who has argued his case with cogency and fluency, has submitted that the master had, and that I have, no alternative but to make an order in this case for such sum to be paid into court as will provide his clients with sufficient security to cover their costs. He founds that submission on two main facts. First, because of the way in which the Court of Appeal has interpreted the equivalent of this section in earlier legislation; secondly, because the prospects of Triplan recovering anything more than a small sum in the arbitration proceedings are remote. He has given me his own personal opinion of what the likely outcome of this arbitration will be. I have every respect for his personal opinion having regard to his experience in these matters, but I am not in a position, nor was the master, to be able to form any firm view about Triplan’s prospects of success, and if so to what extent, in a matter which is as complicated as this at this interlocutory stage. What I do know is that Parkinson have made an offer to settle for £x. Whether that is a f

a generous offer, a correct assessment of what is due to Triplan, or an inadequate offer, I am not in a position to say. I repeat, all I know is they have offered £x to settle this arbitration.

In support of his first point counsel for Parkinson has cited two cases decided in the Court of Appeal nearly 100 years ago. The first is *Northampton Coal, Iron and Waggon Co v Midland Waggon Co*¹. The headnote reads as follows:

b 'An action was commenced by a limited company which was in course of liquidation. The Defendants put in a defence, counter-claim and demurrer, and subsequently obtained an order for inquiries. After this, and about ten months after the original statement of claim had been delivered, the Plaintiffs obtained an order to amend, and made amendments raising a fresh case likely to require a great mass of additional evidence. The Defendants thereupon applied to have security for costs, which was refused by *Malins, V.C.*, in Chambers . . . Held . . . that as a new case which would cause a great increase of expense had been raised by the amendment, security for costs ought to be given.'

Sir George Jessel MR in the course of giving judgment said²:

d 'The next point is are they entitled to such security? Well, the *Companies Act*, 1862, s. 69, says that where a limited company is Plaintiff, any Judge having jurisdiction in the matter may, "if it appears by any credible testimony that there is reason to believe that if the Defendant be successful in his defence the assets of the company will be insufficient to pay his costs," require sufficient security to be given for such costs. I should say that the fact of the Plaintiff company being in liquidation would be sufficient "reason to believe" the assets to be insufficient unless evidence to the contrary was given . . . It appears to me, therefore, that the Appellants are entitled to what they ask.'

James and Thesiger LJJ agreed.

The second case is *Pure Spirit Co v Fowler*³. The headnote reads as follows:

f 'A shareholder in a company sued the company in the Chancery Division to set aside a contract on the ground of fraud in the prospectus. While this action was pending the company sued the shareholder in the Queen's Bench Division for calls. The company was in liquidation. The shareholder applied for an order that the company should give security for costs in the action for calls:— Held, that the fact that the company was in liquidation shewed, in the absence of evidence to the contrary, that there was reason to believe that if the defendant should be successful in his defence the assets of the company would be insufficient to pay his costs, and therefore the defendant was entitled to security for costs under the *Companies Act*, 1862 . . .'

In the course of his judgment Denman J said⁴:

h 'I am of opinion that the fact that a company is in liquidation forms of itself a reason to believe that the assets of the company will be insufficient to pay the defendant's costs. In *Northampton Coal, Iron and Waggon Co. v. Midland Waggon Co.*¹, Jessel, M.R., said³ [and he quoted the passage which I have already referred to and went on:] That, in my opinion, is decisive of the question, for the expression "I should say" is substantially equivalent to "I do say", and

1 (1878) 7 Ch D 500

2 (1878) 7 Ch D at 503

3 (1890) 25 QBD 235

4 (1890) 25 QBD at 236, 237

it is not a mere dictum. In the present case there is no evidence to the contrary. Then the Master of the Rolls continued¹: "It appears to me, therefore, that the appellants are entitled to what they ask." This passage shews that that case is really a decision that the fact of the company being in liquidation is in itself a prima facie reason to believe that if the defendant be successful in his defence the assets of the company will be insufficient to pay his costs, and therefore, if in the present case I thought we had a discretion, I should be prepared to follow the view expressed by the Master of the Rolls in the passage which I have read; but I think the case goes further than this, for in my opinion it shews that the Court is bound to order security for costs where the company is in liquidation, and there is no evidence to rebut the inference that the assets will be insufficient to pay the defendant's costs if he succeeds.'

Charles J said something of the same kind²:

'I am of the same opinion. The last case which has been referred to—*Northampton Coal, Iron and Waggon Co. v. Midland Waggon Co.*³— is an authority for the proposition that where a company is in liquidation this fact gives sufficient reason to believe that if the defendant be successful in his defence the assets of the company will be insufficient to pay his costs. In the present case there are no special circumstances to rebut the inference that the assets will be insufficient, and therefore the present case comes within the terms of s. 69 of the Companies Act, 1862. Without saying that in all cases s. 69 is absolutely imperative, still I think that, where there are no special circumstances to shew the contrary, the Court should exercise its discretion by ordering security for costs to be given.'

Counsel for Parkinson submits that the situation here is on all fours with that which existed in the *Northampton Coal* case³ and the *Pure Spirit* case⁴. Triplan is in precisely the same position as if it were in liquidation. Speaking for myself, if those Court of Appeal cases can be properly construed as meaning that I have no discretion to refuse to give security for costs in a case of this kind, I would limit it to cases where the company is actually in liquidation. Triplan is not. But, I am not prepared to hold that such is the proper construction to be placed on those observations by those members of the Court of Appeal. I am reinforced in that conclusion by a similar view which was expressed by Plowman J on the hearing of a procedure summons in *Acrobin Ltd v Karstu Tenants' Association*⁵. So far as I am aware, it is not reported save in an article on security for costs published in the *Solicitors' Journal*⁶. It is written by Mr Jack Hames of counsel. The relevant part of that article⁷ reads as follows:

'Whether court has discretion to make order. The second point raised was this: assuming that the facts are found which bring s. 447 into operation, i.e., that the company is unable to pay the defendant's costs, has the court a discretion in deciding whether or not to make an order, or is it bound to make an order? The Annual Practice 1966, at p. 506, contains this note:—"On the other hand, the wide discretion conferred on the court by r. 1 (1) . . . does not apply to security ordered under s. 447." The view appears to be held among many practitioners that once inability to pay is established, the case is virtually over and the court has, at best, a restricted discretion in deciding whether or not to make an order

1 (1878) 7 Ch D at 503

2 (1890) 25 QBD at 238

3 (1878) 7 Ch D 500

4 (1890) 25 QBD 235

5 23rd November 1965

6 (1965) 110 Sol Jo 199

7 (1965) 110 Sol Jo at 200

a for costs. That view is negatively supported by the use of the words "having regard to all the circumstances of the case" in the order, words which do not occur in the section. In *City of Moscow Gas Co. v. International Financial Society*¹, a case in which security for costs was sought against a company in liquidation, James, L.J., said²:—"but I am disposed to agree with the Master of the Rolls that, whenever a bill is filed in the name of a company which is being wound up, security for costs must be given, whether the bill be a purely cross bill or not."

b If these observations are treated as obiter, the point of the court's discretion was specifically taken in *Pure Spirit Co. v. Fowler*³ [the case to which I have already referred] . . . It was pointed out to the learned judge that either these cases were *sui generis*, or they did not go so far as to establish a rule restricting the extent of the court's jurisdiction in the exercise of its discretion, and if they did go that far, they were wrongly decided. Reliance was placed on the use of the word "may" in s. 447 and on a passage from the speech of Lord Wright in *Evans v. Bartlam*⁴, in which he said:—

"I see no reason to interfere with the judge's order. The respondent's counsel in my judgment has entirely failed to satisfy the onus of showing that the judge was wrong. Order 27, r. 15, gives a discretion untrammelled in terms: it does not even require an affidavit as a condition and the discretion may be exercised on any proper material, though in practice an affidavit is generally required. To quote again from Bowen L.J. in *Gardner v. Jay*⁵: 'When a tribunal is invested by Act of Parliament or by rules with a discretion, without any indication in the Act or rules of the grounds upon which the discretion is to be exercised, it is a mistake to lay down any rules with a view of indicating the particular grooves in which the discretion should run, for if the Act or the rules did not fetter the discretion of the judge why should the court do so?' Similarly it has been held by the Court of Appeal in *Hope v. Great Western Railway Co.*⁶, that the discretion to grant or refuse a jury in King's Bench cases is in truth, as it is in terms, unfettered. It is, however, often convenient in practice to lay down, not rules of law, but some general indications, to help the court in exercising the discretion, though in matters of discretion no one case can be an authority for another. As Kay, L.J., said in *Jenkins v. Bushby*⁷, 'the court cannot be bound by a previous decision, to exercise its discretion in a particular way, because that would be in effect putting an end to the discretion'. A discretion necessarily involves a latitude of individual choice according to the particular circumstances, and differs from a case where the decision follows *ex debito justitiae* once the facts are ascertained".

g "The contention that the court has a wide jurisdiction was accepted by Plowman, J., and by inference he accepted that the jurisdiction was as unlimited and untrammelled as the discretion given to it under Ord. 23. It follows that the note above referred to at p. 506 of the Annual Practice is wrong, and this conclusion accords with common sense; if the discretion is more limited it becomes necessary to indicate the extent of the limitation. Either the court has a discretion and that must be a wide discretion to take account of all relevant circumstances, or it has no discretion and the order is mandatory, so that s. 447 is thus restricted. Clearly the section is not restricted and the discretion is wide."

i 1 (1872) 7 Ch App 225
 2 (1872) 7 Ch App at 229
 3 (1890) 25 QBD 235
 4 [1937] AC 473 at 488, cf [1937] 2 All ER 646 at 655
 5 (1885) 29 Ch D 50 at 58
 6 [1937] 1 All ER 625, [1937] 2 KB 130
 7 [1891] 1 Ch 484 at 495

I agree. The 1973 edition of the Supreme Court Practice gives the effect of those decisions in these words¹:

'The fact that a company is in liquidation is prima facie evidence that it is unable to pay the costs unless evidence to the contrary is given.'

No one could quarrel with that. The words of which Mr Hames complained which appeared in the 1966 edition do not appear in the notes in the current edition. Accordingly, I hold that my discretion is unfettered even though there is before me credible evidence that if Parkinson are successful in their defence Triplan will be unable to pay their costs.

If the matter stopped there I would hesitate to make a substantial order for security for costs in this case because the result might well be that Triplan would be unable to proceed to arbitration. Nothing I have read or heard has led me to believe that this is anything but a claim put forward in good faith. It may be misconceived, it may be based on misapprehension, it may be based on miscalculation, but Triplan is a small company whose whole future depends on the outcome of this arbitration, and Parkinson is a large company with vast resources. The court is always mindful of the possibility that an order for security can become a weapon of oppression available to the strong to prevent the weak from getting access to the courts or the arbitrator to have their claims properly adjudicated according to law. For that reason alone I would not be prepared to make an order for security of costs in excess of the figure which the master arrived at, namely £1,500. However, the matter does not end there.

Counsel for Triplan submits that this is not a case where security for Parkinson's costs should be ordered at all because they already have sufficient security, namely, £x which they hold in their own hands on offer to Triplan and the £300 which the arbitrator holds as security for his fees and expenses. I accept the powerful and lucid argument presented by counsel. It seems to me to be beyond argument that those sums amounting to £x plus £300 do constitute security for Parkinson's costs. Counsel drew my attention to the note which appears in the White Book² which reads as follows:

'Again, if a defendant admits so much of a claim as would be equal to the amount for which security would have been ordered, the Court may refuse him security, for he can secure himself by paying the admitted amount into Court (*Hogan v. Hogan* (No. 2)³).

In *Hogan v Hogan* (No 2)³ the facts were as follows. The plaintiff, who resided out of the jurisdiction, sued the defendant for £144 13s 3d, money alleged to be due for work and labour done, goods sold and delivered and money paid. The defendant applied for security for costs, and the application was dismissed on a preliminary objection. He now renewed the application for a new summons founded on an affidavit in which he purported to show that he had a bona fide defence, but at the same time stated his willingness to pay £80 of the sum claimed, which sum he was about to lodge in court with his defence. He subsequently delivered his defence, bringing into court £80 with a denial of liability. Dodd J giving judgment is reported in these terms⁴:

'Exercising my discretion, it is clear I should not make an order for security for costs in this case. The mere fact of the defendant admitting a small portion of the demand of the plaintiff would not debar me in a fit case from making such an order. But if I made an order here, the security would probably be fixed in the office at £40 or £50. The defendant admits the plaintiff is entitled to £80,

¹ Volume 1, p 381

² Supreme Court Practice 1973, vol 1, p 377

³ [1924] 2 IR 14

⁴ [1924] 2 IR at 14

a which he proposes to lodge in Court. He can apply for an order that that sum be not paid out till the issue be determined. An order now is unnecessary, and would be futile. I refuse the motion with costs. As to the general principle underlying these orders, I refer to my decision in [a case¹ which he then mentions].

b Counsel for Parkinson has pointed out that this case is not binding on me, that it only has persuasive authority. Of course that is true, but it seems to me to make good sense.

The £x referred to in the offer to settle is to be treated as if it were paid into court. If it were in fact paid into court and this was an action and Triplan failed to recover more than that sum of money, Parkinson would ask for, and would get, the usual order that the money should remain in court pending taxation or agreement of their costs and that the amount of such costs should be paid out to them from that source, the balance if any to be paid to Triplan. As it happens the money remains throughout in their own hands, and the arbitrator would only order that the balance if any be paid to Triplan; at least that is what I anticipate would happen. To put the matter beyond doubt, counsel have settled an undertaking in agreed terms to which reference will be made hereafter.

d The only question that remains is whether £x is sufficient security within the meaning of s 447 of the Companies Act 1948. That question is dealt with in the current edition of the White Book²:

e "Sufficient security" within the above section ought not to be either illusory or oppressive (*Dominion Brewery v. Foster*³; *Imperial Bank of China and Japan v. Bank of Hindustan*⁴). It should be for the probable amount of costs taking into account the chance of the case collapsing, but of course the amount of security is in the discretion of the Court.

Counsel for Triplan has drawn my attention to *Dominion Brewery Ltd v Foster*⁴. The following exchange took place between counsel for the appellants and Sir Nathaniel Lindley MR⁵:

f [Counsel]: The words "sufficient security" in sect. 69 of the Companies Act 1862 must mean enough to satisfy the defendant's probable costs, which in the present case are computed at 1,000l. [LINDLEY, M.R.—We have to consider the possibility of a collapse of the action. The 1,000l. estimate is based on the assumption that the case will be fought out. [Counsel:] There is very little doubt as to that. The affidavit of the solicitor as to the amount likely to be incurred is uncontradicted. Security for costs ought to be security for the whole and not part of the costs. [LINDLEY, M.R.—The principle to be applied is that the security ought not to be illusory nor oppressive—not too little nor too much.]

g and in his judgment Sir Nathaniel Lindley MR said⁶:

h "This case turns upon the true construction of sect. 69 of the Companies Act 1862, and the proper mode of applying it. It is obvious that, as to a question of quantum such as this, you cannot lay down any very accurate principle or rule. The only principle which, as it appears to me, can be said to apply to a case of the kind is this, that you must have regard, in deciding upon the amount of the security to be ordered, to the probable costs which the defendant will be put to so far as this can be ascertained. It would be absurd, of course, to take the

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1 *McNeany v Maguire* [1923] 2 IR 43
2 Supreme Court Practice 1973, vol 1, p 381
3 (1897) 77 LT 507
4 (1866) 1 Ch App 437
5 (1897) 77 LT at 507
6 (1897) 77 LT at 508

estimate of the managing clerk to the defendant's solicitors and give him just what is asked for. You must look as fairly as you can at the whole case. We think that in the present case the security ordered by Kekewich, J. ought to be increased by the sum of 250*l.*, which will make it up to the sum of 600*l.* in all. We must take into account the chance of the case collapsing without coming to trial. And on the whole we think the sum of 600*l.* is a reasonable one, and is sufficient.' a

Chitty LJ said words to much the same effect¹:

'I really do not see how we can lay down any rule more useful than that, or any rule more precise. There must be some estimate made as to what expenses the defendant will be put to, and the court has to take a reasonable view of all the circumstances, the nature of the suit, or any other matters that may properly be brought in. The court is certainly not bound to give the amount of security which a defendant by his solicitors says he thinks will probably be the amount of his costs. I entirely agree with what has been said by the Master of the Rolls as to the proper amount to be given in the present case.' b

In that case it was £600 out of a sum of £1,000 put forward as the estimate of the probable costs. c

I gather it has become the practice to order something in the region of two-thirds of the best estimate the court can make of the probable costs in the normal run of cases. If that is so, then I would point out that building arbitrations of this kind are not the normal run of cases. The discount of two-thirds, or whatever proportion the court may decide, is made to cover the possibility that the whole of the probable costs would not be incurred because the case was settled or not proceeded with for some reason at some stage. Counsel for Parkinson has argued that the discount also takes into account the possibility that the plaintiff might succeed and that as the offer to settle includes an allowance for that possibility I should not make a further discount from my estimate of Parkinson's probable costs. That argument is not supported by authority and I reject it. In my judgment, where some reasonable assessment of the plaintiff's chances of success can be made at this interlocutory stage, and that must be comparatively rare, that would be relevant to the question of whether security for costs should be made or not, but not to the issue of quantum of the security to be ordered except insofar as a further discount might be called for in addition to that made for the possibility that the whole of the estimated costs might not be incurred. In an affidavit sworn on 26th June, Mr Button, who is a solicitor employed by Parkinson, estimated their probable costs at £3,500 based on an eight day hearing. In a later affidavit he added £1,250 to that sum to take into account the probable costs of having a case stated by the arbitrator and heard in the High Court with a right of appeal to the Court of Appeal. In an affidavit sworn some two or three days ago, he estimates the probable length of the case as either 17 days or 32 days. This alternative was based on a statement made by counsel for Triplan before the master that he might have to call all the workmen employed by Triplan on the Bootle site, a total of about 30 men. Mr Button's calculations produce the astronomical total of £11,000. I must say that that figure is, in my view, a wholly unrealistic assessment of Parkinson's probable costs. If this particular arbitration lasted for 15 days Parkinson's probable costs would not exceed £6,000. Very few arbitrations of this kind go beyond 15 days. This is accepted by both counsel. In practice arbitrations of this kind between main contractors and sub-contractors rarely see the light of the second week. The vast majority of them come to an end, for one reason or another, within the first few days. I would make no allowance for the costs of a possible case stated. If that situation should arise and Parkinson d
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a with to indulge in the luxury of having a point of law decided, that matter can be dealt with then, but I see no reason at all why that possibility should be taken into account in deciding what security for costs should be awarded in favour of Parkinson now.

Taking into account all the matters already adumbrated, I have come to the conclusion that £1,500 would amount to substantial security for Parkinson's costs. I have taken the master's figure, and I have come to the conclusion that that figure was right, taking into account all the relevant factors. However, as I consider that Parkinson already have security for their costs to a total figure in excess of £1,500, I can see no grounds for making any further order for security. Accordingly this appeal is allowed and the cross-appeal is dismissed. The stay is removed and the order for security is quashed.

c *Appeal allowed; cross-appeal dismissed. Stay of hearing of arbitration removed. Order for security for costs quashed. Leave to appeal granted.*

Solicitors: Pritchard, Englefield & Tobin, agents for William H Lill & Co, Altrincham (for Triplan); Roger Button (for Parkinson).

d E H Hunter Esq Barrister.

Interlocutory appeal

Parkinson appealed against the judgment of Mars-Jones J on the ground that the judge although correctly finding on the evidence of, inter alia, Triplan's accountant that Triplan, if they should fail in the arbitration would be unable to pay Parkinson's costs, had erred in fact and in law in refusing to increase or uphold the order for security made by Master Lubbock on 29th June 1972 for the following, among other, reasons: (i) he wrongly held himself able to distinguish or free to ignore the Court of Appeal's decision in *Northampton Coal, Iron and Waggon Co v Midland Waggon Co*¹, as explained by Denman J in *Pure Spirit Co v Fowler*²; (ii) he wrongly took into account an offer which had been made by Parkinson in an attempt to settle the proceedings at an early stage despite the fact that: (a) the time for unconditional acceptance thereof had long since lapsed; (b) to take such offers into account on applications for security for costs was contrary to public policy in that the making of such offers was thereby seriously inhibited; (iii) such offers, when designed as the arbitration equivalent of a payment in in court proceedings, were only effective to secure for the party making the offer an order for costs; and did not necessarily secure in any way whatsoever the costs themselves; (iv) the possibility of resolution by settlement or otherwise was already taken into account in the practice of the High Court in usually ordering that the amount of security should be two-thirds of the estimated costs of the matter should it be fought to completion.

g J A Tackaberry for Parkinson.

h Gerald Levy for Triplan.

LORD DENNING MR. Triplan are a small limited company. In 1968 and 1969 they did joinery work as sub-contractors for main contractors, Parkinson. The original contract price for the work was £8,219; but during the course of the contract, some of the work was omitted and a great deal of extra or new work was done. In the result Triplan claimed that they were entitled to £41,761.26 and had only been paid £15,845, leaving £25,916.26 owing to Triplan. In the first instance Triplan sought to have the matter put to arbitration; but Parkinson did not return the form and did

1 (1878) 7 Ch D 500

2 (1890) 25 QBD 235

not reply to letters. So on 17th June 1971 Triplan issued a writ against Parkinson claiming £25,916.26. Faced with a writ, Parkinson demanded arbitration. They applied to stay the action. It was stayed. The dispute went to arbitration. On 15th December 1971 points of claim were delivered by Triplan. Before delivering their points of defence, Parkinson wrote an open letter on 21st January 1972 to Triplan saying:

'My clients have considered this matter and are prepared to offer your clients the sum of [I will not state the figure openly because the arbitration is still pending] and their reasonable costs in full satisfaction of their claim in this matter. It is intended that this offer shall be the equivalent to a payment into court in High Court proceedings with a corresponding effect on your clients' liability for costs should an award be made in your clients' favour below the figure mentioned. This offer will remain open for ten days.'

Such an offer is, of course, equivalent to a payment into court: see *Demolition and Construction Co Ltd v Kent River Board*¹. Afterwards the points of defence were delivered. In April 1972 the arbitrator heard an application to fix a date for the arbitration. He fixed Monday, 3rd July 1972, and allowed eight days for it.

In June Parkinson looked into the financial position of Triplan. In consequence they determined to apply to the court for security for costs. An arbitrator cannot award security for costs of an arbitration; but the High Court can do so. That is shown by s 12 (6) of the Arbitration Act 1950. So Parkinson applied to the master for security for costs of the arbitration.

The application came before the master late on Thursday, 29th June. Parkinson made affidavits to the effect that the financial position of Triplan was precarious, and that there was reason to believe that Triplan would be unable to pay the costs of Parkinson if Parkinson were successful. On that evidence counsel for Parkinson argued that the court had no discretion, but *must* order security for costs to be given. Master Lubbock accepted that argument. He ordered security for costs to be given by Triplan in the sum of £1,500. They had not got the money to pay it. That was the Thursday evening. Triplan wanted to appeal to the judge in chambers. But there was no time to appeal. The arbitrator had fixed the hearing for Monday, 3rd July. So that date had to be vacated. As the arbitrator had allowed eight days for it, he had to be compensated for his lost days. On 4th September 1972 Triplan paid the arbitrator £300 as security for his fees and expenses.

On 26th October the appeal by Triplan came before the judge. Counsel for Parkinson submitted again that once it was shown that there was reason to believe that Triplan would be unable to pay the costs if Parkinson were successful, the court had no discretion but had to order security.

This point is so important that I must deal with it. Section 447 of the Companies Act 1948 provides:

'Where a limited company is plaintiff or pursuer in any action or other legal proceeding, any judge having jurisdiction in the matter may, if it appears by credible testimony that there is reason to believe that the company will be unable to pay the costs of the defendant if successful in his defence, require sufficient security to be given for those costs, and may stay all proceedings until the security is given.'

Does that section mean that the court *must* order security, or is it only that the court *may* in its discretion? There are some observations to the effect that it is *mandatory*. Thus in *Northampton Coal, Iron and Waggon Co v Midland Waggon Co*² James LJ said:

¹ [1963] 2 Lloyd's Rep 7 at 16

² (1878) 7 Ch D 500 at 503, 504

a '... I consider security for costs to be *ex debito justitiae*, and it is a very important matter whether a suitor is likely, if successful, to be able to obtain payment of his costs.'

In 1890, in *Pure Spirit Co v Fowler*¹, Denman J said:

b '... the Court is *bound* to order security for costs where the company is in liquidation, and there is no evidence to rebut the inference that the assets will be insufficient to pay the defendant's costs if he succeeds.'

Those observations seem to have been the basis of a note which was contained in the Annual Practice until 1966². The note said that the wide discretion conferred on the court in other cases 'does not apply to security ordered under' s 447.

c I do not think those observations are correct. I prefer to follow the cases³ which are to be found in the notes in the Law Journal Newspaper. Scrutton LJ said that there were too many applications against companies for security for costs. In his view 'the powers of the section should be carefully used'. Maugham LJ said:

d 'The section only confers a discretion on the Court. There may be many cases where a company is insolvent, and yet the Court would not order security to be lodged.'

I would add a case in 1962 in the Supreme Court of Eire. It is *Peppard and Co Ltd v Bogoff*⁴. Kingsmill Moore J said⁵:

e '... the section does not make it mandatory to order security for costs in every case where the plaintiff company appears to be unable to pay the costs of a successful defendant, but that there still remains a discretion in the Court which may be exercised in special circumstances.'

Turning now to the words of the statute, the important word is 'may'. That gives the judge a discretion whether to order security or not. There is no burden one way or the other. It is a discretion to be exercised in all the circumstances of the case.

f Mars-Jones J, in a full and careful judgment, took that view. He upset the master's order. He refused to order security for costs. Counsel for Parkinson asked for leave to appeal. He put it on the ground that it was an important point whether or not the court had discretion. It was so important that four or five solicitors were waiting in the court to hear the result of it. The judge gave leave to appeal.

g Now before us counsel for Parkinson concedes that his argument was wrong and that the judge was right. There seems to have been some misapprehension on the matter in the past. The sooner it is put right the better. If there is reason to believe that the company cannot pay the costs, then security *may* be ordered, but not *must* be ordered. The court has a discretion which it will exercise. The court has a discretion which it will exercise considering all the circumstances of the particular case. So I turn to consider the circumstances. Counsel for Triplan helpfully suggests some of the matters which the court might take into account, such as whether the company's claim is bona fide and not a sham and whether the company has a reasonably good prospect of success. Again it will consider whether there is an admission by the defendants on the pleadings or elsewhere that money is due. If there was a payment into court of a substantial sum of money (not merely a payment into court to get rid of a nuisance claim), that too would count. The court might also

i 1 (1890) 25 QBD 235 at 237

2 (1966) vol 1, p 506

3 I.e. *Ebury Garages Ltd v Agard* (1933) 76 LJo 204, *Gill All Weather Bodies Ltd v All Weather Motor Bodies Ltd* (1934) 77 LJo 123

4 [1962] IR 180

5 [1962] IR at 188

consider whether the application for security was being used oppressively—so as to try and stifle a genuine claim. It would also consider whether the company's want of means has been brought about by any conduct by the defendants, such as delay in payment or delay in doing their part of the work.

Counsel for Parkinson accepted that most of these were matters proper for consideration, but he urged that it was not legitimate to take into account a payment into court, or, as in this case, the open offer of a sum. But counsel for Triplan said it was an important matter which should be taken into account.

There is little authority on this matter. In *Hogan v Hogan* (No 2)¹, the court did take into account a payment into court. The report is a little confused. At one point it says that £80 was paid into court 'with a denial of liability'; and a few lines later the defendant 'admits the plaintiff is entitled to £80'. But howsoever that may be, I am quite clear that a payment into court, or an open offer, is a matter which the court can take into account. It goes to show that there is substance in the claim; and that it would not be right to deprive the company of it by insisting on security for costs. The judge took the offer into account here. He was fully entitled so to do. Looking at the matter quite generally, the claim of Triplan does seem to be a bona fide claim and to have a reasonable prospect of success, at least in part. And when one adds to that the fact that this application was made at a late hour on the Thursday when the arbitration was due to start on the Monday, I am quite clear that it was not a case for ordering Triplan to provide any security for costs at all.

I find myself in entire agreement with the judge. It is not a case for security for costs; and I would dismiss this appeal accordingly.

CAIRNS LJ. I agree that the appeal should be dismissed. So far as concerns the question whether when a company is the claimant and it is shown that the company would be unlikely to meet an order for costs if such order were made against it, the respondent to the claim is then entitled as a matter of right to an order for security, I agree that there is, or at least may be, a discretion in the court in relation to the matter. In my view the highest at which it can be put in favour of the applicants for security is the way in which it was put in the Irish case to which Lord Denning MR has referred, *Peppard and Co Ltd v Bogoff*², where it was said that there remains a discretion in the court which may be exercised in special circumstances; and, assuming that that is a correct statement of the law, I am quite satisfied that there were special circumstances here. There were special circumstances which I think might have led to the view that, quite apart from the offer that was made by Parkinson, there should be no order for security here at all. Those circumstances include the fact that the application for security, for one reason and another, was made only a day or two before the date that had been fixed for the hearing of the arbitration; the fact that the probable inability of the claimant to meet an order for costs was likely to be dependent on the very failure to recover the sums that were being claimed in this very arbitration, together with another parallel legal proceeding; and the fact that the result of an order for security in this case might well result in the claimants being unable to proceed at all with the claim which admittedly is a bona fide claim. However, an order for security was made by the master in the sum of £1,500. Apart from the offer that had been made by Parkinson, the learned judge agreed that that was a proper assessment of the sum; and I see no reason to differ from it. I do not base myself in any way on the fact that counsel for Parkinson was inclined in one part of his argument to say that that was not a sum that he could attack; I leave that out of account altogether. On the basis that the master and the judge both thought that that was a proper sum, I see no reason whatever to differ from them.

1 [1924] 2 IR 14

2 [1962] IR 180 at 188

a Then comes the question of what should be the effect in relation to that of the offer, the equivalent of payment into court. If the learned judge intended in his judgment to say that the whole amount of that offer might be taken in relation to the amount of security, I think it would be wrong. It is not altogether clear to me whether he did so mean; but the way I think it should be regarded is this: taking into account all the circumstances of the case, including the amount of the offer, is it likely that Triplan would recover more than the sum of £1,500? Now obviously
 b that is a question to which no certain answer could possibly be given at this stage of the proceedings, and it would be quite wrong that on an application for security for costs such details should be gone into as would enable the court to come to anything like a firm answer. What I think can be said is that on the information that the court has before it, the right conclusion is that the amount recovered would be likely to be more than that sum. For that reason I think that the proper view is that to that extent Parkinson have in effect got security to the extent of not less than
 c £1,500 and that therefore no order for security should be made.

I am not impressed by the argument that this would be likely to hinder parties from paying into court or making an offer such as was made by Parkinson in this case. In any case where the plaintiff or claimant has a prospect of recovering some sum in proceedings, it is a matter of simple prudence on the part of defendants
 d or respondents to make a payment in or an offer which will relieve them of having to pay in the long run what may be a heavy bill of costs resulting from a comparatively small award in favour of the plaintiff or claimant.

For these reasons I think that the judge came to the right conclusion and I too would dismiss the appeal.

e **LAWTON LJ.** There are now two judgments in favour of dismissing the appeal. In the ordinary way I would not have thought it appropriate to give further reasons for dismissal, but, having listened to the judgments already given, it seems to me the position is this: Lord Denning MR has said that in his judgment s 447 of the Companies Act 1948 gives a general discretion to the court which is to be exercised having regard to all the circumstances of the case. Cairns LJ, however, has dealt with the
 f problem before us on the basis of the Irish case of *Peppard & Co Ltd v Bogoff*¹ in which Kingsmill Moore J said²:

'I am of opinion that the section [he was referring to the Companies Act 1908] does not make it mandatory to order security for costs in every case where the plaintiff company appears to be unable to pay the costs of a successful defendant, but that there still remains a discretion in the Court which may be exercised
 g in special circumstances.'

There being a difference of emphasis between the two judgments already given, doubt may continue as to the construction of s 447 unless something is said by me. I agree with Lord Denning MR that the effect of s 447 is that once it is established by credible evidence that there is reason to believe that the plaintiff company will be
 h unable to pay the costs of the defendants if they are successful in their defence, the court has a discretion, and that discretion ought not to be hampered by any special rules or regulations, nor ought it to be put into a straitjacket by considerations of burden of proof. It is a discretion which the court will exercise having regard to all the circumstances of the case.

For those reasons I too would dismiss this appeal.

i *Appeal dismissed.*

Solicitors: Church, Adams, Tatham & Co (for Parkinson); Pritchard, Englefield & Tobin, agents for William H Hill & Co, Altrincham (for Triplan).

L J Kovats Esq Barrister.

Practice Direction

FAMILY DIVISION

Practice – Hearing – Matrimonial causes – Royal Courts of Justice – Circuit judges sitting as judges of High Court – Circuit judges hearing shorter High Court applications and ‘short’ High Court matrimonial causes – High Court judges hearing longer applications in county court matrimonial causes – Rules as to right of audience – Costs – Courts Act 1971, ss 20 (3), 23.

1. With a view to making the most efficient use of judicial time, from the commencement of Easter Term 1973, circuit judges (but not deputy circuit judges) sitting to hear matrimonial causes and applications at the Royal Courts of Justice will, in addition, under the provisions of s 23¹ of the Courts Act 1971, sit as judges of the High Court for the hearing of certain Family Division matters.

2. Similarly, High Court judges of the Family Division will continue to dispose of certain county court divorce applications under the provisions of s 20 (3)² of the Courts Act 1971.

3. It is intended that the longer and more substantial applications in county court matrimonial causes in chambers or in open court will in general be heard by judges of the High Court (Family Division) in addition to the normal Family Division business. The circuit judges sitting at the Royal Courts of Justice will, in addition to normal county court business, hear the shorter High Court applications in chambers and ‘short’ High Court matrimonial causes (i.e., those in which there is no contest).

4. In the daily cause lists causes and matters proceeding in the Family Division of the High Court will be marked ‘H.C.’, and county court matrimonial causes and matters will be marked ‘C.C.’

5. All ‘short’ High Court matrimonial causes to be heard by circuit judges will, so far as possible, be given fixed dates of hearing. All such causes already set down, or so soon as they are set down in future, may be fixed for hearing on application to the Clerk of the Rules.

6. Notwithstanding the new arrangements the normal rules as to right of audience will apply, e.g. a solicitor has no right of audience before a circuit judge when he is hearing a High Court cause but does have a right of audience before a High Court judge hearing a county court case. The High Court costs rules and scales will still apply to a High Court cause or matter, and the Matrimonial Causes (Costs) Rules 1971³ and the Divorce Scale to a cause or matter proceeding as in a divorce county court. Practitioners are reminded of the necessity of seeking a certificate for counsel appearing in county court applications whether heard before a judge of the High Court or a circuit judge.

9th April 1973

D NEWTON
Senior Registrar

¹ See 41 Halsbury's Statutes (3rd Edn) 310

² See *ibid*, p 308

³ SI 1971 No 987

Hammond v Haigh Castle & Co Ltd

NATIONAL INDUSTRIAL RELATIONS COURT

SIR JOHN DONALDSON P, MR R BOYFIELD AND MR H ROBERTS

30th JANUARY, 12th FEBRUARY 1973

- b* Industrial relations – Unfair industrial practice – Complaint – Procedure – Time limit – Not practicable in circumstances for complaint to be presented before end of limitation period – Meaning of ‘practicable’ – Industrial Tribunals (Industrial Relations, etc) Regulations 1972 (SI 1972 No 38), Sch, para 2 (1).
- c* Industrial relations – Unfair industrial practice – Complaint – Procedure – Time limit – Complaint to be presented before end of period of four weeks – Unfair dismissal – Period of four weeks beginning with the effective date of termination of contract – Meaning of ‘presented’ – Calculation of four week period – Industrial Tribunals (Industrial Relations, etc) Regulations 1972 (SI 1972 No 38), Sch, para 2 (1).
- d* An employee was dismissed with the result that his employment was effectively terminated on 31st July 1972. The employee sought to claim that he had been unfairly dismissed by his employers. The employee consulted his trade association and on 10th August sent them a completed form of complaint. On 22nd August the association by letter advised the employee to complete a new claim form and warned him that, because of the time limit on claims for unfair dismissal, imposed by para 2 (1)^a of the Schedule to the Industrial Tribunals (Industrial Relations) Regulations 1972^b, the form had to be returned to them for examination and be posted to the tribunal ‘to arrive before the end of August’. Paragraph 2 (1) in fact required the complaint to be presented to the tribunal within four weeks following the effective termination of the contract. On 25th August the employee sent the form to the association who posted it to the tribunal on 29th August. The form was received by
- e* 2 (1)^a of the Schedule to the Industrial Tribunals (Industrial Relations) Regulations 1972^b, the form had to be returned to them for examination and be posted to the tribunal ‘to arrive before the end of August’. Paragraph 2 (1) in fact required the complaint to be presented to the tribunal within four weeks following the effective termination of the contract. On 25th August the employee sent the form to the association who posted it to the tribunal on 29th August. The form was received by
- f* the tribunal on 30th August. The tribunal dismissed the complaint on the ground that it was out of time. The employee appealed contending that in the circumstances it was not ‘practicable’, within para 2 (1) of the Schedule to the 1972 regulations, to present his complaint before the end of the four week period.

g **Held** – (i) The four week period prescribed by para 2 (1) included the effective date of termination of the contract as part of the period of four weeks. Accordingly the employee’s complaint should have been presented on or before the 27th day thereafter, i.e. 27th August (see p 291 e and f, post); *Trow v Ind Coope (West Midlands) Ltd* [1967] 2 All ER 900 applied.

(ii) In the context of the regulations the word ‘practicable’ meant ‘capable of being carried out’ or ‘feasible’; the test was practicability ‘in the circumstances’ which

h included the circumstances surrounding the complaint and the complainant. Practicability in that context fell to be considered in the light of the general standards of ordinary people working in industry. The appropriate question was whether a jury composed of ordinary men and women employed in industry would consider that in all the circumstances it was practicable for the complaint to have been presented within the time limit. In the present case that question had to be answered

j in the affirmative since the employee had not been prevented by illness or any other cause from presenting his complaint; he had of his own choice put the complaint into the hands of the association and they too could have presented his claim within

a Paragraph 2 (1), so far as material, is set out at p 290 j to p 291 a, post

b SI 1972 No 38

the four week period. Accordingly the appeal would be dismissed (see p 292 h to p 293 c, post).

Per Curiam. A claim is 'presented' to a tribunal when it is received by the tribunal whether or not it is dealt with immediately on receipt. A claim is not 'presented' by the act of posting it addressed to the tribunal (see p 291 f and g, post).

Notes

For complaints to industrial tribunals of unfair industrial practice, see Supplement to 38 Halsbury's Laws (3rd Edn) para 677F, 10.

Cases referred to in judgment

Adsett v K & L Steelfounders & Engineers Ltd [1953] 1 All ER 97, [1953] 1 WLR 137; *aff'd* [1953] 2 All ER 320, [1953] 1 WLR 773, 51 LGR 418, CA, 24 Digest (Repl) 1072, 310.

Farquhar's Affairs, Re [1943] 2 All ER 781, CA, 17 Digest (Repl) 419, 10.

Lee v Nursery Furnishings Ltd [1945] 1 All ER 387, 172 LT 285, CA, 24 Digest (Repl) 1094, 433.

Trow v Ind Coope (West Midlands) Ltd [1967] 2 All ER 900, [1967] 2 QB 899, [1967] 3 WLR 633, CA, Digest (Cont Vol C) 955, 250a.

Cases also cited

Alston v Alston [1946] 2 All ER 62, [1946] P 203.

Arrigoni v Morgan Garages Trust Co (6th September 1972) unreported, IT.

Davis v Raisby Quarries Ltd (1972) 7 ITR 402, IT.

Rogers v Telephone Cables Ltd (2nd January 1973) unreported, IT.

Rosenthal v Louis Butler Ltd (21st June 1972) unreported, IT.

Appeal

This was an appeal by Albert William Hammond against the determination on a preliminary point of law by an industrial tribunal (chairman E G Wrintmore Esq) sitting in London, dated 25th October 1972, that the appellant's complaint of unfair dismissal against the respondents, Haigh Castle & Co Ltd, be dismissed for being out of time. The facts are set out in the judgment of the court.

John G C Phillips for the appellant.

Anthony Grabiner for the respondents.

Cur adv vult

12th February. **SIR JOHN DONALDSON P** read the following judgment of the court. The appeal turns on the time limit for making a claim for compensation for unfair dismissal. The appellant was employed as a sales manager by the respondent employers from 1967 until June 1972 when he was dismissed. The dismissal may have been fair or unfair, but this was never investigated by the tribunal for it unanimously decided that the appellant's claim was out of time and that it had no jurisdiction to consider the merits. Equally our consideration of the appeal has necessarily been confined to the time point.

Paragraph 2 of the Schedule to the Industrial Tribunals (Industrial Relations, etc) Regulations 1972¹ (and the equivalent Scottish regulations²) provides:

'(1) In relation to proceedings on complaints under section 106 of the [Industrial Relations Act 1971], a tribunal shall not entertain such a complaint unless it is presented before the end of the period of four weeks beginning—(a) in the case

¹ SI 1972 No 38

² The Industrial Tribunals (Industrial Relations, etc) (Scotland) Regulations 1972 (SI 1972 No 39)

a of a complaint relating to dismissal, with the effective date of termination . . . unless the tribunal is satisfied that in the circumstances it was not practicable for the complaint to be presented before the end of that period.

'(2) In cases to which section 106 of the 1971 Act applies, a tribunal may postpone the hearing for such period as the tribunal may think fit for the purpose of giving an opportunity for the complaint to be settled by way of conciliation and withdrawn . . .'

b The chronology of the appellant's complaint is as follows. The effective date of the termination of his employment is agreed to be 31st July 1972. On or before that date he consulted the United Commercial Travellers' Association, of which he was a member, and on 10th August he sent the association a completed form of complaint. On 17th August the association consulted its solicitors who replied next day advising
c that the claim should be against the present respondents and not against some other company named in the claim. On 22nd August the association advised the appellant to obtain and complete a new claim form naming the respondents as his former employers. It also pointed out to him that there was a very strict time limit on claims for unfair dismissal. In the light of this time limit, the association said that the form must be 'returned to us for examination and posting to the Tribunal Secretary to arrive before the end of August'. On 25th August the association wrote again saying
d that the new form must reach the association's office by first post on 29th August or, if this was impossible, must be posted direct to the tribunal with a copy to the association. The letter ended by saying that the claim must be received by the tribunal on or before 31st August to qualify. On the same day the appellant had in fact sent the form to the association. The association posted it to the tribunal on 29th August
e and it was received by the tribunal on 30th August.

In the light of the decision of the Court of Appeal in *Trow v Ind Coope (West Midlands) Ltd*¹ it is clear that a period beginning with the effective date of termination includes that date as part of the period of four weeks. Accordingly, on the facts of this case the complaint had to be 'presented' on or before the 27th day thereafter, namely 27th August and not on or before 31st August as advised by the association. The time
f limit is four weeks and not one calendar month.

Although it is immaterial to the present appeal, we have been asked to express our opinion on the meaning of the word 'presented'. In our judgment a claim is presented to a tribunal when it is received by the tribunal whether or not it is dealt with immediately on receipt. Thus a claim delivered to the tribunal office by post on a Saturday is presented on that day even if not registered before the following
g Monday. A claim is not, however, presented by the act of posting it addressed to the tribunal.

It follows that the appellant's claim was out of time unless he can bring himself within the exception by satisfying the tribunal 'that in the circumstances it was not practicable for the complaint to be presented before the end of that period'. As to this the tribunal said:

h '6. We accept that [the appellant] acted reasonably in consulting his association, but can this be said to be sufficient? It comes down to a definition of the word "practicable" in the proviso to [para 2 (1)]. In the case of *Lee v Nursery Furnishings*², Lord Goddard³ applied the Oxford Dictionary definition which is "capable of being carried out in action" or "feasible". In the case of *Adsett v K & L Steel Founders and Engineers Ltd*⁴ [Parker JJ] stated⁵ that "practicable" must
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1 [1967] 2 All ER 900, [1967] 2 QB 899

2 [1945] 1 All ER 387

3 [1945] 1 All ER at 389

4 [1953] 1 All ER 97, [1953] 1 WLR 137

5 [1953] 1 All ER at 98, [1953] 1 WLR at 141

impose a stricter standard than "reasonably practicable"; while in the case of *Re Farquhar*¹ Lord Greene MR² refused to equate the word "practicable" with "reasonable" or "equitable" or "fair". The result is that we regret the proviso cannot apply to [the appellant]. He acted reasonably and this we accept; his Association delayed and indeed they may even have given incorrect advice about the date in which his application should be sent in. But it remained possible for his application to have been presented within the four weeks. The presentation within four weeks, to use the language of the Oxford Dictionary, was "capable of being carried out in action". We accept that this is harsh; we hope the regulations in future may be amended, but it is our duty to apply the law as we find it.³

This is by no means the first occasion on which a tribunal has expressed the hope that this regulation may be amended, but it is right to point out that the Secretary of State for Employment is bound by para 5 of Sch 6 to the Industrial Relations Act 1971. This schedule would require amendment before the regulations could be changed. Furthermore, the Donovan Commission³ reported that it was a necessary part of a satisfactory procedure for claims for unfair dismissal that it should operate speedily and recommended that claims should be lodged within five working days of dismissal. A different approach to the same objective was adopted by the previous government in their Bill which was published on 29th April 1970 but never enacted. This provided that written notice of claim must be given to the employer or at an employment exchange within 15 days of the relevant date but that if this were done the claim could be presented at any time within six months. It also provided for an extension of the 15 days notice period if the employee was prevented by sickness or other reasonable cause from giving it within that time, provided always that it was given as soon as reasonably practicable thereafter.

The problem for the legislature is to strike a proper balance between, on the one hand, the need for speed in the context of conciliation, reinstatement, re-engagement or the payment of compensation and, on the other, giving reasonable time to a complainant who may be unaware of his rights and is probably suffering from the disruptive effects of the dismissal itself. Into this equation must also be inserted the need of the employer to have prompt notice of any claim whilst the facts are fresh in the minds of all. It is not easy to find an ideal solution and those concerned may well wish to reconsider the present provisions in the light of the practical experience which is now being accumulated.

Meanwhile, as the tribunal pointed out in the present case, it is for this court and the industrial tribunals to apply the law as they find it. The proviso gives the tribunal jurisdiction to hear a complaint of unfair dismissal if, but only if, in the circumstances it was not practicable for the complaint to have been presented within the four week period.

We agree with the tribunal that in the context of the regulations the word 'practicable' bears its dictionary meaning of 'capable of being carried out in action' or 'feasible'. We also accept that the test of 'practicability' is stricter than that of 'reasonable practicability', but the difference is more significant where the two expressions are used in different sections of the same statute, presumably in contradistinction. Thus Parker J in *Adsett v K & L Steelfounders & Engineers Ltd*⁴ was construing the word 'practicable' in s 47 (1) of the Factories Act 1937, s 50 of which used the words 'reasonably practicable'. In the present context we do not consider that it is necessary or right to apply any absolute standard of practicability and, as the regulation expressly

1 [1943] 2 All ER 781

2 [1943] 2 All ER at 783

3 See the Report of the Royal Commission on Trade Unions and Employers' Associations 1965-1968 (Cmnd 3623), p 147, para 546

4 [1953] 1 All ER 97, [1953] 1 WLR 137

a states, the test is practicability 'in the circumstances' which must include the circumstances surrounding the complaint and the complainant. Practicability in this context falls to be considered in the light of the general standards of ordinary people working in industry. Accordingly the question which members of tribunals have to ask themselves is: 'Would a jury composed of ordinary men and women employed in industry consider that in all the circumstances it was practicable for the complaint to have been presented within the time limit?'

b If we ask ourselves this question in the present case, the answer must be in the affirmative. The appellant was not prevented by illness or any other cause from presenting his complaint. He had a choice whether to do so himself or to use skilled advisers and agents. He chose the latter course and placed the matter in the hands of an association of which he was a member. They, like the appellant, could have presented the complaint within the four week period. The reason why it was not so presented was quite simply that they did not realise that the time limit expired on 27th August.

c Accordingly we agree that the tribunal was unable to adjudicate on the appellant's complaint. We sympathise with the appellant but the experience of other courts is that even when the time limit for taking a step is much longer, it still sometimes happens that professional advisers allow the time to expire without taking the appropriate action. In such circumstances the remedy is not for the court to extend the time, which may cause great hardship to the other party, but for the disappointed litigant to consider whether his adviser is liable to make good such loss (if any) as he may have suffered.

d Although it is no consolation to the appellant, this appeal will have served a most useful purpose if our judgment leads to a wider knowledge by employees of what are their rights. If they think that they have been unfairly dismissed and want to claim compensation, they must get a copy of Form ITR which is obtainable from the office of their local industrial tribunal or any office of the Department of Employment. The completed form must reach the office of the industrial tribunal not later than 27 days after they cease working for the employer. But it is far better to send it in sooner. This enables officers of the Department of Employment to attempt conciliation with the employer and to explore the possibility of the employee being reinstated or re-engaged. Putting in a claim at once has no disadvantages. The tribunal will not deal with it before all possibility of conciliation has been exhausted. No expense is involved and the form is very simple to complete. If later the employee does not wish to proceed with the claim, he can withdraw it. But if he lets the 27 days go by without making a claim, he will have lost all his rights.

e There is one further matter which should be mentioned. Many employees will be able to obtain assistance from their trade union in connection with a claim for unfair dismissal. Such assistance is desirable but not essential, for the right to claim compensation is personal to the employee concerned and is not affected by membership of any particular union or membership of none.

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h *Appeal dismissed.*

Solicitors: Rollit, Sons & Haydon (for the appellant); Keene, Marsland & Co (for the respondents).

Gordon H Scott Esq Barrister.

Midland Foot Comfort Centre Ltd v Richmond ^a and another

NATIONAL INDUSTRIAL RELATIONS COURT

SIR JOHN DONALDSON P, MR R BOYFIELD AND MR H ROBERTS

12th, 27th FEBRUARY 1973

Industrial relations – Unfair dismissal – Redundancy – Compensation for unfair dismissal and redundancy payment – Redundancy a reason justifying dismissal – Presumption of redundancy for purposes of redundancy payment – Onus on employer to show redundancy as a reason justifying dismissal – Circumstances in which tribunal competent to award both compensation for unfair dismissal and redundancy payment – Redundancy Payments Act 1965, s 9 (2) (b) – Industrial Relations Act 1971, s 24 (1), (2), (6). ^c

Industrial relations – Unfair dismissal – Redundancy – Presumption of redundancy for purposes of redundancy payment – Employer rebutting presumption – Employer failing to show that reason for dismissal justified – Compensation – Award reflecting loss of accrued rights to redundancy payment. ^d

Where an employee has been dismissed he may be entitled both to a redundancy payment and to compensation for unfair dismissal. If the industrial tribunal is not satisfied as to the true reason for the dismissal the employee will be presumed, for the purposes of a redundancy payment, to have been dismissed by reason of redundancy by virtue of s 9 (2) (b)^a of the Redundancy Payments Act 1965, but the employer will have failed to discharge the onus imposed on him by s 24 (1)^b of the Industrial Relations Act 1971 of showing that the employee was not unfairly dismissed in that his dismissal was for redundancy or for any of the other reasons specified in s 24 (2) of the 1971 Act or ejusdem generis. Alternatively, even if the employer succeeds in showing that the reason for dismissal was redundancy, the tribunal may find, applying the criteria set out in s 24 (6) of the 1971 Act, that the dismissal was not justified (see p 298 b d g and j, post). ^e

If the tribunal is satisfied that the principal reason for the employee's dismissal was other than redundancy but was not a reason which justified the dismissal under s 24 of the 1971 Act the presumption of dismissal for redundancy will have been rebutted but the award of compensation for unfair dismissal will reflect the loss of ^f

^a Section 9 (2), so far as material, is set out at p 297 h, post

^b Section 24, so far as material, provides:

'(1) In determining for the purposes of this Act whether the dismissal of an employee was fair or unfair, it shall be for the employer to show—(a) what was the reason (or, if there was more than one, the principal reason) for the dismissal, and (b) that it was a reason falling within the next following subsection, or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which that employee held. ^h

'(2) In subsection (1) (b) of this section the reference to a reason falling within this subsection is a reference to a reason which—(a) related to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do, or (b) related to the conduct of the employee, or (c) was that the employee was redundant, or (d) was that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment ... ^j

'(6) ... the determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend on whether in the circumstances he acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and that question shall be determined in accordance with equity and the substantial merits of the case ...'

- a accrued rights to a payment in the event of dismissal for that reason and the likelihood that, if not dismissed for other reasons, the employee would have been dismissed for redundancy and received that payment (see p 298 h, post).

Notes

- b For unfair dismissal, see Supplement to 38 Halsbury's Laws (3rd Edn) para 677B, 18-20, and for dismissal by reason of redundancy, see *ibid* para 808c, 1.
For the Redundancy Payments Act 1965, s 9, see 12 Halsbury's Statutes (3rd Edn) 246, and for the Industrial Relations Act 1971, s 24, see 41 *ibid*, 2090.

Appeal

- c Midland Foot Comfort Centre Ltd appealed to the National Industrial Relations Court against the decision, dated 24th July 1972, of an industrial tribunal (chairman A R F Dickson Esq) sitting at Birmingham that the respondent, Margaret Joyce Richmond, formerly Moppett ('Miss Moppett'), was entitled to a redundancy payment and compensation for unfair dismissal from the appellants. The appellants' grounds of appeal were (1) that Miss Moppett had not been dismissed; (2) that, if she had been dismissed, it was the result of industrial misconduct or inefficiency, and (3) that Miss Moppett was not redundant. On 11th December 1972 the court
d (Sir John Donaldson P, Mr R Davies and Mr H Roberts) heard argument limited to the first issue and held that there were no grounds for reversing the tribunal's decision that Miss Moppett had been dismissed. The court adjourned the hearing of the remaining issues to enable the Secretary of State for Employment to be joined as a respondent to the appeal under r 52 of the Industrial Court Rules 1971¹. The
e hearing of those issues took place before a differently constituted court. The facts are set out in the judgment of the court.

Stanley Hooper for the appellants.

A C Myer for Miss Moppett.

Christopher Sumner for the Secretary of State for Employment.

Cur adv vult

- 27th February. **SIR JOHN DONALDSON P** read the following judgment of the court. The industrial tribunal sitting in Birmingham unanimously decided that Miss M J Moppett was entitled to a redundancy payment of £180 and also that
g she had been unfairly dismissed in circumstances which entitled her to payment of compensation which the tribunal assessed at £200. These awards were cumulative. Miss Moppett has since married and is now Mrs Richmond, but it was thought more convenient to refer to her by her maiden name for the purposes of the argument and we shall do likewise in this judgment.

- h In April 1959 Miss Moppett entered the employment of Midland Foot Comfort Centre Ltd. That company owned a shoe shop in Birmingham which sold a specialised range of shoes and Miss Moppett was employed there as a receptionist. Three or four years later Miss Moppett was promoted to the post of secretary/book-keeper and in October 1970 to that of manageress of the shop.

- i In April 1972 the company sold the assets and goodwill of the Birmingham shop to Mrs Persaud who registered 'Midland Foot Comfort Centre' as her business name in respect of the business carried on at that shop. Mrs Persaud renewed Miss Moppett's contract of employment with the substitution of her name as employer for that of the company. Accordingly there was continuity of employment for the purposes of a claim under the Redundancy Payments Act 1965 (see s 13) and of a

claim for compensation for unfair dismissal under the Industrial Relations Act 1971 (see the Industrial Relations (Continuity of Employment) Regulations 1972¹, made under s 151 (3) of the 1971 Act). a

Miss Moppett alleged before the tribunal that she was dismissed on 22nd May 1972 and that this dismissal was unfair. She claimed a redundancy payment and compensation for unfair dismissal. The appellants resisted this claim on three grounds, namely (a) that Miss Moppett left of her own accord and was not dismissed; b (b) that if she was dismissed it was as a result of industrial misconduct or inefficiency, and (c) that Miss Moppett was not redundant. All these issues were decided by the tribunal in favour of Miss Moppett.

The appellants appealed to this court which consisted of Mr Davies, Mr Roberts and myself. It then became apparent that issues of some general importance could arise involving the interrelationship of a claim for a redundancy payment and a claim for compensation for unfair dismissal. The court considered that such issues should not be argued without the Secretary of State for Employment being given an opportunity of being represented in his capacity as protector of the redundancy fund. The court therefore decided to limit the appeal in the first instance to the single issue of whether the tribunal had erred in law in finding that Miss Moppett was dismissed and to adjourn all other issues. c

The court, so constituted, dismissed the appeal insofar as it turned on that issue. In giving the court's reasons in an ex tempore judgment I said: d

'Counsel, who has said everything which can be said in favour of the appellants, would have liked no doubt to have submitted that the tribunal reached a wrong conclusion of fact on the evidence but that argument is not open to him since this court's jurisdiction is limited to considering questions of law. Faced with that almost insuperable problem he has, if we may say so, displayed the greatest ingenuity. The finding of fact by the tribunal was that Miss Moppett was told by Mr Persaud, who was the husband of the owner of the Midland Foot Comfort Centre, that she could leave either at once or at the end of the week. Miss Moppett chose the former of the two alternatives. She could not leave literally at once and during the short delay she made up her own insurance cards. The tribunal found as a fact, and apparently there was no issue about it, that one of her duties with the firm was to make up the cards of employees who were leaving the firm. She did this for herself. In counsel for the appellants' submission that act was done without authority because whilst it may have been open to Miss Moppett to make up other people's cards she could not make up her own cards. Accordingly he submits that in making up her own card she must have been acting for herself and not for the employer. In so doing she terminated her own employment. Suffice it perhaps to say that in our judgment that is a wholly unrealistic view of the situation. Given that Miss Moppett was entitled and bound under the terms of her employment to make up insurance cards for employees who were leaving, we can find no grounds on which any tribunal properly directing itself could conceivably reach the conclusion that her authority was limited to making up the cards of others. Of course she was entitled to make up her own card and indeed bound to do so. It follows that whatever other arguments might have been produced, in doing this she acted on behalf of her employer and not on her own behalf and did not dismiss herself. We reach this conclusion with the less regret because if counsel for the appellants' argument was sound, the only reason why Miss Moppett dismissed herself was that perhaps a matter of seconds before the time at which her contract of employment would otherwise have been terminated by the e
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i

a action of the employer, she did an act which had this entirely unexpected, unintended and surprising result. For these reasons we are quite satisfied that there are no grounds for disagreeing with or reversing the tribunal's finding that Miss Moppett was dismissed.'

b As the remaining issues were entirely unconnected with that of whether the tribunal was correct in law in finding that Miss Moppett was dismissed, there was no necessity for them to be determined by an identically constituted court. In the event Mr Davies was unable to be present and his place was taken by Mr Boyfield. Miss Moppett was represented by Mr Myer, the appellants by Mr Hooper and the Secretary of State by Mr Sumner, all of counsel.

c Counsel for the appellants submitted that on the evidence it was clear that at the time of Miss Moppett's dismissal the business was expanding and that there was no redundancy situation. In the circumstances the tribunal should not have found, as it did, that the appellants had failed to rebut the presumption that Miss Moppett was dismissed by reason of redundancy. It is doubtful whether this really is a question of law, but in any event it is a submission which in our judgment fails. The tribunal found that no new manageress was engaged after Miss Moppett left, that her work was done by part-time shop assistants and that the requirements of the business for a full-time manageress had diminished. It is clear that this was a small shop and Miss Moppett was a working manageress. The tribunal's finding, properly construed, was that the requirements of the business for employees to carry out work of a particular kind, namely managerial work, had diminished. That such a finding was open to it cannot be doubted since Mrs Persaud gave evidence that following her purchase of the business she and her husband managed it and therefore did not require a manageress. The requirements of a business for employees to carry out work of a particular kind can cease or diminish for at least two quite different reasons. In the first place, work of the particular kind may fall off. This is the usual situation. But an alternative is that while the need to do a particular kind of work continues unabated or increases, the employer reorganises the business in such a way that the work is not carried on by employees but by others. Those others may be independent contractors or, in cases in which the employer is not a corporate body, the employer himself. Whatever may have been the position of Mr Persaud, Mrs Persaud could not have been an employee and the transfer to her of some or all of Miss Moppett's managerial duties—Miss Moppett's remaining duties being performed by shop assistants—diminished the requirements of the business for employees to carry out work of that particular kind. This submission therefore fails.

g Counsel for the Secretary of State accepted that on the findings of the tribunal a redundancy situation existed at the time of Miss Moppett's dismissal. However, he submitted that the tribunal failed to distinguish between the two limbs of the presumption created by s 9 (2) (b) of the Redundancy Payments Act 1965. This provides:

h '... an employee who has been dismissed by his employer shall, unless the contrary is proved, be presumed to have been so dismissed by reason of redundancy.'

j The two limbs are (a) the presumption that a redundancy situation existed and (b) the presumption that the dismissal was by reason of that redundancy. In the submission of counsel for the Secretary of State, if the tribunal had properly directed itself it must have concluded that the presumption of causation was rebutted.

It is this submission that calls for a consideration of the interrelationship of a claim for a redundancy payment and one on grounds of unfair dismissal. In relation

to the claim for a redundancy payment it is for the employee to prove dismissal and for the employer to prove either that the employee was not redundant or that if he was, the dismissal was not wholly or mainly by reason of that redundancy. In relation to the claim for unfair dismissal, it is again for the employee to prove dismissal and it is then for the employer to show what was the principal reason for the dismissal and that it was one of the reasons set out in s 24 (2) of the 1971 Act or *eiusdem generis*. If he fails to show any reason or fails to show that it was one of the reasons which *could* justify a dismissal, the dismissal is an unfair industrial practice. If he succeeds in showing one of these reasons, the dismissal is potentially justified and the tribunal has to consider whether or not it was justified, applying the criteria set out in s 24 (6). The fact that an employee is redundant is a reason which could but will not necessarily prevent, a finding of unfair dismissal. But the presumption of redundancy and dismissal for that reason, which applies in relation to the redundancy payment claim, has no application to the claim for compensation for unfair dismissal (see para 8 of Sch 6 to the Industrial Relations Act 1971).

It follows that a situation could arise in which a tribunal, having taken account of the presumption found in relation to the claim under the 1965 Act that the employee was redundant and was dismissed by reason of that redundancy, but was not satisfied by the employer's evidence that this was the reason for the dismissal and so found that the dismissal was unfair. This much was, we think, accepted by counsel for the Secretary of State. But he submits that the position is or is likely to be different where, as here, the employer seeks to show that the dismissal was for some reason other than redundancy. Here the appellants charged Miss Moppett with industrial misconduct and inefficiency. The tribunal rejected both charges and added, for good measure, that even if the appellants had been able to prove her allegation of inefficiency or deliberate failure to carry out instructions in relation to finding a source of supply for certain shoes, it would not have been a sufficient reason for dismissing Miss Moppett. In the submission of counsel for the Secretary of State this leaves the position that on the uncontradicted evidence of the appellants, Miss Moppett was dismissed because the appellants quite wrongly considered that she had been guilty of industrial misconduct and inefficiency, but that she was not dismissed by reason of redundancy.

We accept that where there are claims under both the 1965 and the 1971 Acts the tribunal in considering the claim to a redundancy payment must take full account of the employer's evidence as to the reason for the dismissal even if, as will usually be the case, this evidence is primarily addressed to rebutting the claim that the dismissal was unfair. If the tribunal is satisfied that the reason was redundancy, no problem arises. If it is left in doubt as to the true reason, the dismissal is unfair and the presumption provided by the 1965 Act entitles the applicant to a redundancy payment. But if the tribunal is satisfied on the evidence that the principal reason for the dismissal was other than redundancy and was not a s 24 reason, e.g. an unreasonable personal dislike of the employee, the dismissal will be unfair but the claim to a redundancy payment will fail because the presumption of dismissal for redundancy will have been rebutted. Of course, in such an event, the amount of the award of compensation will reflect the loss of accrued rights to a redundancy payment in the event of dismissal for that reason and the likelihood that, if not dismissed for other reasons, the employee would have been dismissed for redundancy and received that payment.

It follows that in our judgment it is quite possible for an applicant to be awarded both a redundancy payment and compensation for unfair dismissal and that this may be the likely result if the evidence of the reason for the dismissal is unsatisfactory and the tribunal is left in doubt on this aspect. That in our judgment was the position in the present appeal and we are not satisfied that the decision of the tribunal was wrong.

If the Secretary of State considers as a matter of policy that the redundancy fund

a should not be involved in paying rebates to employers who unfairly dismiss their employees the remedy lies in making regulations under s 150 (2) of the 1971 Act. Meanwhile, no such regulations having been made, such rebates may sometimes become payable.

For these reasons the appeal will be dismissed.

b Appeal dismissed.

Solicitors: *Pepper, Tangye & Winterton*, Birmingham (for the appellants); *Kingsford, Dorman & Co*, agents for *Glaisyer, Porter & Mason*, Birmingham (for Miss Moppett); Solicitor, *Department of Employment*.

Gordon H Scott Esq Barrister.

McAlwane v Boughton Estates Ltd

d NATIONAL INDUSTRIAL RELATIONS COURT
SIR JOHN DONALDSON P, MR R BOYFIELD AND MR ROBERT ROBERTS
20th FEBRUARY 1973

e Employment – Redundancy – Dismissal by reason of redundancy – Dismissal – Meaning – Notice to employee to terminate contract of employment – Employee verbally requesting termination of contract on date prior to expiry of notice – Employers agreeing to request – Employee leaving before expiry date – Whether employee ‘dismissed’ or whether consensual termination of contract – Redundancy Payments Act 1965, s 4 (1), (2).

f Industrial relations – Unfair dismissal – Dismissal – Meaning – Notice to employee to terminate contract of employment – Employee verbally requesting termination of contract on date prior to expiry of notice – Employers agreeing to request – Employee leaving before expiry date – Whether employee ‘dismissed’ or whether consensual termination of contract – Industrial Relations Act 1971, s 23 (3).

g On 20th March 1972 an employee was given notice terminating his contract of employment on 19th April. On 10th April the employee verbally asked his employers if he could leave their employment on 12th April. The employers agreed and made various payments to the employee on the basis that his employment would end on 12th April. The employee finished work on that date. Subsequently, the employee applied to an industrial tribunal for a redundancy payment and/or compensation for unfair dismissal. Evidence adduced by the employers was to the effect that the employee had been ‘allowed to go’ at a date earlier than that specified in the notice. The tribunal held that since the employee had not given written notice to his employers in accordance with s 4^a of the Redundancy Payments Act 1965 and

a Section 4, so far as material, provides:

j ‘(1) The provisions of this section shall have effect where—(a) an employer gives notice to an employee to terminate his contract of employment, and (b) at a time within the obligatory period of that notice, the employee gives notice in writing to the employer to terminate the contract of employment on a date earlier than the date on which the employer’s notice is due to expire.

‘(2) Subject to the following provisions of this section, in the circumstances specified in the preceding subsection the employee shall, for the purposes of this Part of this Act, be taken to be dismissed by his employer, and “the relevant date” in relation to that dismissal shall be the date on which the employee’s notice expires...’

s 23 (3)^b of the Industrial Relations Act 1971, he had not been dismissed by his employers. The employee appealed. For the employers it was contended that the contract of employment had been terminated not by dismissal but by mutual agreement between the parties. a

Held – (i) The tribunal had erred in interpreting the employee's request to leave his employment at an earlier date as the giving of notice by an employee to an employer for the purposes of s 4 of the 1965 Act or of s 23 (3) of the 1971 Act (see p 301 g, post). b

(ii) The evidence before the tribunal did not indicate that the employers and the employee had mutually agreed to terminate the contract of employment. The fact that the employee had been 'allowed to go' was quite inconsistent with such a consensual termination of the contract; that fact was consistent only with a variation of the employers' notice. It followed that the employee had been dismissed by his employers and the case would be remitted to the tribunal to determine whether the employee had been redundant and/or unfairly dismissed (see p 302 a to c and e and h, post). c

Per Curiam. It would be a very rare case indeed where it could properly be found that the employer and the employee had got together and, notwithstanding a current notice of termination of the contract, agreed mutually to terminate the contract, particularly when the financial consequences to the employee were realised (see p 302 f, post). d

Notes

For unfair dismissal, see Supplement to 38 Halsbury's Laws (3rd Edn) para 677B, 18, 19; for dismissal by reason of redundancy, see *ibid* para 808C, 1, 2.

For the Redundancy Payments Act 1965, s 4, see 12 Halsbury's Statutes (3rd Edn) 241. e

For the Industrial Relations Act 1971, s 23, see 41 *ibid* 2088.

Appeal

This was an appeal by Edward McAlwane against the decision, dated 7th November 1972, of an industrial tribunal (chairman D G Brown Esq) sitting at Bedford, that the appellant was not entitled to a redundancy payment and/or compensation for unfair dismissal from the respondents, Boughton Estates Ltd. The facts are set out in the judgment of the court. f

Mr O H Parsons, solicitor, for the appellant.

Jeremy Roberts for the respondents. g

SIR JOHN DONALDSON P delivered the following judgment of the court. This is an appeal by Mr McAlwane from an unanimous decision of an industrial tribunal sitting at Bedford which dismissed his application under the Redundancy Payments

^b Section 23, so far as material, provides:

(1) In this Act "dismissal" and "dismiss" shall be construed in accordance with the following provisions of this section. h

(2) Subject to the next following subsection, for the purposes of this Act an employee shall be taken to be dismissed by his employer if, but only if,—(a) the contract under which he is employed by the employer is terminated by the employer, whether it is so terminated by notice or without notice, or (b) where under that contract he is employed for a fixed term, that term expires without being renewed under the same contract. i

(3) Where an employer gives notice to an employee to terminate his contract of employment and, at a time within the obligatory period of that notice, the employee gives notice in writing to the employer to terminate the contract of employment on a date earlier than the date on which the employer's notice is due to expire, the employee shall for the purposes of this Act be taken to be dismissed by his employer, and the reasons for the dismissal shall be taken to be the reasons for which the employer's notice is given . . .

a Act 1965 and (in respect of unfair dismissal) under the Industrial Relations Act 1971. The basis of the dismissal was, in the tribunal's view, that the contract of employment was terminated by the appellant and not by the respondents, his employers. We can take the facts from the reasons of the tribunal:

b '1. On the 11 April 1968 the [appellant] entered the respondents' employ as a painter and decorator. The respondents' own some 1,000 acres in Northamptonshire. Mr Royston is the agent under whom there is a clerk of works, Mr Howlett. Mr Howlett is responsible for the upkeep and repair of various properties and his staff consisted of between 16 and 20 men, including bricklayers, thatchers, painters, decorators, mechanics, carpenters, plumbers and labourers. The [appellant] was working under Mr Howlett.

c '2. On 20 March [1972] a letter was written by Mr Royston . . . to [the appellant] informing him that for various reasons his employment was being terminated with effect from Wednesday 19 April 1972. On 10 April the [appellant] went to the respondents and asked to leave on 12 April.'

d The respondents agreed and made various payments to the appellant on the basis that his employment was to be terminated on 12th April. Having set out those facts the tribunal referred to s 3 of the Redundancy Payments Act 1965 which declares that an employee shall be taken to be dismissed by his employer if, but only if, the contract under which he is employed by the employer is terminated by the employer, whether it is so terminated by notice or without notice. The tribunal then referred to s 4 of the 1965 Act, which provides that where an employer gives notice to an employee to terminate his contract of employment and at a time within the obligatory period of that notice the employee gives notice in writing to the employer to terminate the contract of employment on a date earlier than that on which the employer's notice is due to expire, the employee shall still be taken to be dismissed. The tribunal drew attention to the fact that similar provisions exist in s 23 of the Industrial Relations Act 1971. The tribunal then went on to say, in para 7 of the reasons, that the appellant was entitled under the Contracts of Employment Act 1972 to two weeks' notice of termination of his employment and that—

f 'He gave notice during the obligatory period to the respondents to leave before the expiry of notice and in fact complied with Section 23 (3) in all respects other than the requirement of the notice being in writing.'

For that reason the tribunal found that the contract was not determined by the employer.

g Counsel who has appeared for the respondents on this appeal very fairly and frankly concedes that the tribunal has erred in interpreting what it found as a fact to be a request to leave the respondents' employment, as the giving of notice. He accepts that the appellant never gave notice. Nevertheless, he submits that the tribunal's decision can be upheld on different grounds.

h The statutory provisions are intended to deal with the situation in which during the running of notice of dismissal by the employer, the employee unilaterally decides to terminate his employment on an earlier date, and leaves with or without notice to the employer. In that situation the legislature has decided that the employee will only preserve his rights if he gives written notice of his intention. But there is a much more common situation (illustrated by this case) in which the employee says to the employer: 'You have given me notice terminating my employment as from (some future date) but it would suit my convenience better, and may not inconvenience you, if I left on (an earlier date). Do you agree?' Counsel for the respondents says that as a matter of law, if the employer agrees, there are two possible analyses. First, it may be that the employer, by agreeing, is varying his notice of dismissal and is substituting an earlier date. In that case, as counsel for the respondents concedes, the effective instrument for terminating the contract of employment remains the

employer's notice, albeit the date on which the notice takes effect is varied at the request of the employee. But he says there is an alternative legal analysis, namely that the employee is really saying: 'Let us disregard this notice which you have given me, and let us mutually agree that the contract of employment shall be terminated on some earlier date.' In counsel's submission, in that event the effect is that the contract of employment is terminated by that mutual agreement, not by the notice. The reason is that whilst the notice remains in existence, the contract of employment has been terminated by mutual agreement between the parties by the date on which the notice would otherwise take effect. He submits that on the evidence in this case the proper legal analysis is the latter, namely that the two parties mutually agreed to terminate the contract of employment. In our judgment the evidence does not support his contention. Mr Walker, the solicitor for the respondents, in opening the case to the tribunal said that the appellant asked to leave one week earlier in order to go to new employment and was allowed to do so. 'One week earlier' must clearly be a reference to the notice which had already been given and would have expired on 19th April. So on the basis of the opening the respondents' case was that the appellant was asking the respondents to vary the notice to make it effective one week earlier. That is supported by the evidence given by Mr Royston that 'I gave the notice of termination of employment to the [appellant] on 20th March . . . I allowed him to leave before four weeks' notice was up.' There is a further reference in his evidence, in reply to a question by the tribunal, that 'I did not see him when he asked to leave earlier'. Mr Howlett, clerk of works to the respondents, in evidence also made the position again perfectly clear when he said: 'He [the appellant] did not put anything in writing and he was allowed to go.' The words 'allowed to go' are quite inconsistent with a consensual termination of the contract of employment. Had there been a consensual termination the wording would have been: 'We agreed with [the appellant] that he should go.' 'Allowed to go' is, in our judgment, consistent only with a variation of the respondents' notice. That again is supported by [the appellant's] own evidence that 'I said I would like to leave a week earlier because . . .'

We would further suggest that it would be a very rare case indeed in which it could properly be found that the employer and the employee had got together and, notwithstanding that there was a current notice of termination of the employment, agreed mutually to terminate the contract, particularly when one realises the financial consequences to the employee involved in such an agreement. We do not say that such a situation cannot arise; we merely say that, viewed in a real life situation, it would seem to be a possibility which might appeal to a lawyer more than to a personnel manager. We have no doubt at all that on the facts of this particular case the only possible conclusion for the tribunal to have reached was that the respondents, at the request of the appellant, varied the notice.

It follows that the appellant was dismissed by the respondents, and the case will have to go back to the tribunal for a determination whether he was redundant within the meaning of the Redundancy Payments Act 1965 and/or whether he was unfairly dismissed within the meaning of the Industrial Relations Act 1971.

Appeal allowed.

Solicitors: O H Parsons (for the appellant); Wilson & Wilson, Kettering (for the respondents).

Gordon H Scott Esq Barrister.

a

Garfield v Maddocks

QUEEN'S BENCH DIVISION

LORD WIDGERY CJ, EVELEIGH AND MAY JJ

31ST JANUARY 1973

b

Crown Court – Appeal to – Conviction by magistrates – Appeal – Jurisdiction to allow amendment – Amended information alleging different particulars of offence – Appellant convicted on information alleging threatening behaviour with intent to provoke breach of peace – Amended information alleging insulting behaviour whereby breach of peace likely to be occasioned – Whether Crown Court having jurisdiction to allow amendment – Public Order Act 1936, s 5, as substituted by the Race Relations Act 1965, s 7.

c

The accused was charged before justices with using threatening behaviour with intent to provoke a breach of the peace, contrary to s 5^a of the Public Order Act 1936. At the hearing the prosecution sought to amend the information to allege threatening behaviour whereby a breach of the peace was likely to be occasioned, contrary to s 5 of the 1936 Act, but the justices refused to allow the amendment. The accused was convicted and appealed to the Crown Court. Before the Crown Court the prosecution sought leave to amend the information to allege insulting behaviour whereby a breach of the peace was likely to be occasioned. The Crown Court, being of the opinion that s 5 of the 1936 Act created only one offence, allowed the amendment and the accused's conviction was affirmed. On appeal,

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Held – The appeal would be allowed and the case remitted to the Crown Court. Once the conviction had been recorded by the justices on the basis of the information as originally formulated there was no power to amend the information to allege what was a different offence. It was immaterial whether or not the offence alleged against the accused in the amended information was technically the same offence in law as that alleged in the original information; at the very least the particulars of the offence of which the accused had been convicted had been significantly changed in the trial before the Crown Court. In consequence the appeal had not been conducted in respect of the same offence in the sense of the same misdoing (see p 308 e to p 309 b, post).

f

Meek v Powell [1952] 1 All ER 347 applied.

g

Dicta of Lord Parker CJ in *Wright v Nicholson* [1970] 1 All ER at 14 explained.

Notes

For variation between information or complaint and evidence, see 25 Halsbury's Laws (3rd Edn) 188, para 340.

For appeals to Crown Court, see Supplement to 9 Halsbury's Laws (3rd Edn) para 963c, 5.

h

For the Public Order Act 1936, s 5, see 8 Halsbury's Statutes (3rd Edn) 332.

Cases referred to in judgment

Meek v Powell [1952] 1 All ER 347, [1952] 1 KB 164, 116 JP 116, 50 LGR 247, DC, 33 Digest (Repl) 202, 430.

Vernon v Paddon (1972) The Times, 12th February, DC.

j

Wright v Nicholson [1970] 1 All ER 12, [1970] 1 WLR 142, 134 JP 85, DC, Digest (Cont Vol C) 652, 387c.

Case also cited

Hickmott v Curd [1971] 1 All ER 1399, [1971] 1 WLR 1221, DC.

a Section 5, as substituted, is set out at p 305 j, post

Case stated

This was an appeal by way of case stated by the Crown Court at Huntingdon in respect of their adjudication on 24th March 1972. a

On 1st January 1972 the respondent, John Hugh Maddocks, preferred against the appellant, Rorke Stuart Garfield, and Clifford Alan Goodman an information alleging that they on 1st January 1972 at Burghley in the county of Huntingdon and Peterborough in a public place called Burghley Park used threatening behaviour with intent to provoke a breach of the peace, contrary to s 5 of the Public Order Act 1936, as amended. b

On 4th February 1972 the appellant and Goodman appeared before the Peterborough Magistrates' Court to answer the information. At the hearing an application was made by the respondent to amend the information to allege threatening behaviour whereby a breach of the peace was likely to be occasioned. The respondent had given notice to the appellant that the application would be made and it was conceded on behalf of the appellant and Goodman that they were not embarrassed by lack of notice. It was argued on behalf of the respondent that only one offence was created by s 5 of the Public Order Act 1936 as amended. The application was refused and the appellant and Goodman were convicted. On 11th February 1972 the appellant and Goodman entered notice of appeal against the convictions. The grounds thereof were that the convictions were contrary to the weight of the evidence and that each of them was not guilty of the offence. c

On 23rd and 24th March 1972 the appeals were heard at the Crown Court sitting at Huntingdon. At the outset of the proceedings an application was made by the respondent to amend the information to allege insulting behaviour whereby a breach of the peace was likely to be occasioned, contrary to s 5 of the Public Order Act 1936 as amended. The application was opposed by the appellant and Goodman. The application was granted after hearing argument on behalf of the appellant and Goodman and the respondent. d

The Crown Court were of the opinion that s 5 of the Public Order Act 1936 as amended created only one offence. They then heard the appeal on the basis of the amended information, and found the following facts: (a) on 1st January 1972 the Fitzwilliam Hunt met at Burghley Park. It was known in the area the meet was to take place. At the meet there were members of the hunt on horseback, hunt servants with hounds and members of the public. (b) Burghley Park was a public place. (c) The appellant and Goodman were members of the Hunt Saboteurs Association. Goodman was chairman of the Midlands and East Anglia Hunt Saboteurs Association. The appellant was the tactical adviser. The association was a national body, its aim being to promote the abolition of all blood sports. (d) The appellant and Goodman with 17 other members of the association attended the meet. Their express intention was to disrupt the hunt by spraying the hounds with 'Anti-Mate' and thus dull their sense of smell. The appellant and Goodman hoped that as a result of their activities the hounds would be unable to chase and kill any fox. (e) The original plan was abandoned by Goodman on the advice of the appellant because of danger to the public. (f) At about 11.00 a.m. Goodman spoke to the appellant and told him that he was going to 'have a go' and handed him an aerosol tin of Anti-Mate. Goodman then jumped over a fence and ran among the hounds, the riders and the hunt servants. He sprayed the hounds with an aerosol spray of Anti-Mate. Goodman was followed almost immediately by the appellant carrying his tin of Anti-Mate which he used or attempted to use to spray the hounds. (g) The conduct of the appellant and Goodman disturbed the hounds and horses. It angered the members of the hunt. A member of the hunt lashed out at Goodman causing injury to his face. The police had to restrain members of the hunt from assaulting the appellant and Goodman on their arrest. (h) Among other things the appellant and Goodman desired to attract publicity to their cause. The behaviour of each of them was insulting and offensive to country people including those present at the meet. In the circumstances a breach of the peace was likely. e

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a There may have been an overreaction to the conduct of the appellant and Goodman. Criminal acts may have been committed by others in anger at their conduct. Notwithstanding that the justices found the case proved beyond a reasonable doubt against the appellant and Goodman. The justices made no order for costs bearing in mind that the respondent had been granted an indulgence at the outset, when leave was granted for the information to be amended.

b The questions for the opinion of the High Court were: (i) did s 5 of the Public Order Act 1936, as amended, create more than one offence? (ii) were the Crown Court right to allow the information to be amended?

Charles McCullough QC and J B Goldring for the appellant.

E F Jowitt QC and C C Colston for the respondent.

c **LORD WIDGERY CJ.** This is an appeal by case stated from the Huntingdon Crown Court in respect of an adjudication on 24th March 1972. The history of the matter is that on 1st January 1972 the respondent preferred against the appellant and one Goodman an information alleging that they, on 1st January 1972 at Burghley Park, in the county of Huntingdon and Peterborough in a public place called Burghley Park, used threatening behaviour with intent to provoke a breach of the peace, contrary to s 5 of the Public Order Act 1936¹.

d The facts of this case are not important, and I refer to them very briefly. What had happened, according to the prosecution, was that the appellant and Goodman were opposed to fox hunting, and had sought to disrupt a hunt by using aerosol sprays on the hounds with a view to deadening their sense of smell. They had done this and caused a disturbance amongst the hounds and the horses, had upset some of the followers of the hunt, blows had been exchanged and so on. Arising out of that, the information which I have just read was laid. The matter came before the justices on 4th February 1972 and the prosecution sought to amend the information to allege threatening behaviour whereby a breach of the peace was likely to be occasioned; in other words they sought to drop the allegation of threatening behaviour with intent, and change it to threatening behaviour whereby a breach of the peace was

f likely to be occasioned. For reasons of which we are unaware the justices in their wisdom decided not to allow that amendment to be made so these two men stood their trial on the original information and were convicted. They appealed to the Crown Court, and at the outset of the proceedings before the Crown Court, proceedings which were of course a rehearing of the matter, the prosecution returned to their application to amend. This time they put it in a somewhat different form.

g They asked to amend the information to allege insulting behaviour, whereas previously, it will be remembered, the allegation was threatening behaviour. They sought now to make the information read: insulting behaviour whereby a breach of the peace was likely to be occasioned, and the amendment was disputed by the defence. Eventually the Crown Court decided to allow it, and as the Crown Court say in their case stated, they then heard the appeal on the basis of the amended information. There can be no doubt whatever that the amendment having been made, the Crown Court set out on its hearing of the matter on the basis of the amended information, and the Crown Court convicted. Of the two questions asked of this court, the truly relevant one is whether the Crown Court were right to allow the information to be amended.

h The charge was laid under s 5 of the Public Order Act 1936¹ which reads as follows:

j 'Any person who in any public place or at any public meeting—(a) uses threatening, abusive or insulting words or behaviour . . . with intent to provoke a breach of the peace or whereby a breach of the peace is likely to be occasioned, shall be guilty of an offence.'

¹ As substituted by s 7 of the Race Relations Act 1965

Each of the various formulae used or attempted to be used in this case are produced from the language of that section. a

The question of amendment of informations in a magistrates' court is primarily dealt with in s 100 (1) of the Magistrates' Courts Act 1952. That provides:

'No objection shall be allowed to any information or complaint, or to any summons or warrant to procure the presence of the defendant, for any defect in it in substance or in form, or for any variance between it and the evidence adduced on behalf of the prosecutor or complainant at the hearing of the information or complaint.' b

Those extremely wide words, which on their face seem to legalise almost any discrepancy between the evidence and the information, have in fact always been given a more restricted meaning, and in modern times the section is construed in this way, that if the variance between the evidence and the information is slight and does no injustice to the defence, the information may be allowed to stand notwithstanding the variance which occurred. On the other hand, if the variance is so substantial that it is unjust to the defendant to allow it to be adopted without a proper amendment of the information, then the practice is for the court to require the prosecution to amend in order to bring their information into line. Once they do that, of course, there is provision in s 100 (2) whereby an adjournment can be ordered in the interests of the defence if the amendment requires him to seek an adjournment. c

That is the position in the magistrates' court, and consequently if the justices in this case had been minded to accede to the original application for an amendment, they could quite clearly have made it within their powers. Section 100 on the facts which I have referred to would undoubtedly have covered it, but they did not, as I have said, and this case really raises in quite a stark form the question whether when an appeal has been laid before what is now the Crown Court from a decision of justices, there remains a power to amend of a kind which the Crown Court purported to assert in this case. d

I think it convenient to start by looking at *Meek v Powell*¹, a decision of this court. It was a very simple little case in which a defendant had been charged with unlawfully selling adulterated milk, and by an accident the statute under which the charge was laid was quoted as a previous and repealed statute instead of the current statute. The wording of the two Acts was absolutely identical, but by a slip the older Act had been cited in the information. The case was found to be proved, and the matter came to this court by way of case stated. Both Lord Goddard CJ and Byrne J made it quite clear that the concept of amending the proceedings in an appellate court is something which is foreign to our general system. Byrne J said²: e

'The question which falls for decision here is whether that power [i.e. the power to amend in s 31 (1) (vii) of the Summary Jurisdiction Act 1879] is sufficient to enable quarter sessions hearing an appeal to exercise a power which the petty sessional court would have had—namely, that of amending a summons which is defective on the terms I have indicated. In my view that provision gives no power to quarter sessions to exercise, after a conviction has been recorded which is bad on its face, a power which the justices at petty sessions could not exercise (for once the justices at petty sessions have recorded a conviction on a summons which is before them, they have no power after that to amend the summons). Thus, it seems to me to follow that quarter sessions have no power to do that' f

1 [1952] 1 All ER 347, [1952] 1 KB 164

2 [1952] 1 KB at 167, cf [1952] 1 All ER at 349 g

a because their power is derived through the power of justices at the petty sessional court. In those circumstances what was before the quarter sessions in this case was a conviction which had taken place on a repealed statute, and that was a matter which, in my view, could not be cured by any statutory authority conferred on the justices at quarter sessions.'

b Lord Goddard CJ¹, taking the same view, pertinently points out, if one may say so, that where after a trial on indictment the matter is appealed to what was then the Court of Criminal Appeal, there was no power in the Court of Criminal Appeal to amend the indictment. The appeal was against the indictment as laid and relied on in the court of trial, and there was no power, and indeed today there is no power in the Court of Appeal Criminal Division to amend the original indictment. I think that that is a principle which ought in general to apply to appellate proceedings in the criminal law, and it seems to me absolutely right, as counsel for the appellant c has submitted here, that when a man is granted an appeal to the Crown Court, he should be able to appeal against the very offence of which he has been convicted, and not some different offence or some offence committed in different circumstances from that which was alleged below. If that was the law before quarter sessions, as the case of *Meek v Powell*² suggests, it is quite clear that the Crown Court as successor to quarter sessions has no wider power, and I say that because under s 9 d of the Courts Act 1971 the right of the Crown Court, for example, to make any order as the court may think just, is a power which arises only on determination of the hearing of an appeal before the Crown Court.

e There is no other express statutory power of amendment in the Crown Court on an appeal of this kind, and therefore unless it can be said in some way that the power of amendment contained in s 100 is carried through into the Crown Court, there seems to me to be no power to take the steps which the Crown Court took in this instance.

f The one authority which stands out on the other side is again a decision of this court, *Wright v Nicholson*³. That was a case where a man had been convicted of an indecent assault on a little boy, the information alleging that the assault had occurred on 17th August in a particular year. The defendant had run an alibi for 17th August, but ran it unsuccessfully, and he had been convicted before the justices. He appealed to quarter sessions and when the little boy was called on to give his evidence a second time before quarter sessions, he could not remember the actual day on which the offence had taken place; all he could remember was that it was some time during the month of August. The recorder took the view that this discrepancy did not invalidate the proceedings, and finding that the offence had been proved somewhere g between 1st and 31st August, the conviction was upheld. In this court Lord Parker CJ gave the leading judgment. He referred to s 100 (1) of the 1952 Act and he went on in these terms⁴:

h 'It of course has always been held that those words cannot be read literally as meaning: there can be no attack on an information, however fundamental the defect. It depends in every case whether, for instance, the variance between it and the evidence is such as to require an amendment. Circumstances vary infinitely, and it may well be that in many cases a variance between the evidence and the information will not require even an amendment; a misdescription of premises might not even require an amendment. But, as it seems to me in this i case, unless the information is amended there might be grave injustice to the appellant, an amendment is called for.'

1 [1952] 1 All ER at 349, [1952] 1 KB at 168

2 [1952] 1 All ER 347, [1952] 1 KB 164

3 [1970] 1 All ER 12, [1970] 1 WLR 142

4 [1970] 1 All ER at 14, [1970] 1 WLR at 146

I pause there to observe that is a statement of principle which I myself endeavoured to express a few moments ago. He then goes on to find that the difference between alleging the offence on 17th August and alleging it somewhere between 1st and 31st August was a sufficient difference to require an amendment; it was of sufficient importance to require an amendment because it fundamentally altered the basis on which the defendant's alibi defence had to be built. Then Lord Parker CJ went on in these terms¹:

'I find it unnecessary to go through the cases to which this court has been referred. I am quite satisfied that this was a case where the deputy recorder having arrived at that stage, ought to have invited the prosecution to amend, and I have no doubt, if there had been an amendment, laying the incident on a date unknown between 1st and 31st August ...'

According to the report, the court had been referred to *Meek v Powell*², but it is to be observed that Lord Parker CJ found it unnecessary to go through the cases again, and I for my part am satisfied that the issue which is raised before us, namely as to the power of quarter sessions to order an amendment, cannot have been in the mind of the court when this judgment was delivered. What I think Lord Parker CJ is there saying is that in the absence of an amendment, the conviction could not stand, and there had been no amendment and therefore that result was inevitable. He referred to the case as one in which the deputy recorder might have put the matter right by ordering an amendment, but I respectfully think that that was per incuriam, and since in fact no amendment had been made, the result was the same. In my judgment, therefore, based primarily on *Meek v Powell*², one ought to approach appellate proceedings in the criminal law on the basis that amendments of this kind are foreign to them.

Counsel for the respondent has raised a number of points in support of the present position; he has sought to contend that s 5 creates only one offence, and that whatever permutation or combination one produces from the words used in the section, these would all be different varieties or examples of the same offence. I do not find it necessary to reach a positive conclusion on that point, although I observe that the matter was the subject of a decision of this court in *Vernon v Paddon*³. Nothing which I say today is to be regarded as suggesting for a moment that that judgment was not right, or that s 5 creates more than a single offence. All I say is that I find it unnecessary to decide that point finally, because it seems to me not to matter in the context of this case whether the original formula or the amended formula created in each case the same offence in law. What is absolutely vital here to my mind is that the basis on which the prosecution was being put was changed.

Counsel for the respondent says that it was not changed very much, but I find that hard to follow, when one realises the zeal with which the prosecution insisted on achieving their amendment. In the very least the particulars of the offence on which the accused were convicted below were significantly changed before the trial in the Crown Court, and I think that that is enough to enable the appellant to say that the appeal was not conducted in respect of the same offence that he was charged with below. We treat the same offence for this purpose as meaning not simply the technical issue of whether it was the same offence in law, but the same offence in the sense it was the same misdoing which was alleged against him.

I think it is abundantly clear here that the justices should not have allowed the amendment, and having allowed the amendment they decided the case in the Crown Court on a different basis from that on which they ought to have decided it. It seems to me inevitable in these circumstances that the appeal should be allowed, and

1 [1970] 1 All ER at 14, [1970] 1 WLR at 146

2 [1952] 1 All ER 347, [1952] 1 KB 164

3 (1972) The Times, 12th February

- a* subject to argument that the proper course is that the matter should go back to the Crown Court with a direction that they should rehear the appeal on the original unamended information and before a differently constituted bench.

EVELEIGH J. I agree.

- b* **MAY J.** I agree.

Appeal allowed. Case remitted.

Solicitors: Vizards, agents for Dennis, Faulkner & Alsop, Northampton (for the appellant); Sharpe, Pritchard & Co, agents for Chief Prosecuting Solicitor, Mid-Anglia Constabulary (for the respondent).

c

N P Metcalfe Esq Barrister.

d **Fox and another v Lawson**

QUEEN'S BENCH DIVISION

LORD WIDGERY CJ, ASHWORTH AND BRIDGE JJ

27th FEBRUARY 1973

- e* Road traffic – Goods vehicle – Driver – Limitation of time on duty – Length of working day – Periods of duty, driving and rest – Computation of periods – Journey to destination outside Great Britain – Return journey to Great Britain – Whether account to be taken of driver's activities outside Great Britain in computing periods of duty, driving and rest – Transport Act 1968, ss 96 (1), (3) (a), 103 (1).

- f* Road traffic – Goods vehicle – Driver – Records – Duty of driver to keep records – Information as to periods of driving, rest etc – Journey to destination outside Great Britain – Return journey to Great Britain – Whether duty to record information as to periods of driving, rest etc whilst outside Great Britain – Drivers' Hours (Goods Vehicles) (Keeping of Records) Regulations 1970 (SI 1970 No 123), reg 3 (1).

- g* The appellant was employed as a driver of goods vehicles. On 7th March 1971 he began a round trip from Barking to a destination in France and back again. He started the journey at 3.30 p m and left England at 7.00 p m. He returned to England at 12.30 a m on 9th March. Thereafter he was on duty for a period of some eight hours until 1.00 p m and during that period was actually driving for 5½ hours. At no time between 3.30 p m on 7th March and 1.00 p m on 9th March did the appellant have an interval of rest of 11 hours or more. Accordingly, by virtue of s 103 (1)^a of the Transport Act 1968, if account were taken of his activities during the time he was out of England, his 'working day' had lasted for the whole of that period. During the same period he had driven his vehicle for periods amounting in the aggregate to 16½ hours. Only whilst he was in England did the appellant keep a current record of his driving hours etc in accordance with the Drivers' Hours (Goods Vehicles) (Keeping of Records) Regulations 1970. Informations were preferred against him that on 9th March (i) he had driven for periods amounting in the aggregate to more than ten hours, contrary to s 96 (1)^b of the 1968 Act, (ii) he had worked as a driver so
- j*

a Section 103 (1), so far as material, is set out at p 313 j to p 314 a, post

b Section 96, so far as material, is set out at p 313 h and j, post

that his working day exceeded 11 hours, contrary to s 96 (3) (a) of the 1968 Act, and (iii) he had failed to enter in his driver's record book a record of his driving hours etc whilst out of England, contrary to reg 3 (1)^c of the 1970 regulations and s 98 (4) of the 1968 Act. He was convicted and appealed.

Held (Ashworth J dissenting) – The appeal would be allowed and the convictions quashed. No account could be taken of anything done by the appellant whilst he was outside Great Britain for the purpose of computing his hours of duty, hours of driving and hours of rest. Accordingly the appellant's working day had commenced at 12.30 a.m. on 9th March. It followed that the length of the working day and the hours of driving on that day were within the prescribed limits. Furthermore the appellant was not required by the 1970 regulations, which were designed for the purpose of enforcing the restrictions on hours of work and driving, to keep a record of his driving hours etc outside Great Britain (see p 316 a d e and p 318 d, post).

Notes

For the statutory restrictions on drivers' hours, see the Supplement to 33 Halsbury's Laws (3rd Edn) para 1222A, and for cases on the subject, see 45 Digest (Repl) 136-138, 500-511.

For the Transport Act 1968, ss 96, 98, 103, see 28 Halsbury's Statutes (3rd Edn) 751, 759, 764.

Case referred to in judgment

Cox v Army Council [1962] 1 All ER 880, [1963] AC 48, [1962] 2 WLR 950, 46 Cr App Rep 258, HL, 39 Digest (Repl) 411, 294.

Case also cited

Treacy v Director of Public Prosecutions [1971] 1 All ER 110, [1971] AC 537, HL.

Case stated

This was an appeal by way of case stated by justices for the North East London Area in and for the petty sessional division of Beacontree in respect of their adjudication as a magistrates' court sitting at Court House, East Street, Barking, on 25th January and 4th April 1972.

The respondent, John Lawson, an officer of the licensing authority for the metropolitan traffic area, preferred: (1) four informations against the first appellant, Henry William Fox, that he on 9th and 12th March and 2nd and 24th April 1971 at 1-3 Seabourne House, Barking, Essex, did unlawfully work as the driver of a goods vehicle so that his working day exceeded 11 hours, contrary to s 96 (3) (a) of the Transport Act 1968; (2) four informations against the first appellant that he on the same dates and at the same place did unlawfully on a working day drive a goods vehicle for periods amounting in the aggregate to more than ten hours, contrary to s 96 (1) of the Act; (3) four informations against the first appellant that he on the same dates and at the same place did unlawfully being the driver of a goods vehicle fail to enter in a driver's record book a current record as prescribed by the Drivers' Hours (Goods Vehicles) (Keeping of Records) Regulations 1970¹ ('the regulations'), contrary to reg 3 of the regulations and s 98 (4) of the Act.

^c Regulation 3 (1), so far as material, provides: 'Subject to the following provisions of these Regulations—(a) a driver of a goods vehicle shall enter . . . in a driver's record book a current record which shall give in respect of each working day of that driver, the information prescribed in the sheets as set out in Schedule 1 to these Regulations as information which is required to be furnished by a driver . . .'

¹ SI 1970 No 123

a Corresponding informations were preferred against the second appellants, Seabourne Express Ltd, the employers of the first appellant, for permitting those offences. By consent all the informations were heard together on 25th January and 4th April 1972. There was produced to the justices an agreed schedule of (a) times shown in the driver's records kept by the first appellant pursuant to s 98 of the 1968 Act and the regulations and (b) times shown in a non-statutory driver's report forms kept by the first appellant on the instructions of the second appellants. The justices found as a fact that the schedule was an accurate record of the times and events recorded subject to argument as to the 'start' and 'end' of the working day for the purposes of the information and subject to one patent error which the justices corrected on the schedule.

The following facts were found.

c (1) At all material times the first appellant was employed by the second appellants as a driver and drove a goods vehicle in the course of his employment with and in accordance with his instructions from the second appellants.

d (2) The second appellants had knowledge of all the periods during which the first appellant was on duty and all the periods during which the first appellant was driving and they permitted him to be on duty and to drive for all such periods. They further knew and required of the first appellant that only the periods of duty and driving in England were entered in the first appellant's driver's records.

(3) On each of the dates referred to in the informations the first appellant was on duty and was completing the return journey from the English coast forming part of a round trip from the second appellants' operating centre at Barking to Genevilliers in France and return to Barking.

e *Informations for 9th March*

(4) On 7th March, as shown on the driver's record kept by the first appellant, the first appellant was on duty in England for three hours 30 minutes between 3.30 p m and 7.00 p m and drove for three hours ten minutes on a journey from Barking to the ferry at Newhaven.

f (5) Between 7.00 p m on 7th March when the first appellant ceased work in England and 12.30 a m on 9th March when the first appellant next started work in England, the first appellant was on duty in France for eight hours 40 minutes and drove for eight hours ten minutes on journeys from the ferry at Dieppe to Genevilliers and back to the ferry at Dieppe. The first appellant had intervals for rest of four hours 20 minutes on the ferry between Newhaven and Dieppe, eight hours 15 minutes at Genevilliers and four hours 35 minutes on the ferry between Dieppe and Newhaven. The first appellant did not have an interval for rest of not less than 11 hours at any time between starting work at 3.30 p m on 7th March and ceasing work at 1.00 p m on 9th March. Those details were shown on a non-statutory driver's report form kept by the first appellant.

g (6) On 9th March, as shown on the driver's record kept by the first appellant, the first appellant was on duty in England for eight hours five minutes between 12.30 a m and 1.00 p m excluding intervals for rest of four hours 25 minutes and drove for five hours 15 minutes on journeys from the ferry at Newhaven to Rayleigh, London E1, Romford and Barking.

h (7) If 9th March was considered in isolation, the first appellant did not exceed the permitted limits of 11 hours on duty and ten hours driving and properly entered on his driver's record the time of the start of the working day as 00.30 a m.

i (8) If 9th March was the continuation of the working day started on 7th March and continued on 8th March, the first appellant having been on duty for 19 hours 15 minutes on 7th to 9th March exceeded the permitted limit of 11 hours on duty, having been driving for 16 hours 35 minutes on 7th to 9th March exceeded the permitted limit of ten hours' driving and wrongly entered on his driver's record for 9th March the time of the start of the working day as 00.30 a m.

Informations for 12th March, 2nd April and 24th April

[Paragraphs (9) to (23) set out the facts found by the justices in relation to the journeys completed by the first appellant on 12th March and 2nd and 24th April. They showed that in each case if the appropriate date was considered in isolation the first appellant had not exceeded the permitted hours for driving and duty but if the date was to be considered as a continuation of the working day which began on the date when he started his journey in England and account were taken of the hours he was on duty while in France he had in each case exceeded the prescribed hours.]

It was contended by the appellants on a submission of no case to answer (1) that s 96 (1), (3) and (4) of the 1968 Act had no application except to acts or omissions done in the United Kingdom; the fact that the first appellant had failed to have an interval for rest of at least 11 hours when in France was not relevant for the purposes of s 96 of the 1968 Act; (2) that as the respondent accepted that the first appellant was not required to keep a driver's record under s 98 of the 1968 Act and the regulations when in France, it was inconsistent and illogical that the first appellant when in France should nevertheless be required to comply with the provisions of s 96 of the 1968 Act, since the purpose of keeping a driver's record was to enable the provisions of s 96 of the Act to be enforced; (3) that the failure of the first appellant to have a sufficient interval for rest when in France was a matter for the authorities in France to deal with under the European Economic Communities Regulation 543/1969; (4) that it was illogical that the first appellant when in France should be required to comply with the provisions of s 96 of the 1968 Act and at the same time with the differing provisions of the European Economic Communities Regulation 543/1969.

It was contended by the respondent (1) that the facts showed that offences had been committed as specified in the informations and there was a case to answer; (2) that the purpose of Part VI of the 1968 Act was set out in s 95 (1), namely to protect the public against the risks which arose in cases where the drivers of motor vehicles were suffering from fatigue; (3) that ss 96 (1) and 96 (3) (a) respectively limited the hours of driving and duty of a driver for any working day; (4) that 'working day' was defined in s 103 (1), which provided that where a period of duty was not followed by a rest interval of 11 hours or more, the working day of a driver was to be taken as 'the aggregate of that period and each successive period until there is such an interval as aforesaid, together with any interval or intervals between periods so aggregated'; (5) that there was not on any round trip an interval of not less than 11 hours of rest; all periods of driving and duty on each round trip were thus to be aggregated as one working day; the 1968 Act did not require and it was unrealistic to exclude that part of the driving and duty which had been performed in France; (6) that on the date specified in each information the first appellant was driving in England; at that time he was committing an offence because he had driven and had been on duty for more than the maximum hours prescribed for the relevant deemed working day; his records were also incomplete because they did not record his hours for the relevant periods forming part of the relevant working day; the second appellants respectively permitted or caused him to commit the offence.

The justices were of the opinion that the statutory definition of a working day required that all the periods of duty or driving respectively should be aggregated. Since at the close of the respondent's case it appeared that there had not been a period of rest of not less than 11 hours between any of such periods, the justices considered that the total hours of duty and driving exceeded the maximum. They considered that they were entitled to have regard to the hours of duty and driving in France during the relevant period, and that when he drove in England on the date stated in each information the first appellant was contravening the provisions of s 96 of the 1968 Act, that his records were not complete, and that in the absence of an answer it appeared that the second appellants had caused or permitted the respective offences by the first appellant. Accordingly they ruled that there was a case to answer on each information. The appellants called no evidence. The justices found that the

a offences were proved. They sentenced the first appellant to pay a fine of £2 on each of the 12 informations and the second appellants to pay a fine of £10 on each of the 12 informations.

M J Burrell for the appellants.
Gordon Slynn for the respondent.

b

BRIDGE J delivered the first judgment at the invitation of Lord Widgery CJ. This is an appeal by case stated from a decision of justices for the North East London Area in the petty sessional division of Beacontree, who on 4th April 1972 convicted the appellants each of 12 informations charging them with offences under the provisions of the Transport Act 1968 relating to drivers' hours of work on goods vehicles and the keeping of records relating to those hours. The appeal raises an important, *c* and by no means easy question, as to the scope and proper construction of the provisions of Part VI of the Transport Act 1968, and more particularly as to whether those provisions apply, and if so in what sense, to drivers of goods vehicles engaged in international journeys, parts of which are undertaken outside the jurisdiction of the English courts, but some other parts of which are completed within the jurisdiction *d* of our courts.

The appellants are respectively the driver of a goods vehicle and his employers. The convictions are in sets of three applicable to each appellant relating to four dates in March and April 1971, on each of which the first appellant, the driver, was engaged in the completion of a round journey from England to France and back again. In relation to each date the first appellant has been convicted of driving the vehicle so *e* that his working hours exceeded 11 hours; of driving his vehicle within a working day for periods amounting in the aggregate to more than ten hours, and for failing to enter in his driver's record book a current record as prescribed under the relevant regulations. The second appellants, the employers, have been convicted, in relation to each of the four dates, of the three corresponding offences of permitting the offences *f* by the driver.

Before going to the facts, it will be convenient to refer to the principal provisions of the Act with which we are concerned. Section 95 (1) provides:

g "This Part of this Act [that is to say Part VI] shall have effect with a view to securing the observance of proper hours of work by persons engaged in the carriage of passengers or goods by road and thereby protecting the public against the risks which arise in cases where the drivers of motor vehicles are suffering from fatigue."

Section 96, so far as material, provides:

h "(1) Subject to the provisions of this section, a driver shall not on any working day drive a vehicle or vehicles to which this Part of this Act applies for periods amounting in the aggregate to more than ten hours . . .

"(3) Subject to the provisions of this section, the working day of a driver—*(a)* except where paragraph *(b)* or *(c)* of this subsection applies [and they have no application in this case], shall not exceed eleven hours . . .

i "(4) Subject to the provisions of this section, there shall be, between any two successive working days of a driver, an interval for rest which—*(a)* subject to paragraph *(b)* of this subsection, shall not be of less than eleven hours . . ."

With that one must read the provisions contained in s 103 (1) which enacts that—

"“working day”, in relation to any driver, means—*(a)* any period during which he is on duty and which does not fall to be aggregated with any other such period by virtue of paragraph *(b)* of this definition; and *(b)* where a period

during which he is on duty is not followed by an interval for rest of not less than eleven hours . . . the aggregate of that period and each successive such period until there is such an interval as aforesaid, together with any interval or intervals between periods so aggregated . . .'

Section 98 provides that the Minister may make regulations requiring drivers to keep, and employers of drivers to cause to be kept records in respect of matters relevant to enforcement of Part VI of the Act. Such regulations have in fact been made currently in the Drivers' Hours (Goods Vehicles) (Keeping of Records) Regulations 1970¹, which do require particulars of working days, hours of duty, hours of driving, intervals between hours of driving and so forth to be recorded. It is particularly in point to observe that reg 11 (1) provides:

'... each item of information which is required by these Regulations to be entered in a driver's record book . . . shall be entered therein as soon as the required information is available.'

Finally, it is material to observe that s 100 provides in terms, which I can summarise without reading them in extenso, a power to the Minister to provide by regulations for the modification or adaptation of the provisions of Part VI of the Act relating to drivers and crews in relation to international journeys, and particularly so for bringing into force and giving effect to international agreements, governing the conditions under which international journeys are to be undertaken, to which the United Kingdom has become a party.

It is unnecessary to go through the facts of all four round trips from England to France in relation to which the four groups of three convictions are recorded against both the first appellant and the second appellants, his employers. The first round trip, which began on 7th and finished on 9th March 1971 sufficiently illustrates the problems, and will be sufficient for determination of the questions of principle on which the validity of these convictions depends.

The first appellant began his journey in England at Barking on 7th March at 3.30 p m; he was on duty from that time until 7.00 p m, a time of some three hours and 30 minutes, during which he was actually driving from Barking to Newhaven for three hours and ten minutes. From 7.00 p m on 7th March until 12.30 in the small hours of the morning of 9th March, the first appellant was out of England. It is sufficient to say that during his time in France he was in part driving in the course of his employment, in part on duty and in the course of his employment, in part resting; but at no time from his departure from England at 7.00 on the evening of the 7th until his return in the early hours of the morning of the 9th had he any interval for rest which was as much as 11 hours. On 9th March, having returned to England, he was on duty for a period of eight hours and five minutes from 12.30 a m until 1.00 p m, and during that period he was actually driving for a period of five hours and 15 minutes.

His conviction by the justices of driving for periods amounting in the aggregate to more than ten hours contrary to s 96 (1) of the Act and for working as a driver so that his working day exceeded 11 hours contrary to s 96 (3) (a), rests in each case on the application to the round trip and the hours of rest and hours of driving, of the provisions of s 96 (4), and the terms of the definition of 'working day' to which I have already made reference in s 103 (1) (b) of the definition of 'working day', and for the purpose of arriving at the conclusion that the first appellant committed these offences and the second appellants permitted him to do so, the justices have had regard to the hours driven in France, and more particularly to the absence from the period spent in France by the first appellant of an 11 hours interval for rest.

- a Counsel for the appellants submits that by having regard to what was done or omitted to be done in France, the justices misconstrued the statutory provisions. His submission in broad terms—I hope I accurately summarise—is that the provisions of Part VI of the Transport Act 1968 simply have no application to the driving of vehicles outside the jurisdiction of the English courts, nor to what is omitted to be done by drivers engaged in activities which if undertaken in this country would
- b impose obligations on them. He submits that there is no obligation during any period of driving in the course of employment in France to observe the requirements for intervals of rest under these provisions, nor any obligation to comply with the requirements of s 98 and the regulations made under s 98 with respect to the keeping of records.

- c It is common ground between the parties that no offence could in fact be committed at a time whilst the driver was in France either by way of then exceeding the permitted hours of duty, or the permitted hours of driving, or by way of failing to keep the required records. But the argument for the respondent presented to us by counsel is that nevertheless it is in principle permissible, on the true construction of the Act, to aggregate with any period of driving or working as a driver within the jurisdiction, preceding periods of such driving or employment beyond the jurisdiction, and indeed it is submitted that once a driver comes within the jurisdiction, he
- d comes under an immediate obligation to make a record so far as relevant to determine whether he has exceeded the permitted hours of working and driving, of such preceding hours of working and driving as he had undertaken in the foreign country.

- e The first basis for counsel for the appellants' submission is that the ambit of this part of this Act is indicated by the provisions of s 95 (1), that this part of the Act is to have effect in relation to persons engaged in the carriage of passengers or goods 'by road', and he draws our attention to the decision of the House of Lords in *Cox v Army Council*¹, where it was held that 'road' in the Road Traffic Act 1960 (and for the purposes of the Transport Act 1968, definitions from the Road Traffic Act 1960 are applied) was held to mean a road in England; he relies further on the well-known general principle that in the absence of indications to the contrary, Parliament is
- f presumed in a criminal statute to be legislating for what is to be done and what is not to be done within the jurisdiction and not with reference to acts or omissions beyond the jurisdiction.

- g One would expect to find either that one can throughout sensibly apply these provisions to hybrid journeys undertaken in part outside the jurisdiction and in part within the jurisdiction, in such a way that the language of the 1968 Act will fit them, and in such a way that the provisions which the Act contains for enforcement of his regulations can be applied to such hybrid journeys, or to reach the conclusion that the provisions of the Act simply do not apply to anything that is done or omitted to be done beyond the jurisdiction.

- h But it seems to me that one can examine the matter in rather more detail in relation to three separate questions. The first question is whether or not the provisions relating to the keeping of records can or cannot sensibly be applied to what is done or omitted to be done when the employed driver is beyond the jurisdiction of the court. As I understand it, before the justices it was conceded that the records provisions of s 98 and the relevant regulations had no application to anything that occurred abroad. But in this court counsel for the respondent boldly submits that the obligation on the driver to record his activities continues while he is abroad, even
- j though he cannot be prosecuted for an offence committed there. Alternatively, he argues, the obligation to record everything relevant that has happened abroad arises as soon as the driver enters the jurisdiction and continues his hybrid journey in this country. It seems to me with respect to counsel's forceful argument that that is a very tortuous construction of the Act and the provisions of the regulations,

1 [1962] 1 All ER 880, [1963] AC 48

and I am unable to accept that there is at any time any obligation cast on a driver who comes into England from a foreign country under these provisions to make any record of what he has done or failed to do before he came within the jurisdiction. Accordingly I turn to the second and third questions, having already reached the conclusion that if the Act has any application to the foreign parts of hybrid journeys it is at best a defective piece of legislative machinery in that the records provisions, which are designed, and designed exclusively, for the purpose of enforcing the restrictions on hours of work and hours of driving, are not available to discover whether offences are being committed. a

The second question is whether one can, in deciding whether there has been an excess of driving hours in the working day or an excess of working hours in the working day, aggregate with the period of time on duty or time actually driving in England, the preceding periods of time on duty and time driving whilst in France or elsewhere beyond the jurisdiction. Here, when I look at the particular language of s 96, bearing in mind the general principle that Parliament is not presumed to legislate to control actions and omissions beyond the jurisdiction, I find it very difficult to see how the principle of aggregation can be adopted. In particular sub-s (1) creates the offence I have already referred to of driving a vehicle 'for periods amounting in the aggregate to more than ten hours'. Similarly under sub-s (3) 'the working day of a driver . . . shall not exceed eleven hours'. I am unable to accept the submission that in calculating those aggregate periods one can have regard to a number of hours driven or worked beyond the jurisdiction. b

Finally—and this is not quite the same question—can one have regard for the purpose simply of calculating the length of a working day to the circumstance that during the period of the driver's absence abroad, he has not had at least 11 hours continuously as an interval of rest? I reach the conclusion that one cannot. I see that it would be possible to differentiate between the question of aggregating hours for the purpose of s 96 (1) and (3) and the question of whether or not the 11 hours rest period may legitimately be looked for during the time abroad in order to decide when the working day began or ended, but it seems to me it would be a strange distinction to make. c

In the end, therefore, having examined the three separate questions: do the records provisions apply? can one aggregate the foreign driving and working periods? and, can one look to see whether while abroad there has been a rest period? I am relieved to discover, having answered them all in one way, that, as I had expected at the start to find, the Act can consistently be construed as inapplicable to what is done or omitted beyond the jurisdiction. d

In general terms I find myself reinforced in that conclusion by the provisions of s 100 to which I earlier made reference, which have in express contemplation international journeys and contemplate that they will be provided for under regulations which have been the subject of international agreement, which will be brought into force by order of the Minister under that section, and which will require the modification and adaptation of the provisions of Part VI of the Act. For those reasons I would allow these appeals and quash the appellants' convictions. e

ASHWORTH J. Much to my regret I find that I have reached a different conclusion from that just announced by Bridge J, and in my judgment these convictions were right and should be sustained. I start from the basis set out in s 95 of the Act, that the object of this part of the Act was as follows: f

'(1) This Part of this Act shall have effect with a view to securing the observance of proper hours of work by persons engaged in the carriage of passengers or goods by road and thereby protecting the public against the risks which arise in cases where the drivers of motor vehicles are suffering from fatigue.'

g

a It is self-evident that a driver will suffer just as much fatigue whether he drives in this country or abroad, and I feel at the start a reluctance to countenance any relaxation of this limitation of drivers' hours of permitted driving according to whether he has previously driven in this country or abroad. A man who has been driving for ten hours in France, who comes over to this country, is no less likely to be a menace in an hour's time than a man who has been driving here. In order to achieve the
b objective Parliament provided in s 96 (1) in simple form, as I think:

'Subject to the provisions of this section, a driver shall not on any working day drive a vehicle or vehicles to which this Part of this Act applies for periods amounting in the aggregate to more than ten hours.'

c I say 'in simple form' because it seems to me that the question that arises when an offence is alleged to have been committed under s 96 is first: when did your working day begin? and secondly: at the time when you were driving had it come to an end or had there been a rest period of 11 hours? I shall return to that in a moment. After setting out in sub-s (1) what the offence is, s 96 (4) provides:

d 'Subject to the provisions of this section, there shall be, between any two successive working days of a driver, an interval for rest which . . . shall not be of less than eleven hours . . .'

I am not reading the whole of the section but that is the substance of it.

That brings one inevitably to ask what is a working day, which is provided
e in s 103 (1) (b):

'where a period during which he is on duty is not followed by an interval for rest of not less than eleven hours or (where permitted by virtue of section 96 (4) (b) of this Act) of not less than nine and a half hours, the aggregate of that period and each successive such period until there is such an interval as aforesaid, together with any interval or intervals between periods so aggregated'.

f What that comes to is this, that a working day goes on and on and on until it is broken by a period of 11 hours rest, and that is in effect what was admittedly taking place in the present case: that a driver was taking a vehicle to France, having limited rest periods but in fact was extending his working day within the meaning of the definition until after his return to this country.

g One of the troubles in this case in my view has arisen out of the requirement contained in this part of the Act that a driver and his employer should keep records. Although as already stated I would uphold these convictions, I cannot go along with counsel for the respondent in the submission that there is any duty on the part of a driver or a driver's employer to see that records are kept while the vehicle is out of this country. It seems to me that the provisions of the Act and the regulations
h themselves are applicable within the jurisdiction, and not outside it, and so there is in my judgment no statutory requirement to keep them in respect of journeys abroad.

i The prosecution in this case might well have been in difficulty in my judgment if they had had to rely simply on the statutory records kept by the first appellant under the directions of the second appellant, because they would have found in the statutory records nothing to suggest that the period of the working day had been exceeded by a period of driving; but they were fortunate enough to find amongst the documents some further records which were kept, and very properly kept, by the driver in pursuance of his own employer's directions, and there the whole story was revealed. It is manifest from a study of the right-hand column of the first sheet of those records that during his trip to France on 8th March and so on, this man was driving not continuously, but for a very considerable period, and had no rest period of

any substance at all. Accordingly the prosecution were able to show that if it was right to take into account the whole of the period from the start of the working day on 7th March until a break of 11 hours occurred, then it was proved beyond doubt that when the vehicle was stopped on 9th March the working day was still continuing, and the first appellant was driving when he had had no proper rest. a

For my part I regard this problem as one of arithmetic, and I am not concerned in the same way as Bridge J has indicated with the question, so to speak, whether the Act bites in France or is applicable to French driving. I proceed in my judgment on the footing that it applies to English driving and driving on an English road, but I proceed on the footing that in calculating whether there has been the requisite rest period, the court is entitled to look at all the material facts, and in particular to see whether between the start of the particular working day and the time of stoppage, 11 hours had gone by and there has been an adequate rest period. b

It is not a case in my judgment of applying the Act to matters occurring beyond the jurisdiction. It is a case of applying the Act to facts within the jurisdiction, but taking into account matters which happened outside. On that approach, which is a simplification of the matter but which I believe to be right, I think that the facts of this case have proved abundantly that there was a contravention when the first appellant was driving on 9th March and the other relevant dates, and I would uphold the conviction. c

LORD WIDGERY CJ. I agree with the judgment of Bridge J and have nothing which I can usefully add. The appeals will therefore be allowed and the convictions quashed. d

Appeals allowed. Convictions quashed. The court certified that a point of law of general public importance was involved, namely, whether in deciding if an offence had been committed under s 96 (1) and (3) (a) of the Transport Act 1968, it was right to take hours of working, hours of driving done and hours of rest taken outside Great Britain which if done or taken inside Great Britain would fall to be taken into account for the purpose of computing a driver's working day and hours of driving, and gave leave to appeal to the House of Lords. e

Solicitors: Mawby, Barrie & Scott (for the appellants); Treasury Solicitor. f

Jacqueline Charles Barrister.

a Barnet London Borough Council v Eastern Electricity Board and another

QUEEN'S BENCH DIVISION

LORD WIDGERY CJ, EVELEIGH AND MAY JJ

b 29th JANUARY, 19th FEBRUARY 1973

Town and country planning – Trees – Preservation order – Prohibition of wilful destruction of trees – Destruction – Meaning – Damage to root system of tree – Damage reducing life expectancy of tree and rendering it less stable – Whether tree destroyed – Town and Country Planning Act 1962, s 29 (1) (a).

c The appellants, the local planning authority, made a tree preservation order^a under s 29 (1)^b of the Town and Country Planning Act 1962. In accordance with s 29 (1) (a) the order prohibited the 'wilful destruction' of the trees specified in the order. In the course of relaying underground cables the respondents damaged the root systems of six roadside trees which were the subject of the order. The trees in question were in **d** good condition with a life expectancy of 20 years or more. As a result of the damage, their life expectancy was reduced perhaps to as little as between two and five years; they were rendered less stable and a potential danger. The respondents were charged with contravening the preservation order by wilfully destroying the trees, contrary to s 62 of the 1962 Act. On a submission by the respondents of no case to answer the justices took the view that the fact that the life expectancy of the trees in question had **e** been reduced by an uncertain period and their stability reduced by the respondents' actions could not constitute 'destruction' of the trees in the ordinary sense of that word and accordingly dismissed the informations. On appeal,

Held – Before a tree could be said to have been 'destroyed' it must have been rendered useless in the sense of having ceased to have any use as an amenity or as **f** something worth preserving. If a person inflicted on a tree so radical an injury that in all the circumstances a competent forester, taking into account its situation, e.g. its proximity to a highway, would decide that it ought to be felled, that person would have 'wilfully destroyed' the tree within s 29 (1) (a) of the 1962 Act. Accordingly the appeal should be allowed and the case remitted to the justices with a direction to hear the evidence (see p 323 c to f, post).

g Notes

For the prohibition on cutting trees subject to tree preservation orders, see 37 Halsbury's Laws (3rd Edn) 460-462, para 581.

For the Town and Country Planning Act 1962, ss 29, 62, see 36 Halsbury's Statutes (3rd Edn) 114, 138.

h As from 1st April 1972, ss 29 and 62 of the 1962 Act have been replaced respectively by ss 60 and 102 of the Town and Country Planning Act 1971.

Case stated

j This was an appeal by way of case stated by justices for the Middlesex area of Greater London acting in and for the petty sessional division of Highgate in respect of their adjudication as a magistrates' court sitting at Highgate on 29th June 1972.

1. On 5th April 1972 an information was preferred by the appellants, Barnet London Borough Council, against each of the respondents, the Eastern Electricity Board ('the respondent board') and Madden Duggan Co Ltd ('the respondent company') that

a The London Borough of Barnet (Oakleigh Park N20 'B') Tree Preservation Order 1969

b Section 29 (1), so far as material, is set out at p 321 c, post

each had contravened the provisions of the London Borough of Barnet (Oakleigh Park N20 'B') Tree Preservation Order 1969, contrary to s 62 (1) of the Town and Country Planning Act 1962, in that each respondent had, on or about 27th October 1971, severed the roots of six horse chestnut trees, specified in the information, without the consent of the local planning authority and that such severance was contrary to art 2 of the tree preservation order made by the appellants on 12th June 1969 and duly confirmed by the Ministry.

2. The justices heard the two informations together by consent and found the following facts: (a) At the material time the appellants, as highway authority, were engaged in widening a highway known as Oakleigh Road North, Whetstone, in the London Borough of Barnet, a process which involved, inter alia, the relaying of the respondent board's underground electric cables in a position close to the six trees the subject of the informations. (b) The respondent board instructed the respondent company as contractors to excavate and relay the cables. (c) Representatives of the appellants and the respondent board met on more than one occasion prior to and during the relaying operation when it was stressed and accepted that every care should be taken to prevent damage to the root systems of the six trees in the process. No representative of the respondent company was present at those meetings. (d) A representative of the appellants visited the site on 25th and 26th October 1971. On 27th October 1971 he again visited the site and then found that some of the roots of all six trees had been damaged or severed in the process of excavating the trench. Between one-third and one-half of the root system of each tree had been damaged or severed. (e) The representative of the appellants took 15 photographs of the scene which were exhibited to the case. (f) The trees were between 45 feet and 55 feet in height and, prior to the excavations, in good condition with a life expectancy of some 20 years or more. (g) As a result of the root damage and severance suffered the life expectancy of the trees would be shortened through lack of moisture, perhaps to as little as two to five years, and they would be rendered less stable and possibly a potential danger. Although it was unlikely that the trees would survive more than five years their death within that period was not certain. If the trees were heavily lopped their stability would be less affected and their life expectancy would then be likely to be five to ten years. (h) On the appellants' instructions the four trees within the limits of the highway were felled and replaced. The two remaining trees on private property had, with the appellants' permission, been lopped and were still alive although exhibiting symptoms of deterioration.

3. It was contended by the appellants that the acts of severing the roots of the trees amounted to wilfully destroying them in contravention of art 2 of the 1969 order.

4. The respondents gave no evidence and called no witnesses. It was contended by both respondents that the acts of severance of or damage to the roots of the trees could not amount to their wilful destruction and consequently there was no case for them to answer.

5. The justices were not referred to any cases in that context but were referred to an article published in the 'Justice of the Peace'.

6. The justices were of the opinion that the facts that the life expectancy of the six trees would be reduced by an uncertain period and their stability reduced as a result of the respondents' actions could not constitute 'destruction' in the ordinary sense of the word and there was no evidence before them that the trees would die within a reasonably definite period. Accordingly the justices found that the respondents' actions were not in specific breach of the provisions of the 1969 order and dismissed the informations.

R A W Sears for the appellants.

D M A Stokes for the respondents.

Cur adv vult

- a* 19th February. **MAY J** read the judgment of the court at the request of Lord Widgery CJ. This is an appeal by way of case stated by Barnet London Borough Council from the dismissal by the Highgate justices on 29th June 1972 of two informations preferred by the appellants, one against each of the respondents respectively, that the latter had each contravened the provisions of a tree preservation order made by the appellants on 12th June 1969 in respect of a substantial number of trees in the N 20 district of London, and had consequently committed an offence under s 62 (1) of the *b* Town and Country Planning Act 1962.

The power to make tree preservation orders was contained in s 29 of the 1962 Act which, insofar as is material for present purposes, provides as follows:

- c* '(1) If it appears to a local planning authority that it is expedient in the interests of amenity to make provision for the preservation of trees . . . in their area, they may for that purpose make an order (in this Act referred to as a 'tree preservation order') with respect to such trees . . . as may be specified in the order; and, in particular, provision may be made by any such order—(a) for prohibiting . . . the cutting down, topping, lopping or wilful destruction of trees except with the consent of the local planning authority . . .'

- d* The offence of contravening any provision of a tree preservation order was created by s 62 of the 1962 Act which provided for a penalty on summary conviction of a fine not exceeding £50. However s 15 (1) of the Civic Amenities Act 1967 provided that the maximum penalty should be increased to £250 or twice the value of the tree, whichever should be the greater, where the offence comprised 'cutting down or wilfully destroying a tree, or of topping or lopping a tree in such a manner as to be likely to destroy it'. The statutory provisions to which we have referred have since *e* been consolidated and re-enacted in ss 60 and 102 of the Town and Country Planning Act 1971. In its turn the relevant tree preservation order made pursuant to the above power provided, *inter alia*:

- f* '2. Subject to the provisions of this Order and to the exemptions specified in the Second Schedule hereto, no person shall, except with the consent of the authority . . . cut down, top, lop, or wilfully destroy or cause or permit the cutting down, topping, lopping or wilful destruction of any tree specified in the First Schedule hereto . . .'

And in Sch 2:

- g* 'This Order shall not apply so as to require the consent of the authority to . . . (3) The cutting down, topping or lopping of a tree exempted from the provisions of this Order by section 29 (7) of the Act namely a tree which is dying or dead or has become dangerous . . . or so far as may be necessary for the prevention or abatement of a nuisance . . .'

- h* It may be noted that all the trees specified in Sch 1 to the order are there listed and identified either individually or in small groups and their respective positions are further indicated on a map annexed to the order, which map was expressed to prevail where any ambiguity arose between it and the listed details in Sch 1.

- j* At the material time the appellants, as the highway authority, were engaged in widening a road in Whetstone in the London Borough of Barnet and this involved relaying cables the property of the respondent board close to six of the trees subject to the tree preservation order to which we have referred. The respondent company were engaged by the board as the contractors to do this work. Despite prior warnings from the appellants to the respondent board that during the relaying operation every care should be taken to prevent damage to the root systems of the six trees, between one-third and one-half of the root system of each tree was damaged or severed in the process of excavating the necessary trench for the relaying of the cables. Before such damage the trees were between 45 and 55 feet in height, in good condition

and with a life expectation of 20 years or more. The justices found that as a result of the damage to and severance of the tree roots the life expectancy of the trees had been shortened, perhaps to as little as between two and five years, that they had been rendered less stable and possibly a potential danger. Although it was unlikely that the trees would survive more than five years, their death within that period was not certain. If the trees were heavily lopped, their stability would be less affected and their life expectancy would then be likely to be some five to ten years. On the appellants' instructions four of the trees which were within the limits of the highway were felled and replaced. The two remaining trees, which were on private property, had with the appellants' permission been lopped and were still alive although exhibiting symptoms of deterioration. a

The information preferred by the appellants against the respondents alleged that the latter had contravened the provisions of the above order in that they had severed the roots of the relevant six trees without the appellants' consent. The appellants' contention before the justices was such that such severance, with the results we have indicated, amounted to a wilful destruction of the trees contrary to art 2 of the order. At the close of the appellants' evidence the respondents submitted that the acts of severance of or damage to the roots of the trees could not amount to their wilful destruction and that consequently there was no case for them to answer. b

The justices took the view that the facts that the life expectancy of the six trees would be reduced by an uncertain period and that their stability would be reduced as a result of the respondents' actions could not constitute 'destruction' of the trees in the ordinary sense of the word and that there was no evidence before them that the trees would die within a reasonably definite period. Accordingly they held that the respondents had not committed any breach of the provisions of the tree preservation order and dismissed both informations. It is from those dismissals that the appellants now appeal. c

The question which arises for decision in this case, therefore, is the proper construction of the words 'wilful destruction' in the relevant tree preservation order, which of course repeated verbatim the material words of s 29 (1) of the Town and Country Planning Act 1962. It is contended on the appellants' behalf that as the subject-matter of the section and order is trees and woodlands and their purpose is the latter's preservation we must give a relatively wide construction to the word 'destruction'; it is said that in the present context this is not to be equated with 'obliteration'. A tree, it is suggested, can effectively be destroyed as a tree if before its time it receives such an injury as causes it to begin to die, even though it still remains alive and may indeed continue to live, though with decreasing strength, for a period perhaps of years. Having regard to the inherent nature and being of a tree it can properly be said to be destroyed long before it has become dead timber or is uprooted. Indeed, having regard to the whole scheme and purpose of the legislation and bearing in mind that a tree comprises both its roots and its part above ground, the former having the dual function of enabling the tree to feed and of giving it the necessary stability to withstand the winds, it is submitted that the word 'destruction' must be construed as including all acts which materially affect the life-span or stability of the tree. d

The respondents in their turn point to the dictionary meanings of 'destroy' and argue that any such meaning as is contended for by the appellants is far too wide. To destroy, they say, is to render useless or to kill and they ask, pertinently enough, how it can be said that the respondents have destroyed at least the two trees still standing and which are still alive? Even if any act of the respondents can be said to have initiated any 'destruction' of any of the trees, that process is not complete, and a person cannot be convicted of this contravention of the order at least until the tree is dead. e

We have not found this at all an easy point of construction. In the first place we think it right as a matter of language not necessarily to treat 'destruction' as a synonym f

a for 'obliteration'; a glass vase is destroyed when it falls to the ground and shatters, even though the fragments which once comprised it still remain. On the other hand 'destruction' must have at least elements of finality and totality about it and must in our judgment go further than merely a material change in the life-span or stability of the tree. The difficulty in this case is to say precisely how much further one must go and how clearly to define in words the point at which one should stop.

b We think it right to start consideration of the problem with one of the dictionary definitions of destroy to which we have already referred, namely 'to render useless'. Before a tree can be said to be destroyed we feel that it must have been rendered useless—but rendered useless as what? This last enquiry raises immediately the question of the purpose for which the use of the tree may or may not continue to exist. Consequently in our judgment one must bear in mind in this case that the underlying purpose of the relevant legislation is the preservation of trees and wood-lands as amenities, as living creatures providing pleasure, protection and shade; it is their use as such that is sought to be preserved and a tree the subject of a tree preservation order is destroyed in the present context when as a result of that which is done to it, it ceases to have any use as an amenity, as something worth preserving. For example, if a person intentionally inflicts on a tree so radical an injury that in all the circumstances any reasonably competent forester would in consequence d decide that it ought to be felled, then in our opinion that person wilfully destroys the tree within the meaning of that word in the relevant legislation and order. Further, having regard to the way in which the trees are identified and described in Sch 1 to the 1969 order and to the annexed map, and indeed to general considerations as to what is or is not an amenity, we think that one of the relevant circumstances which a forester could or should take into account in deciding whether a given injured e tree should be felled is its situation: a tree adjoining a highway, for instance, needs greater stability and more vigorous life than a similar tree in a country field and the former may thus, by reason of its position alone, be destroyed in contravention of the 1969 order by a lesser injury than would be needed to destroy the latter.

f It follows that in our opinion the justices were wrong in dismissing these informations on submissions and for the reasons stated in the case. Equally we do not think that there are sufficient facts found in the case to enable us to say whether the justices ought or ought not to have found that any of the six trees were destroyed, applying the above test. We feel that the proper course to take is to remit the case to the justices with a direction that they should continue to hear the information, giving both the appellants and the respondents the opportunity of calling whatever further evidence they may wish having regard to the views we have expressed.

g *Appeal allowed. Case remitted to the justices with a direction to continue the hearing.*

Solicitors: R H Williams (for the appellants); Berrymans (for the respondents).

N P Metcalfe Esq Barrister.

Midland Greyhound Racing Co Ltd v Foley ^a

QUEEN'S BENCH DIVISION

LORD WIDGERY CJ, EVELEIGH AND MAY JJ

31ST JANUARY, 1ST FEBRUARY 1973

Gaming – Betting – Licensed track – Charges to bookmakers – Authorised charges – Charges other than authorised charges – Charges demanded or received as a consideration for facilities being given to bookmaker – Facilities – Charges made for provision of betting boards and accessories and maintenance, lighting, storage etc – Charge made for use of licensee's copyright in betting lists – Whether charges made as consideration for facilities – Betting, Gaming and Lotteries Act 1963, s 18 (1), (2). ^b

The appellants were the occupiers and operators of a licensed greyhound track. They made an agreement with a number of bookmakers for a consideration of £5 that they would provide certain services for the assistance of the bookmakers. Of that sum, £2 represented the admission charge, the maximum permitted under s 18 (1)^a of the Betting, Gaming and Lotteries Act 1963, £1.50 was for the provision of betting boards with the bookmakers' names on them, and other accessories together with maintenance, lighting, portorage and storage etc, and £1.50 was for the provision of copyright material consisting of printed betting lists, with permission to use the information thereon. The appellants were convicted on a number of informations charging them with receiving £5 as consideration for facilities being given to bookmakers for carrying on their business, a charge not authorised by s 18 (1) of the 1963 Act, contrary to s 18 (2)^b thereof. They appealed contending that the services provided as consideration for the sum charged did not constitute 'facilities' within s 18 (2). ^c

Held – The appeal would be dismissed. Giving the word 'facilities' its natural meaning, the services provided by the appellants were facilities within s 18 (2) in that they facilitated the bookmakers in the carrying on of their business (see p 328 e f and h j and p 329 b and c, post). ^d

Irvine Greyhound Racing Co Ltd v MacMillan 1936 JC 96 followed. ^e

Notes ^f

For charges to bookmakers on licensed tracks, see 18 Halsbury's Laws (3rd Edn) 224, 225, para 430.

For the Betting, Gaming and Lotteries Act 1963, s 18, see 14 Halsbury's Statutes (3rd Edn) 561. ^g

Case referred to in judgment

Irvine Greyhound Racing Co Ltd v MacMillan 1936 JC 96, 25 Digest (Repl) 463, *303.

Case stated ^h

This was an appeal by way of case stated by justices for the county borough of Wolverhampton acting in and for the county borough in respect of their adjudication at the magistrates' court sitting at Wolverhampton on 10th July 1972.

1. On 22nd June 1972 informations were preferred by the respondent, Jack Travers Foley, a superintendent of police acting for and on behalf of the Director of Public Prosecutions, against the appellants, Midland Greyhound Racing Co Ltd, that they: ⁱ

(i) on 3rd February 1972 at Monmore Green, Wolverhampton, being the occupiers of a licensed track, did receive from Stanley Enoch Hughes, a bookmaker, payment

^a Section 18 (1) is set out at p 327 d and f, post

^b Section 18 (2), so far as material, is set out at p 327 g and h, post

a of the sum of £5 as a consideration for facilities being given to him for the carrying on of his business, which sum was not a charge authorised by s 18 (1) of the Betting, Gaming and Lotteries Act 1963, contrary to s 18 (2) of the Betting, Gaming and Lotteries Act 1963; (ii) on 4th February 1972 at St Anne's Road, Willenhall, Walsall, being the occupiers of a licensed track, did receive from Stanley Enoch Hughes, a bookmaker, payment of the sum of £5 as a consideration for facilities being given to him for the carrying on of his business, which sum was not a charge authorised by s 18 (1) of the Betting, Gaming and Lotteries Act 1963, contrary to s 18 (2) of the Betting, Gaming and Lotteries Act 1963; (iii) on 5th February 1972 on Monmore Green, Wolverhampton, being the occupiers of a licensed track, did receive from Stanley Enoch Hughes, a bookmaker, payment of the sum of £5 as a consideration for facilities being given to him for the carrying on of his business, which sum was not a charge authorised by s 18 (1) of the Betting, Gaming and Lotteries Act 1963, contrary to s 18 (2) of the Betting, Gaming and Lotteries Act 1963; (iv) on 4th February 1972 at St Anne's Road, Willenhall, Walsall, being the occupiers of a licensed track, did receive from Tom Nuttall, a bookmaker, payment of the sum of £5 as a consideration for facilities being given to him for the carrying on of his business, which sum was not a charge authorised by s 18 (1) of the Betting, Gaming and Lotteries Act 1963, contrary to s 18 (2) of the Betting, Gaming and Lotteries Act 1963; (v) on 5th February 1972 at Monmore Green, Wolverhampton, being the occupiers of a licensed track, did receive from Tom Nuttall, a bookmaker, payment of the sum of £5 as a consideration for facilities being given to him for the carrying on of his business, which sum was not a charge authorised by s 18 (1) of the Betting, Gaming and Lotteries Act 1963, contrary to s 18 (2) of the Betting, Gaming and Lotteries Act 1963.

e 2. The justices heard the informations together (with the consent of the appellants) on 10th July 1972 and found the following facts. (a) The appellants had at all material times occupied and operated two greyhound racing tracks known respectively as Monmore Green Stadium at Wolverhampton and the Willenhall Stadium at St Anne's Road, Willenhall, Walsall. Those tracks were licensed by the National Greyhound Club Ltd and operated under the rules of racing laid down by that organisation, and held betting licences granted by the appropriate local authorities. At all material times the admission charge for members of the public to the 'first enclosure' f at each track had been 40p. (b) On 23rd October 1970 Mr Hughes, the holder of a bookmaker's permit, was invited by the appellants to sign a form of agreement and did so. The agreement contained a 'Schedule of Services' as follows: (i) provision of betting board with bookmaker's trading name signwritten, renewing and re-sign-writing as necessary; (ii) provisions of stools, post for betting board, maintenance thereof, portage and storage; (iii) provision of chalk, sponges and services of attendant; (iv) provision of lighting; (v) transport of bookmaker's equipment g between Wolverhampton and Willenhall if required. The agreement also contained a paragraph headed 'Copyright' which continued:

h 'Provision of Printed Betting Lists for each Race on the Programme, with permission to use the information provided thereon, i.e. details of runners in the respective races which are also shown on the Official Race Card, the copyright of which is vested in the Stadium Management.'

i A charge of £1 10s (£1.50) for services and £1 10s (£1.50) for betting lists and copyright was made under the agreement. Those charges represented an increase on those previously made by the appellants for the same services and for the betting lists and licence to use the information thereon. (c) On 22nd October 1970 Mr Nuttall, the holder of a bookmaker's permit, was invited by the appellants to sign a precisely similar form of agreement and did so. That agreement is the second annexure hereto. (d) On 3rd February 1972 Mr Hughes went to Monmore Green Stadium with a view to carrying on his business of bookmaking; he paid the ordinary admission charge of 40p and then went to a special office where he paid a further £4.60. The total of

£5 consisted of £1.50 for the scheduled services, £1.50 for betting lists and copyright, and £2 being the maximum charge for admission permitted by s 18 of the Betting, Gaming and Lotteries Act 1963. On 4th February 1972 Mr Hughes, in precisely similar circumstances, paid a total of £5 at Willenhall Stadium. On 5th February 1972, in precisely similar circumstances, he paid a total of £5 at Monmore Green Stadium. Mr Nuttall, in precisely similar circumstances, paid a total of £5 at Willenhall Stadium on 4th February 1972 and a total of £5 at Monmore Green Stadium on 5th February 1972. (e) At Monmore Green Stadium there was and had at all material times been a special area in the first enclosure built and reserved by the appellants for the exclusive use of bookmakers. At Willenhall Stadium there was and had at all material times been a rail reserved for their exclusive use. In the case of both stadia the positions reserved for bookmakers were within the first enclosures and were sited in a position to enable the bookmakers to serve patrons in the first enclosure. (f) The appellants at no time suggested that if the bookmakers refused to pay the additional £3 they would be denied admittance to the appropriate area of the track for the purpose of carrying on their respective businesses. The agreements were genuine agreements freely entered into. (g) The appellants were entitled to copyright in the betting lists and race-cards, as was conceded by the respondent. (h) The appellants had at all times behaved correctly and treated the police with courtesy and frankness, admitting the facts on which the prosecution was based and contending that they were in law entitled to make the charges complained of. On 14th April 1972 Peter Edwin Cartwright, a director of the appellants, was interviewed by Police Superintendent Foley. He handed to the superintendent a prepared statement which he signed in the presence of the officer.

3. It was contended by the appellants: (a) that the scheduled services were not facilities within s 18 (2) of the Betting, Gaming and Lotteries Act 1963; (b) that provision of printed betting lists and the licence to use the appellants' copyright were not facilities within s 18 (2) of the Act. The appellants referred the justices to dictionary definitions of 'facility' and contended that that word meant an unimpeded opportunity for doing something and (in the plural) favourable conditions for doing something, and not the services and articles which were used in doing something.

4. It was contended by the respondent that the scheduled services, and the betting lists and licence to use the appellants' copyright, were facilities because they each made it easier to carry on the bookmaker's business.

5. The justices were referred to *Irvine Greyhound Racing Co Ltd v MacMillan*¹.

6. The justices were of opinion that the facts proved on the informations were indistinguishable from those in *Irvine's* case¹. Although not bound by that decision they considered that it was correct and that they ought to follow it. They considered that the claim for copyright did not affect the matter as s 18 of the 1963 Act was directed against any charge or payment as a consideration for facilities given to bookmakers for carrying on their business, no matter what the charge or payment was called. Accordingly, they held that both the services scheduled to the agreements and the betting lists and licence to use the appellants' copyright given by the agreements were 'facilities' within s 18 (2) of the Betting, Gaming and Lotteries Act 1963. Accordingly they convicted the appellants on each of the informations and imposed a fine of £10 on each.

7. The questions for the opinion of the High Court were: (1) whether the services scheduled to the agreements were 'facilities' within s 18 (2) of the Betting, Gaming and Lotteries Act 1963; and (2) whether the betting lists and licence to use the appellants' copyright were 'facilities' within s 18 (2) of the Betting, Gaming and Lotteries Act 1963.

John Hall QC and J Grove Hull for the appellants.

D W Tudor Price and Andrew Rose for the respondent.

LORD WIDGERY CJ. This is an appeal by case stated by justices for the county borough of Wolverhampton in respect of their adjudication as a magistrates' court on 10th July 1972 at Wolverhampton. On that occasion they convicted the appellants of five offences against the Betting, Gaming and Lotteries Act 1963; the five offences were all similar in character, raising the same point, and it is sufficient to refer to one of them, namely the first. There the information alleged that the appellants, being the occupier, of a licensed track, did receive from Stanley Enoch Hughes, a bookmaker, payment of the sum of £5 as consideration for facilities being given to him for the carrying on of his business, which sum was not a charge authorised by s 18 (1) of the Betting, Gaming and Lotteries Act 1963, contrary to s 18 (2).

The background to the matter is that when totalisators were first introduced into greyhound tracks, Parliament thought it proper to make provision for the protection of bookmakers, not perhaps so much for the bookmakers' own interests, as in the interests of the public who might wish to have a choice of dealing freely either with the totalisator or bookmakers. Accordingly, legislation was introduced which is now to be found in s 18 of the Betting, Gaming and Lotteries Act 1963, and this is what it provides:

'(1) The occupier of any licensed track may make to a bookmaker or to any assistant accompanying a bookmaker to the track for the purpose of his business any charge for admission to any particular part of the track not exceeding, in the case of the bookmaker, five times the amount, or, in the case of an assistant, the amount, of the highest charge made to members of the public for admission to that part of the track . . .'

So that one starts with the fact that the actual admission charge to a bookmaker can be higher than that made to an ordinary member of the public, but must not exceed five times the charge made to a member of the public. Then there is a proviso which says:

'... there shall not be made to any bookmaker or bookmaker's assistant for admission to any particular part of the track any charge differing in amount from the charge made to any other bookmaker or bookmaker's assistant, as the case may be, for admission to that part of the track.'

A proviso, I observe, obviously intended to see that bookmakers are treated on a fair and equal basis. Then one comes to sub-s (2) which creates the offence of which the appellants were convicted in this case:

'If in the case of any licensed track any charge other than—(a) a charge authorised by the foregoing subsection [and I omit (b)] is made to a bookmaker or bookmaker's assistant, or any payment, valuable thing or favour, other than a charge so authorised or an amount so payable, is demanded or received by or for the benefit of the occupier of the track as a consideration for facilities being given to a bookmaker for the carrying on of his business, the person immediately responsible, and, if that person is not the occupier of the track, that occupier also, shall be guilty of an offence . . .'

So it is made an offence for the occupier of a licensed track to make a charge to a bookmaker in excess of the charges already authorised under s 18 (1) as a consideration for facilities being given to a bookmaker for the carrying on of his business.

What happened in this case, and we are told it has happened elsewhere, was that the appellants as occupiers of a number of tracks made an agreement with a number of bookmakers the effect of which was that, to use a neutral term, the occupier of the track should provide certain services for the assistance of the bookmaker, and the bookmaker should pay for them. The substance of the agreement made is that the occupier of the track should provide betting boards with the bookmaker's trading

name signwritten on them, should provide stools, a post for the betting board and maintenance for these items, portorage, storage, the provision of chalk, sponges and the services of an attendant, that the occupier of the track should also provide lighting and provide transport on certain occasions for the carrying of these articles from one track to another. The agreement went on to provide that on the occupier of the track providing those services, to use a neutral word again, the bookmaker should pay to the occupier of the track a total of £5. Of that £5, £2 was the straightforward admission fee which was five times the 40p charged to members of the public, £1.50 for those bookmakers in the first enclosure was attributable to the services which I have already described in outline, and a final £1.50 was in respect of the privilege afforded by the occupier of the track to the bookmaker of providing the bookmaker with certain copyright material which he required for the purposes of his business.

That agreement being made, and an agreement if I may say so which appears on the face of it to be wholly free from vice, it was alleged below and indeed held by the justices that an offence had been committed under s 18. The argument centres entirely on the phrase 'facilities being given to a bookmaker for the carrying on of his business'. If these services including the provision of the copyright material are properly to be described as facilities given to the bookmaker for the carrying on of his business, then it seems to me inevitable that the offence was committed and the justices were right, because it is that and just that which is prohibited by the section.

Counsel for the appellants has argued forcefully, if I may say so, that these physical services, whereby the bookmaker's task is eased, are not 'facilities' for the purpose of the section. For my part, taking the matter as one of first impression on the natural meaning of the words used, I would have thought that these services did come within the ordinary meaning of the word 'facilities'.

We have been referred to a number of dictionary definitions, and that in the Oxford English Dictionary is 'opportunities; favourable conditions, for the easier performance of any action'. I would have thought, giving the word its natural meaning, that the provision of these methods of assisting bookmakers could properly, as a matter of English, come within the phrase 'facilities', and in that we are supported by a Scottish decision, which is the only authority to which we have been referred. It is *Irvine Greyhound Racing Co Ltd v MacMillan*¹. It was a case indistinguishable from the present except that the use of copyright material was not involved, but the occupier of the track had agreed with his bookmakers, if I may use that phrase, to provide the sort of physical services which are provided in this case. The Court of Session came to the conclusion that the charge was made out, and after discussing the narrower meaning of 'facilities', which counsel for the appellants was inevitably bound to try to support in this case, the Lord Justice-Clerk (Lord Aitchison) said²:

'I think that is a much too narrow meaning to give to the word "facilities." Anything given by the occupier to the bookmaker, or any service rendered by the occupier to the bookmaker, which in fact facilitates the carrying on of the bookmaker's business is a facility in the sense of the subsection³.'

Counsel for the appellants argued, as he had to argue, that the word is not appropriate to the provision of physical aids of the kind which I have described. But I am bound to say for my part that I think that these physical aids do come within the ordinary meaning of the language, and being reinforced in that view by the decision of the Court of Session, I find it impossible to depart from it. I reach that conclusion with some regret, because it seems to me that this on its face is a perfectly sensible

¹ 1936 JC 96

² 1936 JC at 100

³ I.e. s 13 (2) of the Betting and Lotteries Act 1934, repealed and re-enacted in s 18 (2) of the 1963 Act

a arrangement fair to both parties, and indeed convenient to both parties, and one asks oneself why Parliament should have been concerned to make it a criminal offence that such an arrangement should be made. I can only suppose that Parliament thought that arrangements of this kind were susceptible to extortion and other unsatisfactory practices, and thought that the only way to prevent that ill was to prohibit such arrangements, whether in fact they were obnoxious or not. I fear on the view of the section I take that is the effect; it seems to me the justices were right, and I would dismiss the appeal.

EVELEIGH J. I agree.

MAY J. I agree.

c Appeal dismissed. Certificate that decision involved point of law of general importance refused.

Solicitors: Bristows, Cooke & Carmael (for the appellants); Director of Public Prosecutions.

N P Metcalfe Esq Barrister.

Stocks v Magna Merchants Ltd

QUEEN'S BENCH DIVISION AT MANCHESTER

ARNOLD J

24th, 25th JANUARY 1973

f Damages – Measure of damages – Wrongful dismissal – Loss of future earnings – Redundancy payment – Deduction from award – Dismissal entitling plaintiff to redundancy payment – Whether redundancy payment to be taken into account in assessing damages.

The plaintiff was engaged by the defendants, a limited company, as their managing director for a period of years terminating on 31st July 1971. On 30th June 1970 the defendants ceased to carry on business and discharged the plaintiff from their employment. In consequence the defendants became liable to pay the plaintiff a redundancy payment by virtue of s 1 (2) (a) of the Redundancy Payments Act 1965. The plaintiff brought an action against the defendants for wrongful dismissal. The defendants did not dispute liability but claimed to be entitled to deduct the amount of the redundancy payment from the damages for which they were liable.

g Held – The question whether a redundancy payment fell to be taken into consideration in assessing damages for wrongful dismissal was to be determined by applying the principle of remoteness. Since a redundancy payment was not a payment which would inevitably be made on the termination of a person's employment but was conditional on the circumstances in which the termination took place, it was not too remote to be taken into account. Accordingly the redundancy payment fell to be deducted in calculating the damages payable to the plaintiff (see p 333 a to f, post).

j Parsons v BNM Laboratories Ltd [1963] 2 All ER 658 and Parry v Cleaver [1969] 1 All ER 555 applied.

Notes

For the measure of damages for wrongful dismissal, see 11 Halsbury's Laws (3rd Edn)

244, para 414, and 25 *ibid* 521-524, paras 993-995, and for cases on the subject, see 34 Digest (Repl) 128-132, 866-894. a

For the Redundancy Payments Act 1965, s 1, see 12 Halsbury's Statutes (3rd Edn) 238.

Cases referred to in judgment

National Insurance Co of New Zealand Ltd v Espagne (1961) 105 CLR 569, [1961] ALR 627, Digest (Cont Vol A) 1197, *1902a. b

Parry v Cleaver [1969] 1 All ER 555, [1970] AC 1, [1969] 2 WLR 821, 6 KIR 265, [1969] 1 Lloyd's Rep 183, HL, Digest (Cont Vol C) 750, 1061e.

Parsons v BNM Laboratories Ltd [1963] 2 All ER 658, [1964] 1 QB 95, [1963] 2 WLR 1273, [1963] TR 183, 42 ATC 200, Digest (Cont Vol A) 462, 37a.

Cases also cited

Bradburn v Great Western Railway Co (1874) LR 10 Exch 1, [1874-80] All ER Rep 195.

Browning v War Office [1962] 3 All ER 1089, [1963] 1 QB 750, CA.

Hindle v Percival Boats Ltd [1969] 1 All ER 836, [1969] 1 WLR 174, CA.

Payne v Railway Executive [1951] 2 All ER 910, [1952] 1 KB 26, CA.

Victoria Laundry (Windsor) Ltd v Newman Industries Ltd [1949] 1 All ER 997, [1949] 2 KB 528, CA. c
d

Action

By a writ issued on 13th July 1971 the plaintiff, Edgar Stocks, claimed damages against the defendants, Magna Merchants Ltd, for breach of an agreement dated 9th September 1968 made between the plaintiff and the defendants whereby the defendants agreed, *inter alia*, to employ the plaintiff until 31st July 1971. The facts are set out in the judgment. e

Michael Lever for the plaintiff

Martin Collins QC for the defendants. f

ARNOLD J. By an agreement dated 9th September 1968 between the plaintiff and the defendants the plaintiff agreed to serve the defendants, and the defendants agreed to employ the plaintiff, as managing director of the defendants' business for a period of years terminating on 31st July 1971. The plaintiff's salary was £2,500 a year.

On 30th June 1970 the defendants ceased to carry on their business and discharged the plaintiff from their employment. By so doing the defendants acted in breach of the contract of employment which I have mentioned and so became liable to the plaintiff in damages for that breach. By ceasing to carry on their business the defendants brought themselves within the ambit of redundancy defined in s 1 (2) (a) of the Redundancy Payments Act 1965, and accordingly their dismissal of the plaintiff attracted a liability to make a redundancy payment to the plaintiff under that Act. In this action the plaintiff sues the defendants for damages for wrongful dismissal and it is not in dispute that the defendants are liable for such damages. The sole issue concerns the amount of those damages. g
h

It is not in dispute between the parties that the proper measure of damages for wrongful dismissal is the amount of the loss suffered by the plaintiff and that this falls to be determined by taking the gross amount of the remuneration which the plaintiff would have earned during the remainder of his period of service, less any amount which he has or ought to have earned elsewhere, and by deducting therefrom the diminution which the gross amount would have suffered if he had, in fact, earned it. It is, moreover, not in dispute that if the termination of the employment through the breach of contract has resulted in the payment to the plaintiff of a sum of money, i

a in certain circumstances the amount of the damages falls to be reduced by that sum. It is the circumstances in which this ought or ought not to be done which provide the core of the present dispute.

b The duration of the contract period after the date of the dismissal in the present case was 13 months and the gross remuneration attributable to that period at the rate provided for in the contract was £2,708.33. Income tax which would have been payable by the plaintiff in respect of that sum would have been £781.45, and as a result of his dismissal the plaintiff received unemployment benefit amounting in the aggregate to £377 wholly referable to the remaining period of the contract. If those two sums are deducted from the gross amount of remuneration this is reduced to £1,549.88. So far the parties are in agreement. No question arises in the present case of a deduction in respect of earnings during the residue of the contract period since there were none and the defendants do not point to any failure on the plaintiff's part to mitigate damage in this regard.

c The redundancy payment, which I have mentioned, amounted to £1,140. If this were to be deductible from the sum of £1,549.88, the net amount would be £409.88. This is the measure of damages for which the defendants contend, since they argue that the damages ought to be assessed after giving credit to them for the amount of the redundancy payment. The plaintiff disputes this. He says that the measure of damages is £1,549.88 since, as he contends, the redundancy payment should not be taken into account.

d There is no authority on the point and the parties agree that it is a matter of principle, that is that it falls to be determined by reference to the proper method of assessing damages in such a case as the present and having regard to the true nature of a redundancy payment under the Redundancy Payments Act 1965, and that the resolution of the matter does not depend on the facts of the particular case.

e The redundancy payment was attracted, as I have indicated, because of the dismissal of the plaintiff being attributable wholly, or mainly, to the fact that the defendants had ceased, or intended to cease, to carry on their business for the purposes of which the employee, that is the plaintiff, was employed by them. That is, of course, a quotation from s 1 (2) of the 1965 Act. It was because this circumstance obtained at the date of the dismissal on 30th June 1970 that the plaintiff came within the ambit of the subsection, and so became entitled to the payment. The question is whether a payment of this character comes within the category of those which fall to be deducted in assessing damages for wrongful dismissal in breach of a contract of service. The extent of that category has been considered in a number of cases dealing with matters other than redundancy payments and notably in *Parsons v BNM Laboratories Ltd*¹. In that case two matters of deductibility were involved. One related to income tax and that has no relevance to the present case, but the other related to unemployment benefit. In that case the plaintiff had been unemployed for a period of getting on for three months after the wrongful dismissal by the defendants and he received unemployment benefit in the sum of £59 2s 6d in respect of that period. The question was whether that sum was deductible in assessing the damages and the Court of Appeal held that it was. So much is clear.

h It is not, however, very easy to discern the reason for this conclusion of the Court of Appeal since, if I may respectfully say so, each of the three learned Lords Justices seems to have reached his conclusion in a somewhat different fashion. Sellers LJ² said that the receipt of the benefit directly mitigated the loss of earnings and was, in effect, a partial substitute for them. He rejected any analogy between the unemployment benefit and a payment under an insurance policy kept up by the employee, plaintiff, or a pension payable to the employee, plaintiff, on termination of his service, on the ground that the unemployment benefit was something for which the employer

i ¹ [1963] 2 All ER 658, [1964] 1 QB 95

² [1963] 2 All ER at 669, 670, [1964] 1 QB at 120-122

had made a contribution, whereas the insurance or pension had been paid for by the employee alone, in the one case in cash and in the other by means of his service. The view of Harman LJ¹ was that the loss suffered by the plaintiff was diminished, as he says, pro tanto by the payment of the unemployment benefit and so, to that extent, could not be charged against the wrongdoer. In distinguishing the case from that of an insurance payment he pointed out that the insurance contract was a purely voluntary one made by the plaintiff, while the contribution which attracted the payment of unemployment benefit was one which the plaintiff, and I quote², 'is bound to make with the very object of mitigating the damage which inability to work will do him', and he said it was just as if his employer continued to pay part of his wages. Pearson LJ³ dealt with the matter at somewhat greater length. His conclusion is stated in these words⁴:

'Is the plaintiff's receipt of unemployment benefit a matter too remote to be taken into consideration in ascertaining his net loss resulting from the wrongful dismissal? The common-sense answer is that of course it is not too remote. It is not "completely collateral". The dismissal caused the plaintiff to become unemployed, and therefore entitled, as a matter of general right under the system of state insurance and not by virtue of any private insurance policy of his own, to receive unemployment benefit. The effect of the dismissal was not to deprive him of all income but to reduce his income by substituting unemployment benefit for his salary. It would be unrealistic to disregard the unemployment benefit, because to do so would confer on the plaintiff, to the extent of £59 2s. 6d., a fortuitous windfall in addition to compensation. Counsel for the defendants also put his argument in this way: the plaintiff has a duty to mitigate the damage, resulting from the wrongful dismissal, by seeking other employment and drawing unemployment benefit in the meantime. I think that is correct, although the word "duty" is used in a special sense, meaning only that the plaintiff cannot charge the defendant with any part of the loss which the plaintiff could have avoided by taking reasonable steps.'

In *Parry v Cleaver*⁵ the House of Lords had to consider, in the context of a personal injuries claim, whether the damages fell to be reduced by the deduction of the value of a disability pension payable to the plaintiff on his discharge from employment, as a result of the injuries, out of what was treated as a fund to which both the plaintiff and his employers had contributed. I mention here that the employers were, of course, not the defendants in that case. *Parsons v BNM Laboratories Ltd*⁶ was cited and mentioned in the speeches of three of the Lords of Appeal and no distinction was drawn between the case of an award of damages for personal injuries, such as was in question in *Parry v Cleaver*⁵, and one of an assessment of damages for wrongful dismissal, such as was in question in *Parsons v BNM Laboratories Ltd*⁶. In my judgment, for purposes here relevant, the principles governing the one may properly be regarded as governing the other. It is, therefore, relevant to consider how far what was said by the majority of the Lords of Appeal in *Parry v Cleaver*⁵ throws light on the true ratio decidendi of *Parsons v BNM Laboratories Ltd*⁶. Lord Reid⁷, Lord Pearce⁸ and Lord Wilberforce⁹, particularly in his citation from Windeyer J¹⁰

1 [1963] 2 All ER at 675, 676, [1964] 1 QB at 130, 131

2 [1963] 2 All ER at 676, [1964] 1 QB at 131

3 [1963] 2 All ER at 682-684, [1964] 1 QB at 141-144

4 [1963] 2 All ER at 684, [1964] 1 QB at 143, 144

5 [1969] 1 All ER 555, [1970] AC 1

6 [1963] 2 All ER 658, [1964] 1 QB 95

7 [1969] 1 All ER at 559, [1970] AC at 15, 16

8 [1969] 1 All ER at 577, [1970] AC at 37

9 [1969] 1 All ER at 580-582, [1970] AC at 40-42

10 In *National Insurance Co of New Zealand Ltd v Espagne* (1961) 105 CLR 569 at 597, 598

a in the Australian High Court, all seem to reject a determinant test based on whether the plaintiff alone paid the premiums or contribution and suggest rather that the question is one of remoteness, as Pearson LJ employed that conception in *Parsons v BNM Laboratories Ltd*¹. My conclusion is, therefore, that the question of deductibility falls to be determined by the application of this principle of remoteness.

b The present question, in my judgment, falls to be answered in favour of the plaintiff if the redundancy payment in quality and, in particular, as regards its remoteness or proximity in relation to the dismissal of the plaintiff is analogous to a retirement pension, or predominantly analogous to that, but in favour of the defendants if it is analogous, or predominantly analogous, in those respects to unemployment benefit.

c The redundancy payment fell to be made because of the dismissal of the plaintiff for the motives which underlay that dismissal, for that is the determinant factor under the statute. It was not a payment which was inevitably going to be made at whatever time, and in whatever circumstances, the plaintiff's employment should come to an end, whether during, or at the end of, or later than the end of, the contractual period under the contract current at the date of dismissal, but only if the employment came to an end for the same reasons, or for other comparable reasons, as those for which it was, in fact, brought to an end by the dismissal.

d Unemployment benefit is payable on the dismissal of the plaintiff not inevitably and irrespective of the events which happen, but only if, in fact, on that dismissal a period of unemployment ensues. A retirement pension is payable, except to the extent that its conditions prescribe otherwise, whenever the employment is terminated, irrespective of whether that event comes about by dismissal, by resignation, or by retirement in due course, and irrespective of the event, or intended event, which prompts that dismissal or that resignation if those be the facts.

e My view is that there is a closer analogy, as regards remoteness or proximity to the dismissal of the plaintiff, between the payment of unemployment benefit and the payment of a sum for redundancy under the 1965 Act than there is between the payment of a retirement pension and a redundancy payment. Consequently, in my judgment, consistently with the authority of *Parsons v BNM Laboratories Ltd*¹, the right conclusion here is that the amount of the redundancy payment does fall to be deducted in calculating the damages payable by the defendants to the plaintiff

f which I accordingly assess at the sum of £409.88.

g I cannot be sufficiently grateful to counsel in this case for the full and careful way in which they have deployed argument on what, at the end of all, is a very difficult point, and if I have not mentioned all the arguments which have been advanced, on the one side or the other, it is not because I have not paid the fullest attention to them.

Judgment for plaintiff for £409.88.

Solicitors: *Addleshaw, Sons & Latham*, Manchester (for the plaintiff); *Grundy, Kershaw, Farrar & Co*, Manchester (for the defendants).

M Denise Chorlton Barrister.

Practice Direction

CHANCERY DIVISION

Probate – Practice – Chancery Division – Contentious probate – Accounts of administrators pendente lite – Information as to unconverted assets – Exhibition of inventory – Frequency of accounts.

Probate – Practice – Chancery Division – Contentious probate – Copies of scripts – Lodgment.

A. Accounts of administrators pendente lite

1. Criticisms have been made of the form of accounts lodged by administrators pendente lite in probate actions on the ground that they are accounts only of cash received and paid and accordingly give no details of unconverted assets in the administrators' hands.

2. It appears that under the Contentious Probate Rules 1862 an administrator was required to exhibit an inventory and render an account but that in course of time the inventory was no longer called for. The subject is now governed by RSC Ord 76, r 15 (2), which applies the procedure for passing a receiver's account laid down by RSC Ord 30, rr 4 and 6, but the form of receivers' accounts is not laid down by the Rules of the Supreme Court and only appears in Form 40 of the revised unprescribed Chancery Masters' Practice Forms¹; this provides only for cash items.

3. The former practice of exhibiting an inventory will be revived. The administrator is to exhibit to his affidavit verifying his accounts, in addition to his cash account, a schedule listing (a) assets other than cash in his hands at the commencement of the accounting period and (b) assets other than cash acquired by him during that period. A suitable form would be that for a judicial trustee's statement of trust property (Form 62 of the revised Chancery Masters' Practice Forms²) but the columns showing estimated capital value and estimated gross annual income may be omitted.

4. The clerk taking the account will strike through items in the schedule which have been converted into cash during the accounting period and note the date of disposal. The remaining items will constitute the first part of any subsequent schedule.

5. It is not proposed to direct annual administrators' accounts in every case. The frequency of accounts will be directed by the master according to the size and nature of the estate and any other relevant factors. It is anticipated that formal accounts may sometimes be dispensed with by the parties but that the administrator will normally be ordered to bring in an account at the end of the first year of his administration and that no further account may be needed, at any rate until he is discharged, but this is purely for general guidance.

B. Lodgment of copies of scripts

6. It is desirable in the interests of security to avoid frequent handling of wills, codicils and other testamentary scripts in chambers and also to provide copies of such scripts for the perusal of the judge before the hearing of an action in the Short Probate List.

7. When a party lodges an original script in court he will at the same time lodge a copy thereof with the appropriate clerk. If a script is not lodged by a party when it is forwarded by the Family Division to the Chancery Division, the party relying on it will lodge a copy thereof in chambers before the first hearing at which

¹ See the Supreme Court Practice 1973, vol 2, Second Cumulative Supplement, para 382

² Ibid, para 404

- a* the script has to be considered. Photographic copies are preferred but typed copies are acceptable. Such copies will be used by the master and sent by him to the judge if the matter is set down in the Short Probate List.

By the direction of the Vice-Chancellor.

R E BALL
Chief Master

- b* 1st May 1973

Practice Direction

- c* FAMILY DIVISION

Costs – Taxation – Value added tax – Matrimonial proceedings – Divorce county court.

- d* 1. The High Court practice for dealing with the incidence of value added tax ('VAT') in respect of the taxation of bills of costs¹ should be followed in the course of the taxation of the costs of matrimonial proceedings in the divorce county court.

2. The following points should be noted:

- e* (1) *Apportionment of work.* It is considered that where all the necessary steps to conclude matrimonial proceedings have been taken prior to 1st April 1973 except for the taxation of the bill of costs, as a matter of convenience the date of the actual taxation should be taken in order to determine whether the charge under item 26 of the Divorce Scale is subject to VAT.

- f* (2) *Disbursements.* It has been agreed that items 35 (a) and (b), 36 (b), 37 (b), 38 (b) and 39 (b) in the Divorce Scale should be regarded as profit costs. Amounts claimed in respect thereof should therefore appear in the profit costs column of the bill and will be chargeable with VAT. On the other hand, items 32, 33 (a) to (f), 34, 36 (a), 37 (a), 38 (a), and 39 (a) should be treated as disbursements by the solicitor, acting as agent for his client. Amounts claimed in respect of these items should appear in the disbursements column, the VAT element, if any, being shown separately. Exceptions may arise: for instance, it would be appropriate to treat the cost of a telephone call or cable to Europe or to the United States of America as a disbursement.

- g* 3. *Fixed costs.* The Matrimonial Causes (Costs) Rules 1971² are amended with effect from 1st April 1973 by the addition of a further rule 7A³ allowing as a disbursement a sum in respect of VAT to be charged on the element of profit costs and counsel's fees in the fixed costs. It is necessary therefore to indicate the amount of VAT claimed in the form of election to take fixed costs. Until new forms are available, the VAT element will have to be shown in separate columns and the certificate will indicate the total VAT allowed.

- h* This Direction is issued with the concurrence of the Lord Chancellor.

27th March 1973

D NEWTON
Senior Registrar

j 1 See *Practice Direction* [1973] 1 All ER 974, [1973] 1 WLR 438

2 SI 1971 No 987

3 See the Matrimonial Causes (Costs) (Amendment) Rules 1973 (SI 1973 No 350), r 2

Practice Direction

QUEEN'S BENCH DIVISION

Rent restriction – Possession – Protected tenancy – Claim for possession – Procedure – Indorsement on writ of summons – Certificate of solicitor or plaintiff's affidavit – Increase in rateable values – New forms of indorsement – Rent Act 1968, s 1, as amended by Counter-Inflation Act 1973, s 14 – RSC Ord 6, r 2 (1) (c) – RSC Ord 13, r 4 (2).

By s 14 of the Counter-Inflation Act 1973, which was passed on 22nd March 1973, rateable values for the purposes of the Rent Act 1968 have been substantially increased and the indorsements required to be made on the writs of summons by RSC Ord 6, r 2 (1) (c), and the certificate to be supplied by solicitors, or if the plaintiff is acting in person, the affidavit required, pursuant to Ord 13, r 4 (2), must be appropriately adapted.

The new limits of rateable value are as follows: (1) where the appropriate day was before 22nd March 1973 (see s 6 of the Rent Act 1968)—(a) the rateable value on the appropriate day must have been in excess of £400 in Greater London and £200 elsewhere; and (b) the rateable value on 22nd March 1973 must have been in excess of £600 in Greater London and £300 elsewhere; and (c) the rateable value on 1st April 1973 must have been in excess of £1,500 in Greater London and £750 elsewhere; (2) where the appropriate day was on or after 22nd March 1973 and before 1st April 1973, (b) above applies with the substitution of appropriate day for 22nd March 1973 and (c) above also applies; (3) where the appropriate day is on or after 1st April 1973, (c) of the foregoing applies with the substitution of the appropriate day for 1st April 1973.

Suggested forms of indorsement are as follows:

'The premises are dwelling-houses situated in [Greater London] [elsewhere than in Greater London] and the rateable value was as follows:—

'(a) on the appropriate day in excess of	$\left[\begin{array}{c} £400 \\ £200 \end{array} \right]$	} whichever is appropriate.'
'(b) on 22nd March 1973 in excess of	$\left[\begin{array}{c} £600 \\ £300 \end{array} \right]$	
'(c) on or after 1st April 1973 in excess of	$\left[\begin{array}{c} £1500 \\ £750 \end{array} \right]$	

The general effect of this recent legislation is to protect all tenancies, the present rateable value of which is £1,500 in Greater London and £750 elsewhere.

Until the necessary amendment of the Rules of the Supreme Court can be effected, all writs claiming possession of dwelling-houses under a rateable value of £1,500 in London and £750 elsewhere should be referred to the Practice Master in the Supreme Court or the registrar in the appropriate district registry, prior to entering judgment in default of appearance.

W RUSSELL LAWRENCE
Senior Master

6th April 1973

a Killick and another v Second Covent Garden Property Co Ltd

COURT OF APPEAL, CIVIL DIVISION

DAVIES, CAIRNS AND STAMP LJJ

b 12th, 13th FEBRUARY 1973

Landlord and tenant – Lease – Assignment – Consent – Consent not to be unreasonably withheld – Covenant by lessee to use premises only for purposes of printers' business – Proposed assignment by lessee – Intention of proposed assignee to use premises as offices – Refusal of consent – Whether breach of covenant a necessary consequence of assignment – Whether consent unreasonably withheld.

d The lessee held premises under a lease which contained a covenant in cl 1 (7) that the lessee 'Will not carry on or permit to be carried on and that there shall not be carried on upon the premises hereby demised or any part thereof and that the same shall not be used as or for [various specified purposes] nor for any other purpose than the trade or business of a printer nor have or permit any sale by auction in or upon the demised premises or any part thereof without the Lessors' written consent which shall not be unreasonably withheld'. Clause 1 (12) contained a further covenant that the lessee 'Will not assign underlet or part with the possession of the premises hereby demised or any part thereof without the consent in writing of the Lessors first had and obtained but such consent shall not be unreasonably withheld'. **e** An underlease of the premises contained covenants in similar terms, with modifications requiring that the consents should be those of the lessee as well as of the lessors. The underlessees were printers and had used the premises for the purposes of their business. Both the lessee and the underlessees wished to assign their leases to a company who were not printers and who proposed to use the premises as offices. **f** They applied to the lessors for consent to the assignments. The lessors refused consent on the grounds that the covenant not to use the premises for a purpose other than that of the business of a printer was unqualified and a breach of that covenant would be a necessary consequence of the assignment.

g **Held** – The lessors' consent to the assignment had been unreasonably withheld for the following reasons—

g (i) It was not a necessary consequence of the proposed assignment that the premises would be used for a purpose that was in breach of covenant since the giving of consent would not of itself preclude the lessors from thereafter insisting that the terms of the user covenant be strictly complied with since the assignees would simply step into the shoes of the lessee and underlessees and thereby become subject to the user covenant (see p 339 e f and j and p 340 g, post).

h (ii) In any event, on the true construction of cl 1 (7), the user covenant was not unqualified but was subject to the consent of the lessors to a change of use which was not to be unreasonably withheld (see p 340 c f and g, post).

Notes

j For assignment of leases subject to landlords' consent, see 23 Halsbury's Laws (3rd Edn) 629-637, paras 1333-1344, and for cases on the subject, see 31 Digest (Repl) 420, 421, 5491-5505.

Cases referred to in judgment

Granada TV Network Ltd v Great Universal Stores Ltd (1963) 187 Estates Gazette 391.
Packaging Centre Ltd v Poland Street Estates Ltd (1961) 178 Estates Gazette 189, CA.

Appeal

The landlords, Second Covent Garden Property Co Ltd, appealed against an order of his Honour Judge Rogers sitting at the Mayor's and City of London Court on 20th October 1972 declaring that the landlords had unreasonably withheld their consent to two assignments, by the lessee, Lawrence Edwin Killick, and the underlessees, Herbert Fitch & Co Ltd, respectively, of premises at 31, 33 and 35 Mansell Street, Aldgate in the City of London, to a company, Primaplex Ltd. The grounds of appeal were that the judge had erred in law in holding that on a true construction of cl 1 (7) in the lease and of cl 1 (7) in the underlease the concluding words in the former sub-clause 'without the Lessors' written consent which shall not be unreasonably withheld' and in the latter sub-clause 'without the Lessors' and the Superior Lessors' written consent which shall not be unreasonably withheld' applied to the earlier words in each sub-clause '[use] for any other purpose than the trade or business of a printer' and that accordingly the landlords had unreasonably withheld their consent to the proposed assignments by the lessee and the underlessees respectively of the lease and underlease. The facts are set out in the judgment of Stamp LJ.

Christopher Priday for the landlords.

G Avgherinos for the lessee and underlessees.

STAMP LJ delivered the first judgment at the request of Davies LJ. This is an appeal against an order of his Honour Judge Rogers, sitting at the Mayor's and City of London Court, on 20th October 1972, whereby it was declared that Second Covent Garden Property Co Ltd ('the landlords') unreasonably withheld their consent to two assignments: one an assignment by Mr Lawrence Edwin Killick ('the lessee') of the lease, and the other an assignment by Herbert Fitch & Co Ltd ('the underlessees') of the underlease, of premises known as 31, 33 and 35 Mansell Street, Aldgate in the City of London. Each of the assignments or intended assignments is an assignment to a company called Primaplex Ltd.

The lessee holds the premises under a lease dated 9th April 1951 for a term of 42 years from 30th March 1951. It is a valuable lease, and the landlords are entitled to the reversion expectant on its determination. The underlessees hold the premises under an underlease dated 20th September 1967 for a term expiring a few days earlier than the head lease.

Clause 1 (7) of the head lease contains a covenant, which I will call 'the user covenant', that the lessee—

'Will not carry on or permit to be carried on and that there shall not be carried on upon the premises hereby demised or any part thereof and that the same shall not be used as or for a public house hotel inn tavern or beer-shop or for the sale of wine beer or spirits or as a club or for any noisy noxious noisome offensive disreputable dangerous or objectionable trade business or occupation whatsoever nor for any other purpose than the trade or business of a printer nor have or permit any sale by auction in or upon the demised premises or any part thereof without the Lessors' written consent which shall not be unreasonably withheld.'

Clause 1 (12) of the head lease contains a covenant that the lessee:

'Will not assign underlet or part with the possession of the premises hereby demised or any part thereof without the consent in writing of the Lessors first had and obtained but such consent shall not be unreasonably withheld.'

The underlease contains covenants by the underlessees in similar terms to those I have recited with modifications requiring that the necessary consents shall be those of the landlords as well as of the lessee.

a The premises have been used by the underlessees for their trade or business of printers. It is, I think, common ground that, owing to the situation of the premises, in the City, and for reasons which I need not specify, that trade or business can no longer be profitably carried on there. Primaplex Ltd are not printers and propose to apply for planning permission to use the premises as offices and do the necessary works to convert them for that purpose. Both the lessee and the underlessees, being desirous of assigning their leases to Primaplex Ltd, applied to the landlords for their consent and, that consent not forthcoming, they applied for and obtained the declaration contained in the order of Judge Rogers.

b The ground on which the landlords seek to justify the withholding of consent to the proposed assignments to Primaplex Ltd as being not unreasonable is simply that it will be a necessary consequence that there will be a breach of the user covenant. That part of the user covenant which precludes user of the premises for any purpose other than the trade or business of a printer is, so it is urged, an absolute covenant unqualified by the qualifying words at the end of the user covenant, which it is submitted relate only to sales by auction. The other persons concerned take the view that the qualifying words govern the user provisions and that a refusal of consent to use the premises as offices could in the circumstances be successfully challenged as unreasonable.

c Counsel for the landlords submitted that a landlord may reasonably refuse consent to an assignment if the assignment would necessarily involve a breach of covenant, and I will accept that submission as being well-founded. But whatever view one takes as to the construction of the user covenant, I cannot accept that, if the landlords in this case did consent to the proposed assignments, there would as a necessary consequence be a breach of the user covenant. As a result of the assignments Primaplex Ltd would step into the shoes of the lessee and underlessees and would thereupon become subject to the user covenant. The landlords would be in the same position, neither better nor worse, to enforce the user covenant as would be the case if the present underlessees themselves were proposing to seek planning permission for use of the premises as offices and proposed so to use them. On that short ground I would hold that the landlords' withholding of consent is unreasonable.

d Two authorities were cited in support of the proposition that the withholding of consent in such a case as this necessarily involved a breach of the user covenant, namely, a decision of this court in *Packaging Centre Ltd v Poland Street Estate Ltd*¹, given on 15th March 1961, and *Granada TV Network Ltd v Great Universal Stores Ltd*². Both were cases in which the tenant sought the consent of the landlords to an underlease to an underlessee who under the terms of the underlease was to use the premises in breach of the user covenant in the lease. In *Packaging Centre Ltd v Poland Street Estate Ltd*¹ the underlease provided that the premises would be used exclusively as office premises, which was a breach of the user covenant in the lease. It followed that had the landlords consented to that subletting they could not thereafter have successfully objected to the user which the lease prohibited and they would therefore be prejudiced by the giving of consent. Not dissimilar was the *Granada TV Network* case², where the underletting was to be in favour of a person who would necessarily be unable to use the premises for the purposes for which they could alone be used under the terms of the head lease. Again the giving by the landlords of consent to a subletting on those terms would have precluded them from thereafter relying on the terms of the user covenant.

e Those cases are, in my judgment, not applicable where, as here, the giving of consent to an assignment does not of itself preclude the landlords from thereafter insisting that the terms of the user covenant be strictly complied with. Of course, a landlord who gives his consent to an assignment knowing that the assignee intends

1 (1961) 178 Estates Gazette 189

2 (1963) 187 Estates Gazette 391

to use the premises in breach of a user covenant may incautiously estop himself from thereafter relying on the covenant or may waive the right to enforce it. But a landlord who is minded to refuse consent to an assignment on account of the user covenant is not acting incautiously; and nothing could have been easier than for the landlords here, while giving their consent, expressly to reserve their right to enforce the user covenant against the assignee. Here, be it observed, the proposed assignee was content to accept that position, relying, as I understand it, on the view that the part of the user covenant prohibiting use otherwise than for printing was qualified by the last 11 words of the user covenant and that if the landlords refused their consent to use as offices that consent would be unreasonably withheld. For these reasons I would conclude that this appeal ought to be dismissed.

Judge Rogers took the view that on the true construction of the user covenant the qualifying words 'without the Lessors' written consent which shall not be unreasonably withheld' apply as well to that part of the covenant precluding use for any other purpose than the trade or business of a printer as to the prohibition of sales by auction. On this view of the construction of the user covenant there could, as counsel for the landlords conceded, be no question of a consent to the assignment necessarily involving breach of the user covenant. The covenant is ill drawn in all conscience, but it appears to me that grammatically, so far as it is at all grammatical, the covenant is as capable of the construction adopted by the learned judge as of one which applies the qualifying words only to sales by auction. Moreover, if it had been intended to limit the qualifying words to sales by auction and so differentiate between one limb of the covenant and the others, it would, so I think, have been more natural to have called attention to the difference by inserting the qualifying words immediately before rather than after the prohibition of sales by auction. Counsel for the landlords submitted the covenant to analysis, which I do not find convincing because I do not think that this particular ill-drawn covenant is susceptible to analytical approach. What has to be construed is a single, awkwardly expressed sentence, and read naturally and as a single sentence it appears to me that the qualifying words at the end of the sentence relate to all that goes before, and I agree that to the extent that construction is doubtful the judge was right to construe it, as he did, *contra proferentes*. I agree with his conclusion and on that ground too I would dismiss the appeal.

DAVIES LJ. I entirely agree, and do not wish to add anything.

CAIRNS LJ. I also agree. On the point of construction, I confess that on first reading the clause I felt that the words 'without the Lessors' written consent which shall not be unreasonably withheld' fastened more easily on to the part of the clause relating to sales by auction than to the whole of the clause or to the second and third parts of it without the first part. When all the surrounding circumstances are considered, however, it seems to me so improbable that the tenants would have agreed to bind themselves for 42 years not to use the premises for any other purpose than that of a printing business, even if the lessors unreasonably withheld their consent to a change of use, that I am unwilling to construe the clause in that way unless the actual words of it point unmistakably in that direction. I do not think they do. I think that the clause is ambiguous, and this is one of the rare cases where resort should be had to the *contra proferentem* rule and, applying that rule, the clause should be construed in the manner contended for by the tenants.

On the other issues I have nothing to add to what has been said by Stamp LJ.

Appeal dismissed.

Solicitors: *Paisner & Co* (for the landlords); *Coward Chance* (for the lessee and underlessees).

F A Amies Esq Barrister.

a Cory Lighterage Ltd v Transport and General Workers Union and others

CHANCERY DIVISION

BRIGHTMAN J

31ST JANUARY, 1ST, 2ND, 5TH, 22ND FEBRUARY 1973

b *Industrial relations – Industrial dispute – Acts done in contemplation or furtherance of an industrial dispute – Intimidation – Act not actionable on ground only that it consists of threats to break or frustrate contracts – Act not actionable on ground only that it is an interference with trade or business of another – Acts consisting of threats to do legalised acts – Threatened acts also constituting an unfair industrial practice – Whether threats thereby constituting unlawful intimidation actionable in the High Court – Industrial Relations Act 1971, ss 33 (3), 132 (1) (a), (2).*

c The plaintiffs were tug and barge owners in the Port of London. The crews of their tugs included lightermen who as registered dock workers were allocated to the plaintiffs by the National Dock Labour Board. The plaintiffs employed the lightermen but, under the Dock Workers Employment Scheme 1967^a, they could not terminate a man's employment without the board's consent. S was a lighterman employed by the plaintiffs and a member of the defendant trade union ('the union'). For many years 100 per cent trade union membership had been practised in the London docks. For reasons of his own S decided to stop paying his union dues with the deliberate intention of allowing his membership of the union to lapse. In consequence S's fellow workers decided not to work with S until his union dues were paid. The workers were supported in that action by the union. It being apparent to the plaintiffs that if S were not taken off his tug all their lighterage force would come out on strike, they suspended S on full pay. They subsequently applied to the board for consent to the discharge of S but that was refused. They then issued a writ in the High Court against the union and certain officials of the union, and moved for an interim order restraining the defendants from instructing, directing or recommending to any union member in the plaintiffs' employment that he should withhold his labour because of the employment of S as a lighterman. The plaintiffs contended that, by threatening a strike, the defendants had been guilty of the torts of intimidation and conspiracy and that, even if the threats had been made in contemplation or furtherance of an 'industrial dispute', within s 167 (1)^b of the Industrial Relations Act 1971, the defendants were not entitled to the protection afforded by s 132 (1), (2)^c of the 1971 Act since their acts did not 'only' consist of the

a See the Dock Workers (Regulation of Employment) (Amendment) Order 1967 (SI 1967 No 1252), Sch 2

b Section 167 (1), so far as material, provides: "'industrial dispute' ... means a dispute between one or more employers or organisations of employers and one or more workers or organisations of workers, where the dispute relates wholly or mainly to any one or more of the following, that is to say—(a) terms and conditions of employment, or the physical conditions in which any workers are required to work; (b) engagement or non-engagement, or termination or suspension of employment, of one or more workers ...'

c Section 132 provides:

j '(1) An act done by a person in contemplation or furtherance of an industrial dispute shall not be actionable in tort on the ground only—(a) that it induces another person to break a contract to which that other person is a party or prevents another person from performing such a contract, or (b) that it consists in his threatening that a contract (whether one to which he is a party or not) will be broken or will be prevented from being performed, or that he will induce another person to break a contract to which that other person is a party or will prevent another person from performing such a contract.

(2) For the avoidance of doubt it is hereby declared that an act done by a person in contemplation or furtherance of an industrial dispute is not actionable in tort on the

acts of intimidation legalised by s 132 (1), (2), but included acts which were illegal in that they amounted to an 'unfair industrial practice' under the 1971 Act. a

Held—(i) The dispute between the plaintiffs and the defendants was an 'industrial dispute' in that it related wholly or mainly to the 'termination or suspension of employment' of S, within s 167 (1) of the 1971 Act, since the defendants wished the plaintiffs to remove S from their effective employment as a lighterman while the plaintiffs wished to retain S in their employment because, consent to his discharge having been refused, they had to pay him anyway (see p 350 e and h, post). b

(ii) Insofar as the action sought relief on the ground of conspiracy it was subject to the mandatory stay under ss 131 (2)^d and 132 (4) of the 1971 Act since the action said to have been taken by the defendants constituted an unfair industrial practice under s 33 (3)^e of the 1971 Act in that the defendants were alleged to have threatened a strike for the purpose of inducing the plaintiffs to take action against S which would, as against him, have been an unfair industrial practice under s 5 (2)^f of the 1971 Act (see p 351 a to c, post). c

(Continued from p 341)

ground only that it is an interference with the trade, business or employment of another person, or with the right of another person to dispose of his capital or his labour as he wills. d

'(3) An agreement or combination by two or more persons to do or procure to be done any act in contemplation or furtherance of an industrial dispute shall not be actionable in tort, if the act in question is one which, if done without any such agreement or combination, would not be actionable in tort.

'(4) Where in any court proceedings in tort are brought in respect of an agreement or combination by two or more persons to do or procure to be done an act in contemplation or furtherance of an industrial dispute, and subsection (3) of this section does not afford a defence to the proceedings, the court shall nevertheless stay the proceedings if it is satisfied that either of the conditions specified in section 131 (2) of this Act is fulfilled in relation to the act in question.' e

d Section 131, so far as material, provides:

'(1) Where in any court proceedings in tort are brought against a person in respect of any act done by him or on his behalf, the court may stay the proceedings if it is satisfied that either of the conditions specified in the next following subsection is fulfilled in relation to that act. f

'(2) Those conditions are—(a) that the act is one in respect of which proceedings under this Act have been brought before the Industrial Court or an industrial tribunal, whether those proceedings have been disposed of or not; (b) that the act is one in respect of which (as being an unfair industrial practice or a breach of a duty imposed by or under this Act) proceedings under this Act could be brought before the Industrial Court or an industrial tribunal...'. g

e Section 33, so far as material, provides:

'... (2) This section applies to action of any of the following descriptions, that is to say—(a) calling, organising, procuring or financing a strike, or threatening to do so ...

'(3) It shall be an unfair industrial practice for any person (including any trade union or other organisation of workers or any official of a trade union or of such an organisation) to take any action to which this section applies, if the purpose or principal purpose for which that action is taken is—(a) knowingly to induce an employer ... to take any action which (whether by virtue of subsection (1) of this section or otherwise) is or would be an unfair industrial practice, in accordance with section 5 (2) ... of this Act, on the part of the employer ...'. h

f Section 5, so far as material, provides:

'(1) Every worker shall, as between himself and his employer, have the following rights, that is to say ... (b) ... the right, if he so desires, to be a member of no trade union or other organisation of workers or to refuse to be a member of any particular trade union or other organisation of workers ... i

'(2) It shall accordingly be an unfair industrial practice for any employer, or for any person acting on behalf of an employer,—(a) to prevent or deter a worker from exercising any of the rights conferred on him by subsection (1) of this section, or (b) to dismiss, penalise or otherwise discriminate against a worker by reason of his exercising any such right ...'

a (iii) Since the acts alleged against the defendants had been done in contemplation or furtherance of an industrial dispute they were not actionable by the plaintiffs in tort by virtue of s 132 (1) (b) and (2) of the 1971 Act. It was not open to the plaintiffs to contend that the defendants were not entitled to the protection of s 132 by arguing that, since the acts threatened by the defendants constituted an unfair industrial practice under s 33 (3) of the 1971 Act, they went beyond the forms of intimidation legalised by s 132. The fact that an unfair industrial practice, justiciable only before industrial tribunals or the National Industrial Relations Court, was involved could not have the effect of bringing the intimidation within the jurisdiction of the High Court in tort. It followed that the plaintiffs had failed to make out a case for the relief sought (see p 353 j to p 354 b, post); *Rookes v Barnard* [1964] 1 All ER 367 considered.

c Notes

On 17th April 1973 the Court of Appeal affirmed the decision of Brightman J on different grounds; the decision of the Court of Appeal is reported later in this volume.

For meaning of industrial dispute, see Supplement to 38 Halsbury's Laws (3rd Edn), para 677E, 2.

For restrictions on proceedings in tort, see *ibid*, para 677G, 2.

d For the Industrial Relations Act 1971, ss 5, 33, 131, 132, 167, see 41 Halsbury's Statutes (3rd Edn) 2073, 2098, 2154, 2155, 2181.

Cases referred to in judgment

Allen v Flood [1898] AC 1, [1895-99] All ER Rep 52, 67 LJQB 119, 77 LT 717, 62 JP 595, HL, 45 Digest (Repl) 280, 38.

e *Conway v Wade* [1909] AC 506, [1908-10] All ER Rep 344, 78 LJKB 1025, 101 LT 248, HL, 45 Digest (Repl) 572, 1436.

Midland Cold Storage Ltd v Steer [1972] 3 All ER 941, [1972] Ch 630, [1972] 3 WLR 700.

Quinn v Leathem [1901] AC 495, [1900-3] All ER Rep 1, 70 LJPC 76, 85 LT 289, 65 JP 708, HL, 45 Digest (Repl) 280, 33.

Rookes v Barnard [1964] 1 All ER 367, [1964] AC 1129, [1964] 2 WLR 269, [1964] 1 Lloyd's Rep 28, HL, 45 Digest (Repl) 308, 227.

f *Stratford (J T) & Son Ltd v Lindley* [1964] 3 All ER 102, [1965] AC 269, [1964] 3 WLR 541, [1964] 2 Lloyd's Rep 133, HL, 45 Digest (Repl) 309, 228.

Cases and authority also cited

Aslon's Transport (Hall Green) Ltd v Law (30th May 1972) unreported, NIRC.

Associated Newspapers Group Ltd v Flynn (1970) 10 KIR 17.

g *Attorney-General of the Commonwealth of Australia v Adelaide Steamship Co Ltd* [1913] AC 781, [1911-13] All ER Rep 1120, PC.

Brekkes Ltd v Cattel [1971] 1 All ER 1031, [1972] Ch 105.

Chapman v Honig [1963] 2 All ER 513, [1963] 2 QB 502, CA.

Crofter Hand Woven Harris Tweed Co Ltd v Veitch [1942] 1 All ER 142, [1942] AC 435, HL.

Cunard Steamship Co Ltd, The v Stacey [1955] 2 Lloyd's Rep 247, CA.

h *Cutler v Wandsworth Stadium Ltd* [1949] 1 All ER 544, [1949] AC 398, HL.

Daily Mirror Newspapers Ltd v Gardner [1968] 2 All ER 163, [1968] 2 QB 768, CA.

Eastham v Newcastle United Football Club Ltd [1963] 3 All ER 139, [1964] Ch 413.

Edwards v Society of Graphical and Allied Trades [1970] 3 All ER 689, [1971] Ch 354, CA.

Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd [1967] 1 All ER 699, [1968] AC 269, HL.

i *Faramus v Film Artistes' Association* [1964] 1 All ER 25, [1964] AC 925, HL.

Hargreaves v Bretherton [1958] 3 All ER 122, [1959] 1 QB 45.

Heatons Transport (St Helens) Ltd v Transport and General Workers Union [1972] 3 All ER 101, [1973] AC 15, HL.

Hornal v Neuberger Products Ltd [1956] 3 All ER 970, [1957] 1 QB 247, CA.

Huntley v Thornton [1957] 1 All ER 234, [1957] 1 WLR 321.

Lek v Mathews (1927) 29 Lloyd LR 141, HL.

Maxim Nordenfelt Guns and Ammunition Co v Nordenfelt [1893] 3 Ch 122, CA.

Midland Cold Storage Ltd v Turner [1972] 3 All ER 773, [1972] ICR 230, NIRC.

Mogul Steamship Co Ltd v McGregor, Gow & Co [1892] AC 25, [1891-94] All ER Rep 263, HL.

Mulcahy v R (1868) LR 3 HL 306, HL.

Nagle v Feilden [1966] 1 All ER 689, [1966] 2 QB 633, CA.

R v Bunn (1872) 12 Cox CC 316.

R v Kamara [1972] 3 All ER 999, [1973] 2 WLR 126, CA.

R v Rowlands (1851) 17 QB 671, 117 ER 1439, CCR.

Shaw v Director of Public Prosecutions [1961] 2 All ER 446, [1962] AC 220, HL.

Temperton v Russell [1893] 1 QB 715, [1891-94] All ER Rep 724, CA.

Thomson (D C) & Co Ltd v Deakin [1952] 2 All ER 361, [1952] Ch 646, CA.

Torquay Hotel Co Ltd v Cousins [1969] 1 All ER 522, [1969] 2 Ch 106, CA.

Watson v M'Ewan [1905] AC 480, [1904-7] All ER Rep 1, HL.

Archbold on Pleading, Evidence and Practice in Criminal Cases (37th Edn, 1969), pp 1352, 1353, paras 4061, 4062.

Motion

By a writ issued on 5th January 1973 Cory Lighterage Ltd brought an action against (1) the Transport and General Workers Union, (2) Jack Larkin Jones, (3) William A J Lindley, (4) Henry John Medhurst, (5) George James Spragg and (6) Frederick T Evans, claiming a declaration that certain threats alleged to have been made by the defendants were unlawful and an injunction restraining the first three defendants and each of them by themselves, their servants or agents, from giving any instructions, directions or recommendations to any member of the first defendants in the plaintiffs' employ to withdraw or withhold his labour by reason of the employment by the plaintiffs of one Andrew Shute to work as a lighterman. The statement of claim, as amended, was in the following terms:

(1) The plaintiffs carried on business at Charlton, London, SE7, as tug and barge owners and were employers of lightermen allocated to them by the National Dock Labour Board ('the board') pursuant to the statutory scheme¹ which regulated the employment of lightermen, and under which the employment of lightermen could only be terminated by an employer subject to the board being satisfied of a sufficient cause for the termination, or giving its consent to the termination.

(2) The first defendants were an organisation of workers which was not registered as a trade union under the Industrial Relations Act 1971; the second defendant was at all material times the general secretary of the first defendants; the third defendant was at all material times the secretary of the waterways section of the first defendants; the fourth defendant at all material times was the captain of the motor tug Swiftstone, one of the plaintiffs' tugs, and a shop steward of the first defendants; the fifth and sixth defendants were at all material times shop stewards of the first defendants.

(3) Since 28th September 1972 and continuing, the defendants, in order to assert, enforce and/or implement the 'closed shop' principle, had threatened the plaintiffs that they would instruct, direct or recommend all members of the first defendants in the employ of the plaintiffs to withdraw or withhold their labour if the plaintiffs employed Mr Shute to work as a lighterman; Mr Shute had been allocated by the board to the plaintiffs on 5th July 1971 (and particulars of the alleged threats were given).

(4) Mr Shute had instituted proceedings before an industrial tribunal against the plaintiffs by way of complaint of an unfair industrial practice, namely deprivation of the opportunity to work overtime, under s 5 of the Industrial Relations Act 1971.

¹ See the Dock Workers (Regulation of Employment) (Amendment) Order 1967 (SI 1967 No 1252), Sch 2.

a (5) The defendants' threats were unlawful at common law as pleaded in paras (7) and (8) below having due regard to the provisions of ss 5 (1) and 7 of the 1971 Act. No application has been made to the National Industrial Relations Court, pursuant to the provisions of s 17 (1) (c) of or Sch 1 to the 1971 Act, for an 'approved closed shop agreement'.

b (6) The dispute between the plaintiffs and the defendants arose by reason of the defendants' unlawful insistence on a 'closed shop policy' whereby the plaintiffs had suffered and stood to suffer damage. The threats which had been made in implementation of that 'policy' were not in contemplation or furtherance of any 'industrial dispute' as defined by s 167 of the 1971 Act. The implementation of the threats could not constitute an act in respect of which proceedings had been brought, or could have been brought, within the meaning of s 131 of the 1971 Act; the High Court retained exclusive jurisdiction.

c (7) The defendants had, without lawful justification, or excuse, or the intention of protecting their legitimate interests, conspired together and with other persons unknown to injure the plaintiffs in their way of business; and/or had conspired so to injure the plaintiffs by resort to unlawful means, namely, (a) intimidation of the plaintiffs by reason of the matters pleaded in paras (3) to (5) above, i.e. compelling the plaintiffs to continue to suspend Mr Shute from work drawing full pay, by unlawfully threatening to withdraw or procure the withdrawal of the plaintiffs' labour force; (b) the threat to procure breaches of contract of employment on the part of the members of the first defendants employed by the plaintiffs; (c) the threat to procure breaches of commercial contracts between the plaintiffs and their customers and/or to interfere with the due performance of subsisting contracts, and/or to prevent by unlawful means the plaintiffs from performing further commercial contracts which might be entered into in the ordinary course of business; (d) refusal to recognise the statutory rights and obligations conferred by s 5 of the 1971 Act and/or under the statutory scheme¹; (e) as in restraint of trade and/or contrary to public policy in that the defendants' acts constituted a violation of Mr Shute's right to work and/or deprivation of his statutory rights under s 5 of the 1971 Act; (f) as constituting a criminal conspiracy in that the defendants sought to force the plaintiffs to conduct their business contrary to the will of the plaintiffs by improper threats to withdraw or withhold labour without due notice and/or interfere with the plaintiffs' conduct of their business.

(8) In the alternative and without derogation from the foregoing, the defendants severally had committed each substantive wrong set out in para (7) (and particulars were given).

g (8A) If (which was denied) the acts the subject-matter of the proceedings were done in contemplation of furtherance of an industrial dispute as defined by s 167 of the 1971 Act, the plaintiffs contended in the alternative that the provisions of s 132 (1) and (2) of the 1971 Act did not render those acts non-actionable in tort in that the acts did not 'only' consist in threatening that contracts would be broken or prevented from being performed and/or that other persons would be induced to break contracts or prevented from performing contracts within the meaning of s 132 (1) (b) in that apart from the substantive tort of threat of wrongful procurement of breach of contracts and/or of actionable interference with subsisting contracts each defendant had committed: (a) the tort of intimidation in that the purpose of the act was unlawful as seeking to enforce and/or implement a 'closed shop' policy; and further in that the means employed were unlawful in that they were in contravention of s 5 of the 1971 Act and/or the statutory scheme and/or in restraint of trade and/or in deprivation of the right to work; (b) tortious conduct as in contravention of s 5 of the 1971 Act and/or the statutory scheme and/or as in restraint of trade and/or in deprivation of the right to work.

¹ See the Dock Workers (Regulation of Employment) (Amendment) Order 1967 (SI 1967 No 1252), Sch 2

(8B) By reason of the matters pleaded in para (8A) above, if applicable, the plaintiffs contended that: (a) the threat was not an act in respect of which proceedings under the 1971 Act could be brought before the National Industrial Relations Court or an industrial tribunal under s 131 (2) (b) of the 1971 Act in that by virtue of s 136 (a) of the 1971 Act the Industrial Court lacked jurisdiction in tort; or (b) the discretion afforded by s 131 (1) of the 1971 Act to stay the proceedings ought not to be exercised.

(9) By reason of the foregoing the plaintiffs had suffered damage at the rate of £37.50 per week as from 2nd October 1972 and claimed against the defendants an indemnity in respect of such sums as might be awarded by the industrial tribunal for loss of overtime in addition to the wages paid during absence from work. In the event of implementation of the threats the plaintiffs estimated that damage in the event of closure of their business at upwards of £2,000 per week (exclusive of goodwill lost).

(10) The first three defendants threatened and intended to implement the threats unless restrained by the court if the plaintiffs should employ Mr Shute in work and remove the suspension.

By notice of motion, also dated 5th January 1973, the plaintiffs sought an injunction, until judgment or further order, against the first three defendants named in the writ ('the respondents') in the same terms as that claimed in the writ.

Alan Campbell QC and Marcus Edwards for the plaintiffs.

Ralph Gibson QC and Ian Hunter for the respondents.

Cur adv vult

22nd February. **BRIGHTMAN J** read the following judgment. This is an interlocutory application in an action brought by Cory Lighterage Ltd against the Transport and General Workers Union (which I will call 'the union') and a number of other defendants.

The trouble which has arisen has been provoked by a third party, and has not been sought by the plaintiffs or by the union. An alleviating feature which distinguishes this case from other employer/trade union litigation is that the financial burden is a relatively small sum equal to the weekly wages of one man, and therefore not financially crippling to the plaintiffs or to the union whichever is ultimately left to bear the loss.

The plaintiffs are tug and barge owners. They have a number of contracts with the Greater London Council under which they collect refuse from wharves on the London river and transport it to places for disposal. The plaintiffs have a fleet of five tugs and a number of barges. A tug is crewed by a captain, a mate, an engineer or deck-hand and six lightermen. The plaintiffs' total work force amounts to something over 100 people. The lightermen are allocated to the plaintiffs by the National Dock Labour Board under the Dock Workers Employment Scheme 1967¹. The plaintiffs are the employers and they pay the men. Under the scheme the plaintiffs cannot terminate a man's employment except for misconduct or with the consent of the Dock Labour Board.

In July 1971 Mr Andrew Shute was allocated to the plaintiffs by the Dock Labour Board as a lighterman. He was at that time a member of the Watermen, Lightermen, Tugmen and Bargemen's Union. That was a trade union which was at one time at loggerheads with the Transport and General Workers Union, leading to a collision in the well-known case of *J T Stratford & Son Ltd v Lindley*². In September 1971 the Watermen's Union amalgamated with the Transport and General Workers

¹ See the Dock Workers (Regulation of Employment) (Amendment) Order 1967 (SI 1967 No 1252), Sch 2

² [1964] 3 All ER 102, [1965] AC 269

a Union, and Mr Shute became a member of the latter union. One Captain Henry John Medhurst has been employed by the plaintiffs since 1936 and has been a tugboat skipper since 1953. In June 1972 Mr Shute joined Captain Medhurst's crew.

b At this point it will be appropriate to say something of the part which is played by the trade unions in work on the London river. It is undisputed on the evidence before me that 100 per cent trade union membership has been practised in the London docks for almost half a century, if not more. I will read what is said by Mr Lindley, a senior official of the union, in his affidavit which is not challenged:

c '... all the registered dock workers in the Port of London are members of the Transport and General Workers Union or of the National Amalgamated Stevedores and Dockers. It is in practice impossible for a man to become a registered dockworker without having a union card. There is no closed shop agreement of any kind. It is simply the way the industry has come to be organized. All lightermen who become registered dock workers do so after participating in an apprenticeship scheme. The number of young apprentices entering this scheme is controlled by the Union and the Dock Labour Board. They have to attend a trade union committee to obtain permission to participate in the scheme. The men themselves are a close-knit community and they would in practice always refuse to work with a non-unionist (as they have done in the case of Mr. Shute). If a man falls into arrears with his union contributions sooner or later one or other of the men working with him will find out about it and they will make it plain to him that they will not work with him unless his union card is fully paid up. This has been the position in the Port of London for as long as I can remember and certainly since 1927. Although, as I have already said, there is no closed shop agreement as such, the principle of 100 per cent union membership has long been practised in dockland and has been informally recognized and accepted by the employers and the National Dock Labour Board.'

f In June 1972 Mr Shute, for reasons best known to himself because they do not appear from the affidavits, decided to step out of line. He ceased paying his union dues, with the deliberate intention of permitting his membership to lapse. Captain Medhurst was at that time in charge of the tug Swiftstone, and Mr Shute was a member of his crew as a lighterman. On Thursday, 28th September 1972, Captain Medhurst sailed from Charlton at 6 a.m. to carry out his usual duties. At 1 p.m. Mr Shute came to him on the bridge of the tug and announced that he was 13 weeks in arrear with his union dues and therefore a lapsed member under the union rules. g Captain Medhurst was a shop steward of the union and no doubt Mr Shute was aware of this. Mr Shute is not a party to this action, and I have not heard what he has to say; but if the evidence before me is correct, Mr Shute's action was deliberately provocative and intended to cause trouble, as indeed it has.

h At this stage it will be sufficient to recount the facts in bare outline. After Mr Shute had reported himself to Captain Medhurst, the latter informed the rest of the crew of what had happened. They were unanimous that they would not work with Mr Shute until his union dues were fully paid, but they were willing to give him until Monday, 2nd October, for this purpose. On being so told by Captain Medhurst, Mr Shute replied: 'That's what I wanted you to say. There will be a writ for you on Monday morning, for you personally.' Captain Medhurst then reported the matter by telephone to Mr Lindley, the secretary of the appropriate section of the union, and later to Mr Crozier, the manager of the plaintiffs at Charlton. Mr Lindley also spoke to Mr Crozier on the telephone. He told Mr Crozier that he endorsed the action which the crew intended to take, that is to say, he officially supported them in their stated refusal to sail with Mr Shute from the following Monday if his union card was not by then fully paid up. He also told Mr Crozier that the rest of the plaintiffs' tugs would not be sailing on Monday unless something were done. Mr Lindley

states that he knew very well from experience in the Port of London and from his knowledge of the men concerned that if the Swiftstone did not sail, the men on the other tugs would immediately find out why she was not sailing, and would then straight away endorse the action taken by the crew by also refusing to sail. On the following day, there was a meeting at the plaintiffs' offices between Mr Crozier, Mr Spragg (a shop stewards' convenor) and Mr Evans (a shop steward). It clearly emerged that if Mr Shute was not taken off the tug, all the plaintiffs' lighterage force would be on strike. a

On Monday, 2nd October, at 6 a.m., Mr Crozier attended on the quayside at Charlton where the Swiftstone was berthed. Mr Shute was already aboard, having duly turned up for duty. In order to get the tug away, Mr Crozier ordered Mr Shute ashore, and sent him home on full pay. There he remained until Monday, 4th December, when he telephoned Mr Crozier to warn him that, allegedly on counsel's advice, he would be turning up for work the next day. Mr Crozier attended on the quayside at 5.30 a.m. to find Mr Shute as anticipated already installed aboard. Mr Crozier ordered Mr Shute off the tug. Mr Shute replied, 'That is what I wanted you to say'. Mr Shute left, and once more was at home on full pay. And so the matter stands. b

In the meantime, Mr Shute made an application to an industrial tribunal alleging an unfair industrial practice by the union in contravention apparently of s 5 or s 22 of the Industrial Relations Act 1971. The application, so far as based on s 5, inevitably failed because under that section a complaint only lies against an employer and the union was not Mr Shute's employer. The application under s 22 also inevitably failed; the union was not the employer; s 22 does not apply to registered dock workers engaged in dock work; and Mr Shute had not been dismissed. On 8th December Mr Shute made a further application to an industrial tribunal, this time with more promise. The complaint was lodged against the plaintiffs, alleging that they were discriminating against him on the ground of non-union membership by denying him overtime. This application is, I believe, still pending so I will say no more about it. On 15th December the plaintiffs applied to the Dock Labour Board for consent to the discharge of Mr Shute. This was refused. c

On 5th January 1973 the plaintiffs issued their writ. There are six defendants. First, the union; secondly, Mr Jack Jones, the general secretary; thirdly, Mr Lindley; fourthly, Captain Medhurst; fifthly, Mr Spragg; and sixthly, Mr Evans. On the same day, or shortly thereafter, notice of motion was served on the first three defendants ('the respondents') and on them only. The notice of motion seeks the relatively innocuous relief of an interim order pending trial of the action that the respondents should be restrained from instructing, directing or recommending to any union member in the employ of the plaintiffs, that he should withhold his labour because of the employment of Mr Shute as a lighterman. d

Before I turn to the statement of claim, I think I ought to explain my own understanding of the status of a 'closed shop'. It seems sometimes to be suggested that a 'closed shop' policy in the sense of a policy to achieve 100 per cent union membership, is now illegal or contrary to public policy as a result of the provisions of the 1971 Act. That is not correct. Suppose that a trade union with the full approval of the employer has the policy of achieving 100 per cent membership among employees on the shop floor, and achieves that goal. It would be absurd to suggest on those facts alone that the employer, or the employees, or the union, are in some way acting contrary to the 1971 Act or contrary to public policy. Illegality, or conflict with the 1971 Act, can only arise as a result of the means employed to implement 100 per cent membership, that is to say, because the means employed are criminal or tortious at common law or are open to complaint under the 1971 Act. Even a pre-entry closed shop agreement, that is to say, an agreement precluding an employer from engaging non-union workers, is not illegal in the sense of breaching the law; it is merely void, as if the agreement did not exist: see s 7 of the 1971 Act. e

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a The plaintiffs are not at odds with the union over the fact that the union aspires to 100 per cent membership amongst the plaintiffs' employees. The plaintiffs are content that the union should achieve that goal. Nor are the plaintiffs seeking to protect the livelihood of Mr Shute. They no longer wish him as part of their labour force. What the plaintiffs object to, understandably, is being compelled to keep Mr Shute on their pay-roll without his working at his proper job. The plaintiffs
b are being compelled to act to their own financial detriment, that is to say, in a manner which causes them a financial loss of about £42.50 a week plus any compensation which they have to pay to Mr Shute if he succeeds in his application to the industrial tribunal. The question in the action will be whether that compulsion has involved tortious conduct on the part of the defendants or any of them as against the plaintiffs. The principal question on this motion is whether certain of the defendants, namely, the union, or Mr Jones or Mr Lindley, have acted or have *prima facie* acted tortiously
c as against the plaintiffs.

I turn briefly to the amended statement of claim. As I am only concerned with the question of granting, on an interlocutory application, the very limited relief which is sought by the notice of motion, it is inappropriate for me to analyse the statement of claim in any detail. For present purposes it will be sufficient to say this. Paragraph 3
d of the statement of claim read with the particulars in sub-para (c) asserts that, in order to enforce the 'closed shop' principle, Mr Lindley threatened Mr Crozier that if Mr Shute were not withdrawn from the Swiftstone, the crews of the Swiftstone and of the plaintiffs' other tugs would withdraw their labour in breach of their contracts of employment. This threat is stated to be unlawful intimidation at common law. It is also pleaded that all the defendants have unlawfully conspired together to injure the plaintiffs in their way of business and, by threatening a strike, have intimidated
e the plaintiffs into acting to their detriment, i.e. suspending Mr Shute on full pay.

My initial task is to form a view whether the acts said to have been done by the three respondents were (if done) done in contemplation or furtherance of an industrial dispute within the meaning of the 1971 Act. The answer to this question is material to the answers to two other questions, namely, whether such acts, if otherwise tortious, are protected by s 132 (1), (2) or (3) of the 1971 Act; and whether, so far as
f conspiracy is alleged, the mandatory stay imposed by s 132 (4) of the Act applies.

This will be a convenient moment to mention one point in order to put it aside. Sections 131 and 132 are designed, among other purposes, to avoid a clash between the jurisdiction of the High Court and the jurisdiction of the National Industrial Relations Court (which I will call 'the Industrial Court'). Section 131 contains provisions for a discretionary stay of proceedings, and s 132 (4) contains provisions for a
g mandatory stay. Under s 131, where in any court proceedings in tort are brought, the court has a discretion to stay proceedings if, broadly speaking, the matter is justiciable in the Industrial Court or before an industrial tribunal. It follows that if the matters before me were justiciable in the Industrial Court or before a tribunal, and if a party indicated his intention to apply for a stay of proceedings before me, I might feel that it was undesirable to grant interlocutory relief in this court. Counsel
h on both sides, however, have indicated that their respective clients do not intend to invoke any discretionary power which this court may have to stay proceedings. I do not propose to exercise a discretion uninvited. I therefore pay no further attention to the discretion in s 131. That leaves outstanding the question of a mandatory stay under s 132 (4).

i An industrial dispute is defined by s 167 (1) of the 1971 Act. It includes a dispute between an employer on the one hand and a worker or a trade union on the other hand, provided that the dispute relates wholly or mainly to certain topics. These topics are grouped in four paragraphs. Paragraph (a) relates to 'terms and conditions of employment' and 'physical conditions' of work. Paragraph (b) I will quote in full: 'engagement or non-engagement, or termination or suspension of employment, of one or more workers'. Paragraph (c) relates to demarcation disputes and para (d) relates to 'a procedure agreement', and both are irrelevant to this action.

Counsel for the plaintiffs submitted that the alleged acts of the respondents were not in contemplation or furtherance of an industrial dispute, and he relied on the analogy of *Quinn v Leathem*¹ and *Conway v Wade*², which were decided on the meaning of 'trade dispute' before and after the special definition in the Trade Disputes Act 1906. Counsel for the plaintiffs submitted that the real dispute in the present case was between Mr Shute on the one hand and Mr Shute's shipmates and the union and its officials on the other hand, and therefore lay outside the definition of industrial dispute because the employer was not a disputant. If, contrary to his primary submission, there was a dispute between the plaintiffs on the one hand, and the union and its officials on the other, he submitted that it was not a dispute which related wholly or mainly to any of the topics specified under the four heads of the definition in s 167 (1).

In my view it is clear that there is a dispute between the plaintiffs on the one hand, and the union and its officials on the other hand. Does this dispute relate wholly or mainly to any of the specified topics? I do not think that the dispute is concerned with any of the para (a) topics. 'Terms and conditions of employment' is an expression defined later in s 167 (1). In my view the expression is confined to the contractual terms and conditions on which the plaintiffs' employees are required to work. The present dispute does not, it seems to me, concern those contractual terms and conditions. Nor, obviously, does the dispute concern 'physical conditions' of work. So much for para (a). Does the dispute relate wholly or mainly to the 'termination or suspension of employment' of Mr Shute? I think it does. Admittedly, for other reasons, no effective notice of dismissal can be given to Mr Shute in the absence of the consent of the Dock Labour Board. But the realistic view is that the union and its officials, and union members in the plaintiffs' employ, desire the plaintiffs in one way or another to remove Mr Shute from their effective employment as a lighter-man, while the plaintiffs, for obvious economic reasons, desire to retain Mr Shute in such employment because they have to pay him anyway. The dispute is therefore over the employment of Mr Shute as a lighterman.

On this issue, *Quinn v Leathem*¹ does not in my view help the plaintiffs. In that case there was no dispute between Leathem and his employees (see the speech of Lord Macnaghten³). The dispute was between Leathem and the Belfast union, which desired Leathem to dismiss his men (who were not union members and had been refused union membership) and to employ instead others who were members of the Belfast union. Similarly in *Conway v Wade*². In that case also there was no dispute between Messrs Readhead & Sons and their employees. The dispute was between Conway, the union member who was in arrear with a union fine, and Wade an official of the union who desired to enforce payment of that fine by coercing Conway's employers into dismissing him. I may add that in *Rookes v Barnard*⁴ it was common ground that the issue whether a non-unionist should continue to be employed in BOAC's drawing office, which was predominantly staffed by union members, ought to be treated as a 'trade dispute'⁵. In my judgment when the defendants threatened the plaintiffs, assuming they did threaten the plaintiffs, an industrial dispute existed or was in prospect within the meaning of the 1971 Act. Section 132 of the 1971 Act must therefore be applied to this case on that basis.

It will next be convenient to consider to what extent the acts alleged to have been done by the respondents are acts in respect of which proceedings could be brought under the 1971 Act. If they are acts in respect of which proceedings could be brought under that Act, either as being an unfair industrial practice or a breach of duty

1 [1901] AC 495, [1900-3] All ER Rep 1

2 [1909] AC 506, [1908-10] All ER Rep 344

3 [1901] AC at 511, [1900-3] All ER Rep at 10

4 [1964] 1 All ER 367, [1964] AC 1129

5 [1964] 1 All ER at 397, [1964] AC at 1204

a imposed by or under the Act, then the action is subject to a mandatory stay under s 132 (4) so far as the action is founded on the tort of conspiracy which is not legalised by s 132 (3) (see the analysis of the subsections in *Midland Cold Storage Ltd v Steer*¹).

In my judgment the action said to have been taken by the respondents was an unfair industrial practice under s 33 (3) of the 1971 Act since the respondents (if the allegations of the plaintiffs are established) threatened a strike, and the purpose of such threat was to induce the plaintiffs to take action against Mr Shute which would be an unfair industrial practice as against him under s 5 (2) of the Act; namely, action to induce the plaintiffs to deter Mr Shute from exercising his right not to belong to the union, and to induce the plaintiffs to dismiss or otherwise discriminate against him by reason of his exercising such right. In the result, I hold, for the purposes of this motion, that the action is subject to a mandatory stay under s 132 (4) so far as the action seeks relief on the ground of conspiracy and is maintainable in the face of s 132 (3). I now turn to a consideration of the acts of individual wrongdoing (apart from conspiracy) alleged against the respondents in order to see whether such acts may be tortious.

There can be no doubt that Captain Medhurst and his crew, and the other crews employed by the plaintiffs, threatened to break their contracts of employment with the plaintiffs in order to coerce the plaintiffs into terminating their employment of Mr Shute as a lighterman or alternatively to coerce the plaintiffs into dispensing with his services while at the same time (of necessity) retaining him on their pay-roll to the plaintiffs' financial detriment. I am prepared to assume, for the purposes of this motion, that those so threatening the plaintiffs were aware that the breaches of such contracts of employment would imperil the performance of the plaintiffs' commercial contracts. Those so threatening were therefore, on that basis, liable for the tort of intimidation in accordance with the definition of that species of wrongdoing under the first limb described in *Salmond on Torts*² and approved by the House of Lords in *Rookes v Barnard*³ unless protected by statute. The definition is this: '... it is an actionable wrong intentionally to compel a person, by means of a threat of an illegal act, to do some act whereby loss accrues to him'. Plainly Mr Jones, the second respondent, and Mr Lindley, the third respondent, are equally liable for the tort of intimidation if they joined in the threat or induced it, as also would be the union because it is not disputed that anything done by Mr Jones and Mr Lindley was within the scope of his authority as an official of the union.

The Trade Disputes Act 1906, s 3, legalised certain acts which in others would be wrongful, provided that such acts were done in contemplation of an impending trade dispute or in furtherance of one already existing. The design was to reduce the then imbalance between the respective bargaining positions of employers and employees; no bargain is freely negotiated if the bargaining positions are unequal. Section 3 of the 1906 Act had two limbs, which have been replaced and extended by s 132 (1) (a) and (2) of the 1971 Act. Section 132 (2) declares that an act done by a person in contemplation or furtherance of an industrial dispute shall not be actionable in tort on the ground only that the act is an interference with the trade, business or employment of another person, or with the right of another person to dispose of his capital or labour as he wills. Section 132 (1) (a) is not in point in the present case. No one, as yet, has been induced to break a contract to which he is a party, or has been prevented from performing his obligations under a contract to which he is a party. Section 132 (2) is however in point, because there has been a clear interference in the business of the plaintiffs. Also to the point is s 132 (1) (b). This paragraph replaces and extends s 1 (1) of the Trade Disputes Act 1965, which was enacted to reverse the judicial conclusion in *Rookes v Barnard*³. This paragraph provides that

1 [1972] 3 All ER 941, [1972] Ch 630

2 (13th Edn) 1961, p 697

3 [1964] 1 All ER 367, [1964] AC 1129

an act done by a person in contemplation or furtherance of an industrial dispute shall not be actionable in tort on the ground only that such act consists of a threat that a contract (no longer limited as under the 1965 Act to a contract of employment) will be broken or will be prevented from being performed, or that such act consists of a threat to induce another person to break a contract to which that other person is a party, or a threat to prevent another person from performing such contract. In simple language, intimidation which is confined to threats of the type described is no longer actionable in tort. Such an act may or may not be an unfair industrial practice justiciable in the Industrial Court or before an industrial tribunal but it ceases to be a tort justiciable in the High Court.

This might seem to lead inevitably to the conclusion that the respondents had not committed any tort, whatever remedies may be available to the plaintiffs in the Industrial Court or before a tribunal. Counsel for the plaintiffs, however, relied in argument on the decision in *Rookes v Barnard*¹ and submitted that the respondents are not protected by s 132 (1) (b) because their acts did not 'only' consist of the legalised intimidation covered by s 132. To appreciate this argument, it will be necessary to make some comparison between this case and *Rookes v Barnard*¹. Intimidation may be direct or indirect, lawful or unlawful. It is direct if the defendant intimidates the plaintiff so that he acts to his detriment. It is indirect if the defendant intimidates a third party so that the third party acts to the detriment of the plaintiff. *Rookes v Barnard*¹ was a case of indirect intimidation. The person intimidated was not the plaintiff but BOAC. BOAC did not act unlawfully towards the plaintiff. BOAC determined the plaintiff's contract of employment lawfully by proper notice. The plaintiff claimed that the defendants committed a wrongful act against him, an act of indirect intimidation, by intimidating BOAC by means of threatened breaches of contract in consequence whereof (BOAC having yielded to the threat) the plaintiff (lawfully dismissed by BOAC) suffered loss. As regards the distinction between lawful and unlawful intimidation, it has been clear ever since *Allen v Flood*² that (conspiracy apart) to intimidate by threatening to do what you have a legal right to do is to intimidate by lawful means and is not a tort: see the speech by Lord Reid in *Rookes v Barnard*³.

The questions in issue in *Rookes v Barnard*¹ were, in part, whether there was a tort known to English law as the tort of intimidation such that, although the party intimidated does not seek to recover against the intimidator, another party who has suffered loss at the hands of the person intimidated (as the intended result of such intimidation) can sue the intimidator; secondly, whether, if such tort exists, the act of the intimidator necessary to found such an action is confined to a criminal or tortious act or extends to an act otherwise wrongful, i.e. breach of contract; thirdly, whether in such a case the right of action of the party damnified is excluded by s 3 of the Trade Disputes Act 1906, supposing that a trade dispute is involved. The decision in *Rookes v Barnard*¹ was that the tort of intimidation existed in such a case so as to give a cause of action to someone other than the person intimidated, if he were the intended victim of the intimidation; that the tort existed notwithstanding that the weapon of intimidation was neither criminal nor tortious but a threatened breach of contract; and that the right of action was not excluded by s 3 of the Trade Disputes Act 1906, notwithstanding the existence of a trade dispute. The reason that the action was not excluded was that there was an additional element of illegality, namely, an unlawful threat to BOAC that contracts with BOAC would be breached.

After *Rookes v Barnard*¹ the Trade Disputes Act 1965 legalised certain previously unlawful weapons of intimidation in the context of a trade dispute, and the 1971 Act extended the immunity to a threatened breach of contract, or threatened frustration

1 [1964] 1 All ER 367, [1964] AC 1129

2 [1898] AC 1, [1895-99] All ER Rep 52

3 [1964] 1 All ER at 374, [1964] AC at 1168, 1169

a of a contract, or threatened inducement to break or frustrate a contract. I use the word 'frustrate' in a non-technical sense.

In the present case the plaintiffs are the parties intimidated. There are two alleged groups of intimidators. The first group can be disregarded because they are not respondents; the crews of the tugs threatened the plaintiffs that they would break their contracts of employment and thereby frustrate (as they must have known) the plaintiffs' commercial contracts. The second alleged group of intimidators are the respondents; it is asserted by the plaintiffs that the union and its two officials threatened to induce the plaintiffs' work force to go on strike and thus break their contracts of employment and frustrate (as they must have known) the plaintiffs' commercial contracts. The object of the intimidation in each case was to coerce the plaintiffs into dispensing with the services of Mr Shute. The detriment suffered by the plaintiffs, not particularly desired by the intimidators but the inevitable consequence of the intimidation and therefore in that sense intended, is the financial loss consequent on the retention of Mr Shute on the pay-roll without any benefit from his services and with possible adverse financial consequences if he takes effective action before an industrial tribunal.

d For the purposes of this part of my judgment I shall assume that the allegations made against the respondents to this motion can be proved, namely, that they did in fact threaten the plaintiffs that their work force would be directed to break their contracts of employment and that the plaintiffs' commercial contracts would be frustrated, unless the plaintiffs discharged Mr Shute or acted to their detriment by retaining him on their pay-roll unemployed.

e The broad effect of counsel for the plaintiffs' submission, founded on *Rookes v Barnard*¹, was that the respondents (assuming they threatened as alleged) were guilty of tortious conduct because the illegality of their acts extended beyond the field of intimidation legalised by the Trade Disputes Act 1965 (now by s 132 (1) (b) of the 1971 Act). Since conspiracy is not in point for reasons which I have expressed earlier, it is important to bear in mind the distinction between the means used by the respondents (assuming they threatened as alleged) and the end sought to be achieved by the respondents. In judging whether the respondents can be said to have acted tortiously, it is only f relevant to consider the legality of the weapons that the respondents used in making their threats. The propriety of the ends which they sought to achieve are, I think, irrelevant because, as mentioned earlier, to intimidate by threatening what you have a lawful right to do is not tortious intimidation, however reprehensible it may be.

g It appears to me that the only illegality involved in the weapons used by the respondents, assuming that the plaintiffs prove their case, is the unfair industrial practice defined by s 33 (3) of the 1971 Act, namely, a strike threat for the purpose of inducing the plaintiffs to inflict on Mr Shute something which is an unfair industrial practice as against him under s 5 (2) of the 1971 Act. (I do not rule out the possibility that a case of unfair industrial practice could be made by the plaintiffs under some other section of the 1971 Act, but none was in fact suggested to me in argument.) h To that extent it is right to say that the acts of the respondents (assuming the plaintiffs' case to be proved) extend beyond the field of legalised intimidation into the area of accountable conduct defined by the 1971 Act. In these circumstances ought I to accede to counsel for the plaintiffs' submission that the respondents have been guilty of the tort of intimidation because their action has not consisted 'only' of threatening breach or frustration of contracts?

j I have found this a difficult question to answer with confidence. In the end I have come to the conclusion that it would involve an extension of the doctrine established by *Rookes v Barnard*¹ and one which cannot have been contemplated by the framers of the 1971 legislation. Given that intimidation by threatened breach of contract and

so forth has been legalised since 1965, I cannot believe that it would be right to draw such intimidation back into the jurisdiction of the High Court in tort on the ground that unfair industrial practices, justiciable only before industrial tribunals or in the Industrial Court, are involved. I therefore reach the conclusion that, assuming the respondents have in fact acted as alleged by the plaintiffs, they are not accountable in the High Court for tort at the suit of the plaintiffs, whatever complaints may be levelled against them elsewhere. a

For the reasons which I have endeavoured to state, I am not satisfied that the plaintiffs have made out a *prima facie* case for relief in this court. I have not reviewed the evidence in detail, and I do not intend to do so. As already emphasised, the only respondents to this motion are the union and its officials, Mr Jones and Mr Lindley. I am far from satisfied on the evidence before me that either Mr Jones or Mr Lindley uttered any threats. It must be appreciated that dockland is, and has been for a great many years, a traditionally 100 per cent union area of employment. No doubt those who work in dockland are well conscious of the power that this confers and are unwilling to see it eroded. Such part as Mr Lindley is said to have played (I think that Mr Jones played none) is consistent with a warning of inevitable storms brewing ahead without implying that they were brewed by him. b

Even if the plaintiffs had both the law and the facts on their side, there would be the added question where the balance of convenience lay. This is a case where, as I see it, the loss flowing from the wrongful acts of the respondents, assuming them to be wrongful, is wholly financial, is precisely quantifiable, is modest in amount and admittedly within the financial competence of the union to recoup to the plaintiffs. I doubt whether, in such unusual circumstances, interlocutory relief is appropriate. So, even if I felt that the plaintiffs were correct on the law and the facts, I would be much disposed to leave matters to be resolved at the trial of the action rather than unnecessarily impose on the plaintiffs' labour force the stresses which might result from an interlocutory order. c

I wish only to add this. On any basis this dispute bears unjustly on the plaintiffs, and calls for a solution which is fair and practical. It may be that if discussions were re-opened with the National Dock Labour Board, Mr Shute's allocation elsewhere could be arranged. Since the board allocated Mr Shute to the plaintiffs in the first instance, one would think that the board has a responsibility to give the plaintiffs any assistance within its power which may help to resolve the situation. d

Motion dismissed.

Solicitors: *Alsop, Stevens, Batesons & Co* (for the plaintiffs); *W H Thompson* (for the respondents). e

Susan Corbett Barrister. f

Martindale v Duncan

COURT OF APPEAL, CIVIL DIVISION

DAVIES, PHILLMORE AND STAMP LJJ

29th JANUARY 1973

Damages — Mitigation — Impecuniosity — Failure to mitigate through impecuniosity — Motor accident — Damage to plaintiff's car — Delay in effecting repairs to car — Plaintiff unable to afford cost of repairs — Claim against defendant's insurers — Plaintiff awaiting agreement of insurers to estimated cost before putting repairs in hand — Cost of hiring another car during period of delay — Whether plaintiff entitled to recover cost.

The plaintiff was a private hire driver. His taxi was damaged in a road accident on 27th November 1971. The plaintiff obtained an estimate of the cost of repairs on 1st December, and a solicitor's letter on his behalf was sent to the defendant's insurers at about the same date. On 14th December the plaintiff's solicitors sent a further letter to the defendant's insurers stating: 'Our client will not reveal his

Insurers. Is liability admitted? If it is not admitted we have instructions to issue a Writ immediately . . . The damaged vehicle is a taxi and whilst our client has done everything possible to mitigate his loss, he cannot obtain a hire car to use as a taxi during the period in which the repairs will be completed'. The estimate of repairs was received by the defendant's insurers by 17th January 1972 when they wrote back to the plaintiff's solicitors that they had instructed independent engineers to inspect the taxi on their behalf. On 26th January the insurers wrote confirming that there was no dispute as to liability. They accepted the repairs and an amended repair estimate and agreed to the repairs being put in hand. Repairs were put in hand on 2nd February and completed on 25th February. On an enquiry into damages following default in defence, the district registrar included as damages a sum of £160 for loss of profit for the first four weeks whilst the taxi was off the road and a

further sum of £220 for the hire of a car at £22 a week for the following ten weeks until the repairs had been completed. The plaintiff stated in evidence that he was unable to pay the cost of the repairs, that the defendant's insurers had only inspected or authorised the repairs on 26th January and that he had 'had to wait for OK from my insurers'. The defendant appealed against the award of £220 contending that the repairs ought to have been put in hand within a week of the accident and the plaintiff had thereby failed to mitigate his loss.

Held — The appeal would be dismissed. Although there was authority for the proposition that impecuniosity was no excuse for failing to mitigate damage, the plaintiff's case was entirely different since he was seeking in the first instance to recover his damages from the defendant's insurers, rather than claiming against his own insurers and until the repairs had been authorised he could not be certain that he would stand in a good position vis-à-vis the insurers (see p 358 e to h, post).

Dredger Liesbosch v Steamship Edison [1933] All ER Rep 144 distinguished.

Notes

For mitigation of damages in actions in tort, see 11 Halsbury's Laws (3rd Edn) 291, 292, para 479, and for cases on the subject, see 17 Digest (Repl) 111-113, 249-259.

Case referred to in judgment

Dredger Liesbosch (Owners) v Steamship Edison (Owners) [1933] AC 449, 102 LJP 73, 38 Com Cas 267, 18 Asp MLC 380, 45 Lloyd LR 123, sub nom *The Edison* [1933] All ER Rep 144, 149 LT 49, HL, 42 Digest (Repl) 945, 7368.

Appeal

By a writ issued on 27th January 1972 the plaintiff, John Peter Martindale, brought an action against the defendant, John Duncan, claiming damages arising out of a motor accident on 27th November 1971 caused by the negligent driving of the defendant. The plaintiff was a private hire operator and used his car, which was damaged in the accident, for the purposes of his business. Particulars of the damages claimed were as follows:

Total net loss of earnings in plaintiff's business during the four weeks immediately following the accident (four weeks at £40 weekly)	£160.00
Cost of hiring another vehicle during the ten weeks immediately following the period referred to above (ten weeks at £22 weekly)	220.00
Cost of repair of the plaintiff's car	241.29
	<u>£621.29</u>

Judgment was given against the defendant in default of appearance and, on an enquiry into damages at the Liverpool District Registry of the High Court, Mr Registrar Winter assessed damages as follows:

Repair account	£241.29
Hire (after allowing credit of £27 in respect of saving on insurance and servicing of plaintiff's car)	353.00
	<u>£594.29</u>

The defendant appealed against the registrar's order on the grounds (i) that there was evidence that repairs could have been started on the plaintiff's car in the first week of December 1971 but the registrar had nevertheless ordered the defendant to pay to the plaintiff, in addition to the loss of earnings and cost of repairs (which the defendant conceded was due to the plaintiff), a further sum of £220 in respect of the hiring of a motor vehicle for a period of ten weeks after the repairs would have been completed had the plaintiff acted to mitigate his loss by authorising the repairs; (ii) that the registrar had wrongly disregarded the evidence of the plaintiff to the effect that the delay in authorising repairs arose because (a) he had no money to pay for them, and (b) he was 'advised' (wrongly) that he could give no authority for repairs 'until an inspection had been carried out'.

Justin Price for the defendant.

The plaintiff did not appear and was not represented.

DAVIES LJ. This is a curious little case. It is an appeal against a decision of the district registrar at Liverpool, Mr Registrar Winter, given on 22nd June 1972, whereby, on an enquiry into damages sustained by the plaintiff, a private hire driver, owing to a car collision which had happened on 27th November 1971, he assessed the damages at the sum of £594.29. So far as concerns the bill for the repairs and the bill of £160 for the loss of profit during the first month or so that the car was off the road, no complaint is made by counsel on behalf of the defendant. What he does complain about, however, is that the registrar allowed as part of the claim a sum of £220, being ten weeks at £22 a week, for the hire of a car during that period, after the first four weeks to which I have referred, when the car was off the road. Counsel complains that the car ought not to have been off the road after the first four weeks; he says that the repairs ought to have been put in hand immediately or much earlier

a than they were and that the plaintiff thereby has failed properly to mitigate his damage and indeed has increased his damage by not putting the repairs in hand promptly.

I am bound to say that the facts of this case are even now somewhat obscure to me. We have not had any note of a judgment from the registrar. Whether he gave one or not we do not know. We have his note of the evidence, not readily decipherable on the papers before us. We have one or two letters. It is quite certain that we have not got all the correspondence, and we do not know precisely which of the letters were put in before the registrar and which were not.

b The story, as far as one can make it out, is that, this accident having taken place on 27th November 1971, according to counsel for the defendant, an estimate for the cost of repairs of £241.29 was obtained as early as 1st December. We were told that a letter from a well-known solicitor in Liverpool was sent to the Zurich Insurance Co very early on, about 1st December. But the first document that we have is a letter dated 14th December from the plaintiff's present solicitors, Messrs Bermans, c to the Zurich Insurance Co, who were the defendant's insurers:

'We are instructed herein. Our client will not reveal his Insurers. Is liability admitted? If it is not admitted we have instructions to issue a Writ immediately. Our client's loss is quite considerable. The damaged vehicle is a taxi and whilst d our client has done everything possible to mitigate his loss, he cannot obtain a hire car to use as a taxi during the period in which the repairs will be completed. If you wish to limit your liability, and you have some means of providing our client with a hire car during this period, please let us know at once.'

e In the event, when the action was brought, there was default in filing a defence, judgment was signed in default of defence, and that is how this enquiry came to take place.

The next document that we have is a letter of 17th January 1972. But there had intervened a somewhat mysterious document (I think it had intervened) from the plaintiff's solicitors to the Zurich Insurance Co again. It has no signature; it has f no apparent date of despatch on it; but it has got what looks like a date of receipt, 17th January; and it is in these terms:

'We now enclose copies of the estimate for repairs to our client's vehicle together with the recovery account. The estimate is in three parts. Firstly it details the cost of labour of £125, then the first list of parts in the sum of £129.02 and the subsequent and second list of parts in the sum of £20.56. We hope g that we shall hear from you very quickly indeed that there is no dispute as to liability, in which case we shall quantify our client's claim and expect your cheques without delay.'

There is a manuscript note at the foot of that, dealing with the alleged enclosure of copies of the estimate, and somebody has written 'Not enclosed—ask for them'; h and then there is a note: 'Phone 19/1/72. Will send in post.'

One of the complaints of counsel for the defendant is that the plaintiff refused to disclose the name of his insurers. I cannot see how that would help in any way. And he also complained that the Zurich Insurance Co did not know where the car was. We find no request anywhere in the correspondence for information as to where the car was; on the contrary, as I shall show in a moment, the Zurich Insurance i Co were arranging to have the car inspected by an engineer on their behalf. Obviously they could not have done that unless they knew where the car was.

On 17th January the Zurich Insurance Co wrote to the plaintiff's solicitors:

'We have your letters of the 10th and 11th January. [We have not had the privilege of seeing those.] In view of the estimate submitted, we have instructed independent Engineers, D. D. Slater & Co. Ltd. of Liverpool, to inspect

your client's vehicle on our behalf. We will write to you again as soon as we have received their report.' a

Finally, on 26th January there is a letter marked 'WITHOUT PREJUDICE', but nobody has objected to its being read to us; and by the marking it looks as if it was read to the registrar:

'We have now received the Engineer's report following his inspection of your client's vehicle. This engineer has agreed with the repairs and amended repair estimate is the sum of £105 inclusive of paint materials plus parts and the recovery at £6.50. We have no objection to your client having repairs put in hand in accordance with the amended estimate. No doubt you will let us have a sight of the final account in due course. We confirm that there is to be no dispute on liability.' b

In evidence it transpires that what the plaintiff was saying was that he himself was not able to pay the cost of repairs and that is the first reason why they were not put in hand sooner. Secondly, he said—as appears to be the fact—that the Zurich Insurance Co (for the defendant) did not inspect or authorise the repairs until 26th January 1972; and he also said 'I had to wait for OK from my insurers'. I think that is probably quite a true statement. c

With regard to the dates on which the work was done, authorisation having been given on 26th January in the letter that I have read, the evidence was that the repairs were started on 2nd February and were completed on 25th February. d

Counsel, of course, has referred us to the well-known case of *Owners of Dredger Liesbosch v Owners of Steamship Edison*¹ which is authority for the proposition that impecuniosity is no excuse for not mitigating damage. But I regard this as entirely different from that case. Here was this man who was seeking in the first instance to recover his damages from the Zurich Insurance Co, who were the insurers of the defendant, and, if anything went wrong with that claim, although he obviously would not want to forfeit his 'no claims' bonus, the second string to his bow would be to recover the money from his own insurers, whoever they were; and until he had had authorisation for doing the work he could not be at all certain that he would stand in a good position vis à-vis the insurance company. e

Despite the arguments of counsel and despite my uncomfortable feeling that we have not had all the facts fully put before us (I am not blaming learned counsel for that), I think that the argument for the defendant has entirely failed, and I would dismiss the appeal. f

PHILLIMORE LJ. I agree. g

STAMP LJ. I agree.

Appeal dismissed. h

Solicitors: Mawby, Barrie & Scott, agents for C H Kirwan & Co, Birkenhead (for the defendant).

F A Amies Esq Barrister.

Lloyds Bank Ltd v Marcan and others

CHANCERY DIVISION

PENNYQUICK V-C

10th, 11th, 12th, 13th, 18th JULY 1972

b *Fraudulent conveyance – Conveyance of property with intent to defraud creditors – Intent to defraud – Intent to deprive creditors of timely recourse to property otherwise applicable for their benefit – Property subject to legal charge in favour of bank – Grant of lease of premises by mortgagor to wife at rack rent – Lease granted after issue of summons by bank for possession – Purpose of lease to enable mortgagor and wife to continue living in property – Mortgagor not appreciating that property subject to lease less valuable than with vacant possession – Whether intent to defraud bank – Law of Property Act 1925, s 172 (1).*

c *Fraudulent conveyance – Validity – Bona fide purchaser – Conveyance for valuable consideration and in good faith – Conveyance to person not having notice of intent to defraud creditors – ‘Notice’ including constructive notice – Law of Property Act 1925, s 172 (3).*

d The first defendant, M, owned property consisting of a modern house and some 2½ acres of land on which he carried on jointly with his wife a nursery and horticultural business. On 15th April 1964 he entered into a guarantee in favour of the plaintiff bank of the indebtedness of a company known as M I Ltd. On 5th August 1964 he gave a memorandum of deposit covering the title deeds of the property with the intent to charge them with all his liabilities towards the bank including that under the guarantee. Two years later, on 17th May 1966, he entered into a legal charge whereby he charged the property again with all his liabilities towards the bank including that under the guarantee. On 18th May 1966 the bank called on M for payment under his guarantee of the amount due from the company. Payment not having been made, on 1st September 1967 the bank commenced proceedings against M claiming possession of the property. On 20th January 1968 the summons was adjourned until 15th March.

f On 23rd February the bank informed Mrs M that if she had any claim adverse to the bank she might attend the hearing and apply to be added as defendant. On 11th March M assigned his interest in the horticultural business to Mrs M and on the same date entered into a lease whereby he demised the property to her for a term of 20 years from 1st March 1968 at ‘the best rent that can reasonably be obtained at the date hereof’ such rent to be ‘fixed by such person or persons as the President for the time being of the Royal Institution of Chartered Surveyors shall appoint’. The lease was determinable at the option of the tenant at any time during the currency of the lease on the tenant giving one month’s notice in writing to the landlord. At the time when he granted the lease M had received advice from counsel that it was legitimate to do so. His motive in granting the lease, and Mrs M’s in accepting it, was to enable them and their children to remain at the property. M appreciated that the effect would be to prevent the bank obtaining possession but neither he nor Mrs M appreciated that the grant of a lease, even at a rack rent, would reduce the value of the lessor’s interest in the property. In July 1968 Mrs M was added as a defendant to the proceedings by the bank. In August 1968 Mr and Mrs M’s solicitors wrote to the Secretary of the Royal Institution of Chartered Surveyors referring to the provision in the lease for fixing the rent. In that letter the solicitors made it clear that the purpose of the lease was to secure to Mr and Mrs M and their family the benefit of their home and consequently to prevent the bank taking the property in execution of any judgment. A local estate agent was duly appointed to fix the rent and on 27th November 1968 he determined it at £375 per annum. The bank sought to have the lease set aside and declared null and void under s 172^a of the Law of Property Act 1925 on the ground

^a Section 172 is set out at p 367 c and d, post

that M had granted the lease to Mrs M with intent to defraud his creditors and Mrs M had accepted the lease with the same intention or alternatively in bad faith for no consideration with notice of M's intention to defraud his creditors.

Held – The lease would be set aside for the following reasons—

(i) The word 'defraud' in the expression 'with intent to defraud creditors' in s 172 (1) of the 1925 Act was designed to reproduce the expression 'hinder, delay or defraud' in the Statute of Elizabeth of 1571^b and was not intended to be confined to cases of fraud in the ordinary modern sense of that word, i.e. as involving actual deceit or dishonesty. The word 'defraud' in the context of s 172 carried the meaning of depriving creditors of timely recourse to property which would otherwise be applicable for their benefit. A transferee of property seeking to rely on s 172 (3) of the Act had to establish not merely that the property had been conveyed to him for valuable consideration and in good faith but that he was a person not having at the time of the conveyance notice of the transferor's intent to defraud creditors; for that purpose 'notice' included constructive notice (see p 367 f and g, p 368 h and p 369 b, post).

(ii) The evidence made it clear that M intended to defraud the bank, within the meaning of s 172 (1) of the 1925 Act, in that he intended to deprive the bank of recourse to the property charged in its favour. Furthermore Mrs M had actual notice of that intention in that she knew that the purpose of the lease was that she should go on living on the property with her family and correspondingly that the bank should not obtain possession (see p 369 h to p 370 a and d f, post).

Notes

For the element of fraud in conveyances to defraud creditors, see 17 Halsbury's Laws (3rd Edn) 656-658, paras 1265-1269, and for cases on the subject, see 25 Digest (Repl) 200, 201, 210-225.

For the Law of Property Act 1925, s 172, see 27 Halsbury's Statutes (3rd Edn) 593.

Cases referred to in judgment

Eichholz (decd), Re, ex parte Trustee of the Property of the Deceased Debtor v Eichholz, Eichholz's Trustee v Eichholz [1959] 1 All ER 166, [1959] Ch 708, [1959] 2 WLR 200, 25 Digest (Repl) 174, 38.

Fasey, Re, ex parte Trustees [1923] 2 Ch 1, 92 LJCh 400, 129 LT 132, CA, 25 Digest (Repl) 176, 44.

Freeman v Pope (1870) 5 Ch App 538, 39 LJCh 689, 23 LT 208, 34 JP 659, 25 Digest (Repl) 213, 303.

Glegg v Bromley [1912] 3 KB 474, [1911-13] All ER Rep 1138, 81 LJKB 1081, 106 LT 825, CA, 25 Digest (Repl) 189, 134.

Mogridge v Clapp [1892] 3 Ch 382, 61 LJCh 534, 67 LT 100, CA, 40 Digest (Repl) 814, 2932.

Action

In an action commenced by originating summons dated 1st September 1967 and continued as if commenced by writ the plaintiffs, Lloyds Bank Ltd ('the bank'), sought possession of a property known as Marlow Nursery at Little Marlow, Buckinghamshire, which was the subject of legal charge dated 17th May 1966 made by the first defendant, David Marcan, in the bank's favour. On 4th July 1968 the first defendant's wife, Betty Muriel Marcan, was added as second defendant. On 26th August 1970, Mr Marcan having been adjudicated bankrupt, his trustee in bankruptcy was added as third defendant. The facts are set out in the judgment.

Raymond Walton QC and *Gavin Lightman* for the bank.

Jeremiah Harman QC and *Oliver Lodge* for Mr and Mrs Marcan.

The trustee in bankruptcy did not appear and was not represented.

Cur adv vult

a 18th July. **PENNYCUICK V-C** read the following judgment. In this action the plaintiff is Lloyds Bank Ltd; the defendants are Mr David Marcan and his wife, Mrs Betty Muriel Marcan, and also the trustee in the bankruptcy of Mr Marcan. Summarily the facts are as follows. Mr Marcan owned property known as Marlow Nursery, consisting of a house and some $2\frac{1}{2}$ acres of land in the parish of Little Marlow. The house is modern, though not fully completed. The land is adapted for horticulture and has a number of glasshouses on it. Mr Marcan lived and still lives on this property with his wife and children. He was insolvent from, at latest, 1966 onwards.

b On 15th April 1964 Mr Marcan entered into a guarantee in favour of the bank of the indebtedness of a company known as Marcan Industries Ltd. On 5th August 1964 he gave a memorandum of deposit covering the title deeds of this property with the intent to charge it with all his liabilities towards the bank, including, of course, that under the guarantee. Two years later, on 17th May 1966, he entered into a legal charge, whereby he charged this property again with all his liabilities towards the bank, including, of course, his liability under the guarantee. The legal charge contained a provision to the effect that the statutory powers and any other powers of leasing should not be exercisable by the mortgagor without the consent of the bank and the memorandum of deposit contained a similar provision, but it is not in dispute that this restriction on letting is void under the terms of the Agricultural Holdings Act 1948. On 18th May 1966 the bank called on Mr Marcan for payment under his guarantee of the amount due from Marcan Industries Ltd, then stated to be £22,041. I should mention at this point that subsequently a receiver appointed by the bank sold certain assets of Marcan Industries Ltd at a total price of £3,499, thereby reducing Mr Marcan's liability under the guarantee to £18,542.

c On 1st September 1967 the bank commenced these proceedings by issuing a summons, in the first place against Mr Marcan alone, claiming possession of the property. There was an appointment before Master Ball on 20th January 1968, but the bank's affidavits were defective and the summons was stood over until 15th March 1968. On 23rd February 1968 the bank sent a letter to Mrs Marcan informing her of the hearing and its adjournment, and giving her notice that if she had any claim or right adverse to the bank she might attend at the hearing and apply to be added as a defendant. Mrs Marcan was added as a defendant on 4th July 1968.

d On 11th March 1968 Mr and Mrs Marcan entered into a lease, and that is the transaction which has given rise to the dispute in the present action. The lease is expressed to be made between Mr Marcan, called 'the Landlord', of the one part and Mrs Marcan, called 'the Tenant', of the other part. Clause 1 contains a demise of the property to hold from 1st March 1968 for the term of 20 years:

e 'PAYING therefor on the First day of January of each year during the said term the best rent that can reasonably be obtained at the date hereof, regard being had to the circumstances of the case, but without any fine being taken.'

f Clause 2:

g 'The rent hereinbefore reserved shall be fixed by such person or persons as the President for the time being of the Royal Institution of Chartered Surveyors shall on the application of either party hereto appoint',

h and then there is a proviso which did not operate. By cl 3 the tenant covenants with the landlord to pay the yearly rent. Clause 4:

i 'If the Tenant shall at any time fail to pay the rent hereinbefore reserved within twenty-one days after the specified date it shall be lawful for the Landlord at any time thereafter to re-enter upon the demised premises ...'

Clause 5:

PROVIDED ALWAYS and it is hereby agreed that if the Tenant shall be desirous

of determining this Lease at any time during the currency thereof and of such her desire shall give one calendar month's notice in writing to the Landlord, this present Lease and everything herein contained shall cease and be void without prejudice to any claim by either party against the other in respect of any antecedent breach of the terms hereof whether express or implied.' a

Clause 6:

'IT IS HEREBY DECLARED that the purpose of this Lease is to enable the Tenant to carry on upon the property hereby demised the business heretofore carried on by her and the Landlord under the name and style of "Marlow Nursery & Horticultural Supplies".' b

I should mention in connection with cl 6 that Mr Marcan had hitherto been carrying on business on the property jointly with his wife. On this date he assigned his interest in the business to his wife alone. There was no written assignment, but I do not think anything turns on the validity of the assignment. c

In connection with the lease both parties were represented by the same solicitor, Mr Parry-Jones. On 29th August 1968 Mr Parry-Jones's firm, Reynolds, Parry-Jones & Crawford, wrote a letter to the Secretary of the Royal Institution of Chartered Surveyors referring to the lease including the provision that rent should be fixed by such person as the President for the time being of the Royal Institution of Chartered Surveyors should appoint. The letter continues: d

'Mr. and Mrs. Marcan are husband and wife living together in perfect amity. The reason that Counsel advised that the rent should be fixed by an outsider is that it was Counsel himself who advised that there should be a Lease between Mr. Marcan as owner, and Mrs. Marcan as tenant, because certain proceedings are pending between a Bank as Mortgagees, and Mr. Marcan, and it may be that under such proceedings the Bank would become in a position to take the property in execution of any judgment, and Counsel had advised that in the circumstances it is proper for Mr. Marcan to execute such Lease in favour of his Wife so as to secure to the Marcan family the benefit of their home, since they live in the house in question, and enable Mrs. Marcan to continue to run the business. We might add that the dispute between Mr. Marcan and the Bank is rather a bitter one in that the Bank may claim that they are legally entitled to judgment against Mr. Marcan and to take the property in execution, but they are not morally entitled to do so and that therefore there is nothing wrong in Mr. Marcan defeating the the Bank's objective . . .' e

(I mention that the defendants have not thought fit to disclose counsel's opinion. They are not, of course, obliged to do so.) f

In due course the President of the Royal Institution of Chartered Surveyors appointed a Mr Kendall to fix the rent pursuant to the lease. Mr Kendall is an estate agent practising in High Wycombe. Nothing is said against his character or capacity, although it was mentioned by one of the expert witnesses called by the bank that he did not have much knowledge of agricultural values. There was a long correspondence between Mr Kendall and the solicitors acting for Mr and Mrs Marcan. Ultimately on 27th November 1968 Mr Kendall fixed the rent. His letter recites his appointment as a valuer, reports that he has inspected the property, gives various particulars concerning the business and so forth, describes the property, states that he has not been shown any schedule of condition of the house or glasshouses and refers to the absence of a provision as to repairs. Mr Kendall concludes: g

'I prefer, therefore, to adopt what is usual as the basis of maintenance and I have accordingly come to the conclusion and I give it as my opinion that the annual rental payable under the lease dated 11th March 1968 between David Marcan and Betty Muriel Marcan should be:—£375 . . .' h

a The summons was further stood over and a direction was given that the proceedings should continue as if commenced by writ. In the event pleadings have been delivered on either side, there has been a request for particulars, and certain interrogatories have been delivered and answered. I will refer to the pleadings in a moment.

b On 31st July 1968 the bank obtained judgment against Mr Marcan in respect of personal liabilities in the sum of £1,336, so that falls to be added to the net sum of £18,542 owed by him under the guarantee and makes a total of £19,878. On 8th May 1969 a receiving order was made against Mr Marcan. On 7th August 1969 he was adjudicated bankrupt and a Mr Highley was appointed as trustee in the bankruptcy. In that capacity he was joined as a defendant in these proceedings on 26th August 1970. In the course of the bankruptcy proceedings there were numerous appeals to the court by Mr Marcan, all of which, I think, were dismissed, but nothing turns on the particulars of those appeals. It is apparent from the statement of affairs, c which is in evidence, that Mr Marcan is totally insolvent.

Mr and Mrs Marcan have continued to live on the property pursuant to the lease. Mrs Marcan did not in fact pay the instalment of rent which fell due in January 1969. It seems to me that nothing turns on that; that was simply a matter for arrangement between the husband as lessor and his wife as lessee. Mrs Marcan has tendered to the trustee in bankruptcy the rent which fell due in January 1970.

d I will next refer to the pleadings in the action. The statement of claim was delivered on 6th May 1970. It sets out the facts concerning the guarantee and the legal charge, the amount owing by Mr Marcan, the summons for possession, and the lease. Then para 8: '[Mr Marcan] granted or purported to grant the said Lease with intent to defraud his creditors and in particular the [bank]'. Then follow the particulars of intention to defraud:

e 'The [bank] will rely upon the following facts and matters. (1) The facts and matters hereinbefore set forth [i.e. the term of the lease and the rent]. (2) The substantially lower value of the Property subject to the Lease than the value free from the said Lease. (3) The value of the Property with vacant possession is about £8,500 to £10,500, and substantially less than the sum secured by the Charge. f (4) The terms and value of the Lease and the absence of any premium. (5) The making of a receiving order against [Mr Marcan] on the 8th May 1969 and his adjudication as bankrupt on the 7th August 1969. (6) The written Statement made by [Mr Marcan] in or about August 1969 in support of an application to set aside the aforementioned receiving order and supplied by him to the [bank]. (7) Transcript of proceedings in the Aylesbury County Court in the Bankruptcy on the g 16th January 1969 and 28th November 1969. (8) Letter dated the 29th August 1968 from [Mr and Mrs Marcan's] Solicitors to the Secretary, Royal Institution of Chartered Surveyors. (9) Letter dated the 11th March 1968 from [Mr and Mrs Marcan's] Solicitors to the [bank's] Solicitors.'

h In order to clear the ground I would mention that so far as I can see the circumstance that the value of the property is substantially less than the sum secured by the charge has no significance on any issue which I have to determine. The statement and transcript of proceedings with reference to an affidavit read in those proceedings go to the intention of Mr Marcan. The passages can be looked at, but they do not, I think, go any further than does his own evidence in the action before me. The letter dated 11th March 1968 is not relied on, so what remain are: (1) the 'facts and matters j hereinbefore set forth'; (2) the substantially lower value of the property subject to the lease than the value free from the lease; (4) the terms and value of the lease and the absence of any premium; (5) the bankruptcy, and (8) the letter dated 29th August 1968.

Then para 9:

'[Mrs Marcan] accepted the said Lease with intent to defraud [Mr Marcan's]

creditors and in particular the [bank], or alternatively in bad faith for no consideration with notice of [Mr Marcan's] intention to defraud his creditors and in particular the [bank].'

Then follow the particulars of intention to defraud, bad faith and notice of intention:

'The [bank] will rely upon the following facts and matters: (1) The facts and matters hereinbefore set forth. (2) [Mrs Marcan] is and has at all material times been the wife of [Mr Marcan] and lives and has lived with him at the Property. (3) Letter dated the 23rd February 1968 from the [bank's] Solicitors to [Mrs Marcan] [i.e. the letter giving notice of the proceedings]. (4) The same Solicitors have at all times acted for [Mr and Mrs Marcan] in these proceedings and in the grant of the Lease.'

Then para 10:

'The aforesaid grant of the Lease has prejudiced the [bank] by reason of the following facts: (1) If the said Lease is valid and enforceable against the [bank] the [bank] can only sell the property subject to the Lease. (2) The value of the Property subject to the Lease is less than the sum secured by the Charge and also the value of the Property free from and unencumbered by the Lease.'

Then there is a claim that the lease is void and should be set aside, and a claim for certain ancillary relief.

Mr Marcan admits all the various documents. He then denies para 8 of the statement of claim, and makes no admission as to para 9. He further denies that the grant of the lease has prejudiced the bank by reason of the facts sets out in para 10 of the statement of claim or at all. The defence of Mrs Marcan is on all fours with that of Mr Marcan mutatis mutandis, that is to say, she makes no admission as to the allegations contained in para 8 of the statement of claim and denies para 9.

I need not, I think, refer specifically to the requests for particulars and the particulars delivered pursuant to those requests. I should, however, read Mrs Marcan's answer to certain interrogatories:

'2. To the second Interrogatory, namely, "Were you aware at or prior to the date of the execution of the Lease: (a) of the Legal Charge dated the 17th May, 1966, (b) of the present proceedings by the [bank] for possession of the Property against [Mr Marcan]?", I say that at and prior to the date of execution of the Lease: (a) I was aware that in or about the year 1966 [Mr Marcan] had executed a document to which the [bank] was also a party and which related to the Property but, save as aforesaid, I was not aware of its nature contents or effect. (b) I was aware of the present proceedings by the [bank] for possession of the Property against [Mr Marcan]. To the third Interrogatory namely, "Did the firm of Reynolds, Parry-Jones & Crawford act for you in the grant of the Lease?", I say Yes.'

The fourth interrogatory is concerned with payments of rent.

At the hearing of the action before me there were called on behalf of the bank the trustee in bankruptcy of Mr Marcan and two surveyors and estate agents, Mr Pickard and Mr Dunn. The trustee in bankruptcy, who did not take any part in these proceedings in his capacity as a defendant, gave an account of certain matters concerning Mr Marcan's affairs but did not, I think, contribute anything of significance on the present issue. The two surveyors gave evidence to the same general purport. I mean no disrespect to Mr Pickard when I say that Mr Dunn's evidence appeared to me rather more lucid, and, as his figures are slightly more favourable to Mr and Mrs Marcan than are those of Mr Pickard, I will refer to his evidence.

a Mr Dunn gave certain evidence concerning what are the normal terms of agricultural leases. He deposed that these leases normally contain a prohibition on assignment, and he further pointed out that the terms of this lease as regards duration and also as regards repair are unusual. I do not propose, for reasons which will be apparent, to go into the matter of repair. He then gave the following figures, all these values being at the date of the lease in 1968. He gave as his expert opinion that the true rental value of the property on the terms of the 1968 lease would have been £750. That rent put the capital value of the property at £8,500. He put the capital value of the property subject to a lease on normal terms at £12,500. Finally he put the value of the property with vacant possession at £15,000. Mr Dunn deposed that in the area in which this property is situated—that is the area of Oxfordshire, Buckinghamshire and Berkshire—the letting of the property in itself depreciates the value of the property by making it impossible to give vacant possession. No expert evidence was given on the other side, and I see no reason why I should not accept the evidence of Mr Dunn. He appeared to be a perfectly competent and conscientious witness.

On the other side evidence was given by Mr Marcan himself in court and by Mrs Marcan, who is not in good health, before a special examiner actually during the currency of the hearing in court.

d Mr Marcan made the following statements in evidence; in examination-in-chief:

‘When I received the letter from the bank demanding the property I telephoned the contents of the letter to Mr Parry-Jones. The outcome was that counsel’s opinion was taken, and I was told that it was legitimate to lease the property to my wife. It was pointed out by counsel that this was agricultural property. I understood by granting the lease I could be with my wife and children at the nursery [that was, of course, the property].’

Asked whether the grant of the lease would reduce the value of the property he said: ‘I accept it would naturally do so, but I did not realise it then. I accept because it was pointed out yesterday’, that was by the expert witnesses in court. Asked, ‘What was your purpose in granting the lease?’ he replied, ‘No other motive’.

f In cross-examination it was put to him that he cast about to see how he could prevent the bank obtaining possession. He replied: ‘No, I consulted my solicitor who took counsel’s advice. I was told I had the right to lease the property because it was agricultural.’ Then he was asked: ‘Was your object to prevent the bank getting possession?’ and he answered: ‘I agree that is the natural conclusion if you equate a lease with possession, but it was not too obvious in 1968. It is partly true that it was to stop the bank taking possession’. Then it was put to him: ‘Was there any point?’ and the answer was: ‘To have my wife, who is mentally ill, and the children and to refer again to counsel’s advice.’ Then he said: ‘I put my wife before the bank on advice.’

g There was some cross-examination as to the profits made from the business carried on from this property. In the year 1968 there was a very small loss, £55, after allowance for drawings of £500. In 1969 there was a profit of £187 after allowance of consulting fee to Mr Marcan of £100 and after deduction of £375 for rent. In 1970 there was a profit of £193 after deducting a slightly larger consulting fee and rent. In 1971 there was a loss of £560 after deducting the rent but not, I think, a consulting fee; I am not sure about that. Mrs Marcan’s only other income is something of the order of £200 which she obtains for correcting ‘O’ level papers.

h Mrs Marcan was examined before a special examiner. It is right to say that Mrs Marcan is not in good health, and this examination was evidently a considerable strain on her. She gave the following answers in examination-in-chief:

‘Q Just before you signed it [the lease] did you know that Lloyds Bank were suing your husband, bringing legal action against your husband? A I don’t remember when I knew that particular . . .’

‘Q But you did know some time? A I knew, yes.

'Q Did you know what the the legal action was about? What Lloyds Bank wanted? A I knew there was some controversy, I didn't know all the details. a

'Q Did you know the broad details? A I don't know whether I did or not . . .

'Q Do you know why they wanted to take possession of the house? A Something to do with Marcan Industries, I suppose.

'Q Now then, when you took that lease, when you signed that document, why did you take it, why did you sign the lease? A The solicitor told me to. b

'Q What made you want to sign it? A I understood that it would make it possible for us to go on living here and to carry on the nursery which I saw as a means of livelihood.

'Q You said it would make it possible for "us" to go on living here. Who does live here apart from yourself? A My husband and three children.'

I should refer then to this: c

'Q Mrs Marcan, do you know the valuation fact that letting an agricultural holding makes the property worth less money? Did you ever hear that before? A No, I don't think so.

'Q Mrs Marcan, did you sign that lease in order to prevent Lloyds Bank getting its money? A No.' d

In cross-examination she gave the following answers:

'Q Well now, the point of starting the proceedings was to enforce it [i.e the bank's charge] wasn't it? The point of the bank's proceedings against your husband was to enforce it by getting possession of this property and selling it. That was the whole point of it, wasn't it? A I suppose so. e

Q Your husband must have told you so at some time? A At some time. I don't remember the time and place . . .

'Q . . . you discussed with your husband what could be done to prevent this happening? A No, we didn't discuss that. There wasn't anything we could do.'

Then she was asked about the lease: f

'Q But you see you signed a document called a lease. Have you any idea of what it did? What the purpose of it was? A To rent this property to me.

'Q The purpose was to rent the property to you. Now what was the idea of the property being rented to you? A So that we could go on living here with my family and husband and carry on the nursery as we have been.

'Q So that the bank would not be able to get possession of the property as against you? A That was not my idea. Just so I could go on living here. g

'Q But Mrs Marcan, do please think. The bank were demanding possession of the property, were they not, and you knew it? A I knew they would be doing this.

'Q In fact they were doing it, weren't they? A I didn't know at that particular moment that they had started the proceedings. h

'Q But you must have known they were in fact doing it. That is right, isn't it? A If they had started I suppose I did know.

'Q And the idea of your husband giving you the lease was so that you thought you would be entitled to go on living here and the bank would not be able to take possession? A It was so that I could go on living here, yes.' i

She was pressed on that, and she was asked:

'Q Part of the idea in granting you the lease was that you would be able to go on living here thus preventing the bank from getting vacant possession of the property? A That was not my idea. It was so that I could go on living here, if the two go together . . .

- a 'Q Well, the two obviously go together, don't they? Come, Mrs Marcan, the two obviously go together, don't they? A I don't know whether they do or not, I suppose they do.'

Then she was pressed on that and she said: 'Well, I can see that they do [i.e. go together] now but at the time of signing I suppose I did know. Q You must have known, Mrs Marcan, mustn't you?' And to that there was a pause and no answer.

- b I turn now to the law. The statutory provision under which the bank's present claim is brought is s 172 of the Law of Property Act 1925. That section is in the following terms:

(1) Save as provided in this section, every conveyance of property, made whether before or after the commencement of this Act, with intent to defraud creditors, shall be voidable, at the instance of any person thereby prejudiced.

- c (2) This section does not affect the operation of a disentailing assurance, or the law of bankruptcy for the time being in force.

(3) This section does not extend to any estate or interest in property conveyed for valuable consideration and in good faith or upon good consideration and in good faith to any person not having, at the time of the conveyance, notice of the intent to defraud creditors.'

- d Section 172 re-enacts para 31 of Part II of Sch 3 to the Law of Property (Amendment) Act 1924, which never came independently into operation. That section replaced in very substantially different terms the prolix sections 2 and 6 contained in the Statute of Elizabeth of 1571¹. It should be observed that while the Law of Property Act 1925 is a consolidating Act, what it consolidated, so far as now material, was not the Statute of Elizabeth but the Law of Property (Amendment) Act 1924 which substantially altered the Statute of Elizabeth.

- e Turning first to s 172 (1), there is no doubt that the word 'conveyance' includes a lease: see the definition contained in s 205 (1) (ii) of the same Act. Then comes the expression 'with intent to defraud creditors'. I think it is fairly clear that the word 'defraud' in this subsection is designed to reproduce the expression 'hinder, delay or defraud' in the Statute of Elizabeth, and is not intended to be confined to cases of fraud in the ordinary modern sense of that word, i.e. as involving actual deceit or dishonesty. It is quite inconceivable that if Parliament had intended to circumscribe the effect of the old provision it would not have done so in clear terms. The word 'defraud' in the context of s 172, and having regard to the history of its statutory predecessor, must, I think, carry the meaning of depriving creditors of timely recourse to property which would otherwise be applicable for their benefit. This result can plainly be achieved by transactions in many forms, i.e. not only an outright conveyance but also a lease, charge, contractual agreement or, no doubt, in other ways.

- g I should mention that there appears to be only one modern case on the meaning of this expression 'intent to defraud' in s 172 (1). That is the decision of Harman J in *Re Eichholz* (dec'd)². Harman J puts on the expression, I think, substantially the same meaning as I have done. Unfortunately, his decision is vitiated by the fact that it was not brought to his notice that the Law of Property Act 1925 is not a consolidating Act as regards the Statute of Elizabeth, but only as regards the 1924 Act. The error is extremely easily understood because the 1924 Act seems to have slipped out of notice in most, at any rate, of the well-known textbooks.

- h The word 'intent' denotes a state of mind. A man's intention is a question of fact. i Actual intent may unquestionably be proved by direct evidence or may be inferred from surrounding circumstances. Intent may also be imputed on the basis that a man must be presumed to intend the natural consequences of his own act: see the

1 13 Eliz I c 5

2 [1959] 1 All ER 166, [1959] Ch 708

judgments of Lord Hatherley LC and Giffard LJ in *Freeman v Pope*¹. I would mention that today this imputation might well be considered applicable where there has been a valuable consideration short of full consideration. I do not, however, propose to pursue that point for the reason that in the present case there is evidence of actual intention. That, of course, is by no means always so in cases under this section. Where there is evidence of actual intention, in the nature of things there is very little room for imputing intention. I do not, therefore, propose to pursue the difficult questions which arise as to the circumstances in which intention may be imputed. It is clear that in reaching a decision on the intention of a man in regard to a given transaction all the particular circumstances must be considered. It is also clear that while consideration is a relevant factor, it is by no means conclusive.

I have derived much assistance from a passage in the judgment of Parker J sitting in the Court of Appeal in *Glegg v Bromley*²:

'The only remaining point is, I think, that which was argued under the statute of 13 Eliz. c. 5. Now the scheme of that statute is this: By it all conveyances and assignments made with intent to hinder and delay creditors are rendered void against all creditors hindered or delayed by their operation. There is, however, a proviso for the protection of a purchaser for good consideration without notice of the illegal intention. In the authorities which deal with the statute it is not always clear whether the judges are dealing with the operative part of the Act or with the proviso. The illegal intent under the operative part is a question of fact for the jury or the judge sitting as a jury. On the one hand the want of consideration for the conveyance or assignment is a material fact in considering whether there was any illegal intent, but it is not conclusive that there existed any such intent. In the same way consideration was by no means conclusive that there was no illegal intent. When, however, one comes to deal with the proviso, it is quite clear that any person relying on the proviso must prove both good consideration and the fact that he had no notice of the illegal intent.'

Section 172 (3) is the successor of s 6 of the Statute of Elizabeth. It lays down two conditions, each of which must be satisfied, namely, (1) the property must be 'conveyed for valuable consideration and in good faith or upon good consideration and in good faith', and (2) the conveyance must be 'to any person not having, at the time of the conveyance, notice of the intent to defraud creditors'. Counsel for Mr and Mrs Marcan contended that in this second condition the final words 'to any person not having, at the time of the conveyance, notice of the intent to defraud creditors' only applied to the second alternative in the first condition, namely, 'upon good consideration and in good faith', so that where it is 'for valuable consideration and in good faith' the concluding condition does not require to be satisfied. I am not able to accept this contention. Such a distinction would represent a considerable departure from s 6 of the Statute of Elizabeth, where the expression 'good consideration' clearly comprises alike valuable and non-valuable consideration. Moreover, it is intrinsically improbable that Parliament would make such a distinction, bearing in mind that valuable consideration may fall far short of full consideration. So it seems to me that a transferee seeking to take advantage of this subsection must establish both the requirements of the subsection, i.e. there must be a conveyance for valuable or for good consideration in either case in good faith, and the person must not have notice of the intent to defraud.

I find great difficulty in seeing what is meant by the first requirement. Whose good faith is intended? Does the requirement add anything, and, if so, what, to what is already contained in sub-s (1) and in the second requirement of sub-s (3)? Counsel

¹ (1870) 5 Ch App 538

² [1912] 3 KB 474 at 492, [1911-13] All ER Rep 1138 at 1147

a for Mr and Mrs Marcan contended that the words 'in good faith', which reproduce the words '*bona fide*' from s 6 of the Statute of Elizabeth, indicate that the transaction must be a genuine one as between the parties. I was referred to a statement of Kay LJ in *Mogridge v Clapp*¹, under another section of the Act then in force, in which he says: 'Good faith in that connection must mean or involve a belief that all is being regularly and properly done'. For reasons which will be apparent I do not find it necessary to express any final conclusion on the meaning of the first requirement.

b The second requirement is that the transferee shall not at the time of the conveyance have notice of the intent to defraud. Notice must, I think, plainly include constructive notice. In *Re Fasey*², a case on s 6 of the Statute of Elizabeth, P O Lawrence J made it clear that what is required is simply that the transferee shall not have notice of the intent to defraud. It is not sufficient to enable him to take advantage of the section to show that he was not actually implicated in the fraudulent intention. P O Lawrence J says this³:

c 'Then, it is further contended that no fraudulent intent on the part of the company has been shown and that such intent is essential in order to enable the Court to declare the agreement void under the statute. In my view, that contention is unsound. What is required by the Act to be shown, where there is a conveyance for valuable consideration, is that the purchaser had notice or knowledge of the fraudulent intent.'

d It is accepted on both sides that the burden of proof under s 172 (1) lies on the person seeking to avoid the conveyance, and that under sub-s (3) lies on the transferee.

e I return now to the present case. Counsel for the bank placed much reliance on the actual terms of the lease, including the amount of the rent. These terms are indeed surprising, the rent being only half the current rental value taken by the bank's expert witnesses in this case whose evidence was not contradicted. The fact remains that the figure of £375 was reached by Mr Kendall, an independent estate agent, whose integrity is not challenged, on a full statement of the relevant facts and, of course, on examination of the lease. I find it impossible to say that the amount of the rent forms any indication of intent to defraud. Again, the other terms of the lease cannot have any direct bearing independently of the amount of the rent. However unusual or disadvantageous to the lessor these other terms may be, they were taken into account by Mr Kendall in fixing the amount of the rent.

f Nothing I think turns on the absence of any express provision as to repairs, those being left to be dealt with under the statutory provisions of the Agricultural Holdings Act 1948, but the duration of the lease and the tenant's option to determine it are, I think, material to this extent, that they show an intention to keep the bank out of possession for a lengthy period at the option of Mrs Marcan. I should myself have thought, with the advantage of hindsight, that the lease was depreciatory by reason that the tenant, Mrs Marcan, was a lady whose total resources, including the profits of the business, were barely sufficient to meet the rent, quite apart from other living expenses. However, this point has not been included in the particulars of intention to defraud, and I do not think I ought to take it into account.

g The real gravamen of the case against Mr Marcan is that three weeks after first hearing of the bank's summons for possession, and while that summons stood adjourned, he granted this lease with the admitted intention of enabling his wife and family, including himself, to retain possession of the property and thereby to exclude the bank from possession of the property. That that was indeed his intention is perfectly clear from his own evidence and also from the letter written by his

1 [1892] 3 Ch 382 at 401

2 [1923] 2 Ch 1

3 [1923] 2 Ch at 9

solicitors to the secretary of the Royal Institution of Chartered Surveyors on 29th August 1968. It seems to me that Mr Marcan's own evidence is really equivalent to an admission that he intended to deprive the bank of timely recourse to the property charged in its favour, and that such an intention is an intention to defraud the bank within the meaning of s 172 (1). I appreciate, of course, that he obtained a return in the form of rack rent, but I do not think this is of itself sufficient to convert the intention he in fact had into a different intention. In reaching this conclusion I bear in mind the passage I have read from the judgment of Parker J in *Glegg v Bromley*¹.

My conclusion is not based on the fact that the value of the property subject to a rack rent is less than that of a property with vacant possession. If Mr Marcan had known this to be so, then the evidence of his intention would be even clearer than it is. But counsel for the bank was content to accept his evidence that he did not know this to be so, and I do not see how one can impute this knowledge to him. That being the position the element of depreciation by the mere grant of a lease cannot, I think, be material in determining Mr Marcan's intention.

In the course of argument of a case of this kind it is proper and helpful to consider all sorts of other hypothetical cases, but at the end of the day what has to be decided is the intention of the particular individual concerned in all the particular circumstances, and I think it is better not to express any view as to what would be the proper conclusion as to intention in other cases.

I conclude then that the bank has established an intent on the part of Mr Marcan to defraud the bank within the meaning of s 172 (1). It remains to consider whether Mrs Marcan can extricate herself under s 172 (3). I do not propose to express any conclusion on the first, and, to my mind, extremely obscure, requirement in sub-s (3), namely, that requiring good faith. I will confine myself to the second requirement, namely, 'to any person not having, at the time of the conveyance, notice of the intent to defraud'. In order to take advantage of the subsection, Mrs Marcan must establish that she had no such notice. It is not, as pointed out in *Re Faisey*², sufficient for her to establish that there was no intent to defraud on her own part. I am not satisfied that Mrs Marcan has established absence of notice of Mr Marcan's intent to defraud. She herself knew, as she admits, that the purpose of the lease was that she should go on living on the property with her family, and correspondingly that the bank should not obtain possession. That, it seems to me, amounts to actual notice of Mr Marcan's intent to defraud the bank.

I should add that Mrs Marcan would, I think, in any event have constructive notice of Mr Marcan's intent under s 199 of the Law of Property Act 1925. That section provides, so far as now material:

'(1) A purchaser shall not be prejudicially affected by notice of ... (ii) any other instrument or matter or any fact or thing unless—(a) it is within his own knowledge, or would have come to his knowledge if such inquiries and inspections had been made as ought reasonably to have been made by him; or (b) in the same transaction with respect to which a question of notice to the purchaser arises, it has come to the knowledge of his counsel, as such, or of his solicitor or other agent, as such, or would have come to the knowledge of his solicitor or other agent, as such, if such inquiries and inspections had been made as ought reasonably to have been made by the solicitor or other agent ...'

As regards sub-para (a) it seems to me that the transaction into which Mrs Marcan was invited to enter called out for enquiry. As regards sub-para (b), the relevant facts concerning Mrs Marcan's intent were within the knowledge of Mr Parry-Jones who was the solicitor acting for her in this transaction. Counsel for Mr and Mrs Marcan

1 [1912] 3 KB at 492, [1911-13] All ER Rep at 1147

2 [1923] 2 Ch 1

a made the point that the words 'as such' require that the solicitor shall be acting for the purchaser alone. I do not think this can be derived from the words. The words mean, I think, simply acting in the capacity of solicitor for the purchaser.

I would only add that looking at the broad substance of this transaction I cannot find anything in it which leads me to think that the conclusion which I have reached on a narrower scrutiny of the terms of s 172 and the particular facts is one which does any injustice to Mr Marcan. I propose accordingly to make an order, as sought in the statement of claim, that the lease be set aside and declared to be null and void with no effect at law. Then there is asked an order that the defendants do forthwith deliver up possession of the property to the plaintiffs. I will make an order for possession but defer the operation of the order for a specified time as to which I will in a moment consult counsel. Finally, there will be, as now sought, an enquiry as to mesne profits.

c I have been asked to make a comment on a statement contained in the notes in the Supreme Court Practice under RSC Ord 39, r 11¹. That is the order which is concerned with evidence by deposition. In the present case an order was made for the examination of Mrs Marcan, and her deposition was in fact available to the court. The record of Mr Marcan's deposition, as, so far as my own experience goes (and I think that also applies to the experience of counsel), is the usual practice, took the form of a verbatim transcript of question and answer. That appears to be by far the most convenient way of recording evidence so taken. The note in the Supreme Court Practice says¹:

e 'The general practice is for the deposition of the witness to be taken down by the examiner, not ordinarily by question and answer, but rather in narrative form so as to represent as nearly as may be the evidence of the witness, though if any particular question or answer appears to the examiner to have a special importance he may direct that the exact words be set out or himself set them out in the deposition.'

f That may have been the practice once, but I should have thought that it was a much less accurate method of recording what was said by the witness, and that with modern methods of shorthand transcription and so forth, there was no relative advantage in it. On the contrary, I should have thought it imposed on the examiner a most embarrassing task. It seems to me that the author of the notes to the Supreme Court Practice might well reconsider what is said in that particular passage.

g *Order for possession to be given on 1st February 1973.*

Solicitors: Cameron, Kemm, Nordon & Co (for the bank); Edgley & Co, agents for Reynolds, Parry-Jones & Crawford, High Wycombe (for Mr and Mrs Marcan).

Mary Rose Plummer Barrister.

h

1 See the Supreme Court Practice 1973, vol 1, p 593, para 39/11/1

Warmington and another v Miller

COURT OF APPEAL, CIVIL DIVISION

DAVIES, CAIRNS AND STAMP LJ

31ST JANUARY, 1ST FEBRUARY 1973

Specific performance – Lease – Agreement for lease – Underlease – Execution of underlease breach of covenant in lessor's head lease – Whether lessee entitled to specific performance of agreement to execute underlease.

The defendant was the lessee of premises demised to him for a term of 21 years. The lease contained an unqualified covenant 'Not to assign underlet or part with possession of part only of the demised premises'. The premises included a workshop. The defendant allowed the plaintiffs to use the workshop for their business of panel beating and spraying cars. Subsequently he made an oral agreement with the plaintiffs to grant them a lease of the workshop for a term of 12 months and thereafter until determined by 12 months' notice on either side. The defendant refused to execute the agreement and the plaintiffs claimed, inter alia, a decree of specific performance, or alternatively a declaration that they were in possession of the workshop under the terms of their agreement with the defendant.

Held – The plaintiffs were not entitled to a decree of specific performance since the court would not order the defendant to do that which he could not do under the terms of the lease under which he held the premises and which, if he did, would expose him to proceedings for forfeiture. Neither were the plaintiffs entitled to the declaration sought for the equitable doctrine that an intended lessee was to be treated as having the same rights as if a lease had in fact been granted to him only applied where the intended lessee was entitled to specific performance of the agreement; furthermore such a declaration could only be protected by an injunction and if the plaintiffs subsequently sought an injunction to protect their right to remain in possession it would be an invitation to the court to grant part specific performance of the agreement (see p 377 b to d and g h and p 378 a b and e, post).

Willmott v Barber (1880) 15 Ch D 96 applied.

Walsh v Lonsdale (1882) 21 Ch D 9 distinguished.

Notes

For specific performance of contracts involving a breach of a prior contract with a third party, see 36 Halsbury's Laws (3rd Edn) 300, 301, para 427, and for cases on the subject, see 44 Digest (Repl) 54-56, 405-414.

Cases referred to in judgment

Harnett v Yielding (1805) 2 Sch & Lef 549, [1803-13] All ER Rep 704, 44 Digest (Repl) 24, *55

Walsh v Lonsdale (1882) 21 Ch D 9, 52 LJCh 2, 46 LT 858, CA, 18 Digest (Repl) 255, 63.

Willmott v Barber (1880) 15 Ch D 96, 49 LJCh 792, 43 LT 95; *on appeal* (1881) 17 Ch D 772, 45 LT 229, CA, 44 Digest (Repl) 55, 409.

Appeal

The defendant, Jack Edward Miller, appealed against an order of his Honour Judge Glazebrook made on 22nd June 1972 at Tonbridge County Court decreeing specific performance of an oral contract made on 3rd August 1971 between the defendant of the one part, and the plaintiffs, Kenneth Warmington and Bryan Sydney Read of the other part, for a lease to the plaintiffs of the ground floor workshop in premises known as The Granary, High Street, Edenbridge, Kent. The defendant appealed

a on the ground, inter alia, that the judge had erred in law in holding that, where a lease contained a covenant forbidding subletting of the premises without the consent of the landlord and where, without such consent, the tenant agreed to sublet the premises, there was no sufficient ground for refusing an order for specific performance of the agreement against the tenant. The facts are set out in the judgment of Stamp LJ.

b Roger Gray QC and E J Holman for the defendant.
Henry Summerfield for the plaintiffs.

STAMP LJ delivered the first judgment at the request of Davies LJ. This is an appeal against an order of his Honour Judge Glazebrook, sitting at Tonbridge County Court on 22nd June 1972, whereby he ordered specific performance (although the order itself does not say so) of an oral agreement made between the plaintiffs and the defendant on 3rd August 1971, for a lease by the defendant to the plaintiffs of the ground floor workshop in certain premises known as The Granary, High Street, Edenbridge, in Kent, and awarded the plaintiffs nominal damages for trespass by the defendant. The agreement was pleaded thus:

d 'On or about August 23rd 1971 the Plaintiffs and the Defendant agreed orally by a conversation between the Plaintiffs and Defendant at 96 High Street aforesaid that the Defendant would grant to the Plaintiffs and the Plaintiffs would take from the Defendant a lease of the said workshop for a term of 12 months and thereafter until determined by 12 months' notice on either side at the rent of £20 per week inclusive of rates, electricity and the use of the welding plant installed therein and that the Plaintiffs should have exclusive possession of the said workshop.'

e The judge found the agreement proved, and this court is asked to reverse this finding of fact. Alternatively the defendant submits that specific performance of the agreement ought not, for the reasons which I will indicate, to have been ordered.

f The workshop is part of larger premises demised to the defendant under a lease dated 9th February 1971 for a term of 21 years from 25th December 1970, at a basic rent of £1,100 per annum subject to seven year reviews. The lease contained a covenant by the lessee (the defendant)—

g 'Not without the consent of the Lessors to use the demised premises otherwise than as a warehouse for the storage and cleaning of motor vehicles awaiting disposal provided however that nothing herein contained shall imply or be deemed to be a warranty that the demised premises may in accordance with all town planning laws and regulations now or from time to time in force be used for the purpose above mentioned'.

h It also contained an unqualified covenant 'Not to assign underlet or part with possession of part only of the demised premises'.

i The defendant is a dealer in secondhand cars. The first plaintiff is a panel beater and the second plaintiff is a car sprayer. Notwithstanding the covenant as to user to which I have referred, the workshop was at the time of the alleged agreement fitted up and used as a workshop for car spraying and panel beating. The two floors were used for storage; they were reached through the workshop; and at the back was a yard where the defendant put cars. The judge, in setting out the history of the matter, said this:

'Panel beaters and sprayers—competent ones—are in short supply and the defendant was finding it difficult to get the work he required done. In May 1971 he advertised in the local paper: 'Car sprayer and panel beaters required

full-time, part-time or self-employed, with premises and equipment provided". Read, the second plaintiff, came to see him. Later he brought Warmington, the first plaintiff, and it is common ground that an agreement was reached whereby Warmington and Read came to work in The Granary workshop and paid the defendant £20 a week. The workshop contained the basic equipment for car spraying and panel beating, but the plaintiffs also used equipment and tools of their own.

The judge described the issue thus:

"The issue in the case is whether they were there as tenants (as they claim) or as licensees. They say that on 3rd August 1971 the defendant promised them a tenancy for 12 months with 12 months' notice. The defendant has refused to execute a tenancy and they ask for specific performance. The issue depends on whether I accepted the plaintiffs' or the defendant's account of what was said. That must depend principally on my estimate of their truthfulness but there are two subsidiary issues which afford some help.

"The first is whether the plaintiffs were sole occupants of the workshop. They say they were but the defendant says he had employees working there almost up to the end, i.e. April 1972. The evidence (even apart from the parties) is somewhat conflicting, but I am satisfied that by about early September, and possibly before, the plaintiffs were the sole occupants. They are not correct in saying they had it to themselves from 3rd August. I should suppose that the defendant's employees finished the jobs they were on and may even have continued a little after that. The plaintiffs after all had nothing in writing from the defendant and I think they felt a little uncertain of their position. But the evidence is much nearer the truth than the defendants. Their right to exclude other people was never tested.

"The second subsidiary issue concerns the work the plaintiffs were doing. They say the contract required them to give priority to the defendant's motor cars, but that otherwise they were free to take in their own work. The defendant says they were not permitted to do any work but his. It is clear that at the start there was an accumulation of the defendant's cars to be done and the plaintiffs were fully occupied with them. But by November they were in fact doing nearly as much outside work. The defendant was frequently in the workshop for various reasons, and he must have known they were working on other cars. He says he complained when he saw it going on; if he did he was singularly ineffective and I do not think he is a man who would put up with such flagrant breach of contract. Further, it is not very likely that the plaintiffs would have got headed notepaper and put in a telephone if they were only doing the defendant's work. I am satisfied that the complaints the defendant made were about the plaintiffs taking in "crashed" cars for repair. They had actually advertised for such cars. The defendant objected for two reasons: first, if his customers saw badly damaged cars going into premises, it was poor advertisement for him; secondly his lease forbade this kind of work. On both the subsidiary issues, therefore, I am satisfied the plaintiffs' version is correct or substantially correct.

"A number of other issues were raised in the evidence, but none of them gives me much assistance; for example, the £20 paid by the plaintiffs weekly, at first by deduction and later by cheque. The plaintiffs endorsed the first few cheques "Rent". The defendant, as soon as he saw it, refused to accept such cheques. The word "Rent" can, of course, be used in connection with a licence, but both parties clearly connected it with a tenancy. I think that all the incident shows is that the plaintiffs were anxious to get evidence of a tenancy—to get security—and the defendant was determined they should not have it. I get no help from the fact that everyone had keys. Although the evidence of none of the parties is very precise, I am satisfied that the plaintiffs' version of the contract, that is of how they came to be on these premises, is correct. I prefer their evidence to the

a defendant's. I find that the defendant did promise them a lease for 12 months and 12 months' notice. I think the defendant was desperate to get work done on his cars. He tested the plaintiffs and found they knew their job. But they wanted to start their own business—that is common ground. They had good jobs in the town. There was no reason why they should give these up merely to work for the defendant, whether self-employed or not. It would be stupid to start their own business unless they had some security in the premises. So they asked originally for a five year lease. The defendant offered a 12 months' term and they accepted that. I do not think the defendant ever intended to keep his promise. In truth he was forbidden to part with possession of part of the premises by his lease. The plaintiffs say they kept on asking him for their lease. The defendant agrees they kept on asking; he says he kept on telling them they could not have one because he was forbidden by his lease to do it. I cannot believe they kept on asking if he told them that. I do not think it troubled the defendant very much to make a promise which was a breach of the head lease. After all, the work he was doing, even before the plaintiffs came on the scene, was a clear breach of the user clause.

d The judge went on to deal with the subsequent history of the matter—a history relevant for the purpose of testing the veracity of the evidence regarding the making of the oral agreement on which the plaintiffs relied and the probability or otherwise of such an agreement having been made.

e It is submitted in this appeal that the judge's finding that there was an agreement for a lease was wrong. In support of that submission, it is said that the judge in making his findings gave insufficient weight to some of the facts and excessive weight to other facts. So far as that is concerned, I hope I do no disrespect to that general submission by saying that it is quite impossible to measure the weight which the judge did give to the several facts which he found and which tended to point in one direction or the other. In the end, as the judge pointed out, the issue depended on whether he accepted the plaintiffs' or the defendant's account of what was said on 3rd August 1971. It is clear from the judge's judgment that he did not think much of the defendant's evidence and did not regard him as one on whose evidence he could rely. The defendant, however, relies particularly in this court on documentary evidence consisting of two letters which it is submitted are inconsistent with the prior existence of the agreement set up by the plaintiffs in that they show that as early as November 1971 the plaintiffs were not relying on the agreement and made no mention of it. The first of these letters is dated 12th November 1971, written by the plaintiffs' solicitors to the defendant, in the following terms:

h 'We have been consulted by [the plaintiffs], who at present occupy The Granary which forms part of the premises leased by you from the Stonebridge Trust, in respect of which you are charging them the sum of £20 a week. Our Clients are in a very difficult position as obviously they will wish to spend capital to keep the business going and even extend it, but unless they can have security of tenure this is impossible. We understand from them that you have approached your Landlords for consent for them to have a Tenancy of The Granary, and perhaps you would let us know whether in fact any progress has been made in respect of this, or alternatively we would be prepared to advise them to take over the assignment of the whole premises on reasonable terms. We shall be glad to hear from you.'

j The second letter is a letter dated 22nd November 1971 written by the plaintiffs' solicitors to their own client, the second plaintiff, in these terms:

'Dear Sir, Further to your call on the 10th instant [that is two days before the letter which I have just read], we have now discussed the matter with [the defendant] and he informs us that he is not contemplating assigning his Lease, but

if and when this should take place he will communicate with you as to your position. He also informed us that although you are only on a monthly agreement at the moment if things continue to go as they are doing, he will be pleased to consider a three monthly agreement in future. In the circumstances I feel it would not be wise to go to the expense of Capital equipment and perhaps a short Partnership Agreement would suffice to protect you and your partner.' a

In neither letter is there any reference to the existence of an oral agreement for the granting of a lease. But both letters were written at a time when the defendant had refused to grant a lease and when it was known (as appears from the last paragraph of the letter of 12th November 1971) that the agreement of the landlord was necessary and so were written under the shadow of the danger of a forfeiture. Read in this context, I do not find the terms of the letters inconsistent with the plaintiffs' case or that they indicate that that case was made up at a later date. So far as regards both letters, it is to be observed that the solicitor was one of the trustees for the charity who owned the property and one of the lessors under the defendant's lease. He must have found himself in a most embarrassing position; and his advice to his client not to go to the expense of capital expenditure is not surprising. For all we know he may have advised the second plaintiff orally that the defendant had no power to grant a lease, and to assert in a letter that he had done so would, in view of his dual position, have been, as I see it, most embarrassing. b

There is a short passage in the evidence of a legal executive in the employ of the plaintiffs' then solicitors to the effect that the second plaintiff did not tell him about the length of the plaintiffs' tenure; but we do not know any details of the discussions that he had with the second plaintiff which may for all we know have been of very short duration. c

The defendant also relied on evidence on behalf of the plaintiffs that at some time after the November letters to which I have referred the defendant agreed to a six-months' lease. The first plaintiff's evidence in this regard was as follows (this was following a dispute which had arisen): d

'[The] Defendant said there was no reason why we should argue because he needed work done as much as we needed premises. He told us we did not have to go and we all settled on a six months notice either way. He said a six months lease. These were Defendant's words. We shook hands on it. We continued as before paying rent and doing his work. We were also doing other people's work...' e

The judge dealt with this part of the case as follows: f

'After the solicitors' letters the plaintiffs pressed the defendant for security and finally he agreed to a "six month basis". He denies that he said more than a month or six weeks. But what does a six months basis mean? If it was intended to be a mere licence, this was never made clear to the plaintiffs. Their position was that they had the original promise of 3rd August of a 12 months' lease. They had been to a solicitor to see how valid, how enforceable that was. After seeing their solicitor they believed (they may even have been told) that they could not enforce it. They believed they had to be satisfied with something less. But in fact they were already, in equity, tenants from 3rd August. Nothing that happened after that date, in my view, altered their status. I do not think it can be said that, through a mistake of law or otherwise they surrendered their 12 months' agreement and accepted instead a licence. Incidentally, this is not pleaded by either side.' g

I would add this: had the defendant sought to amend his pleading to plead as an alternative defence that the agreement of 3rd August had been rescinded by a new agreement, it would have been open to the plaintiffs to amend their statement of h

a claim and to claim in the alternative specific performance of the new agreement. Reading the judgment as a whole, and having listened to the powerful submissions of counsel for the defendant, I find it impossible to accept that there was not evidence on which the judge could properly find as a fact that the plaintiffs had proved the agreement on which they relied. He saw the witnesses. I only add on this issue that a plea based on s 40 of the Law of Property Act 1925 was withdrawn.

b I turn to consider the alternative submission advanced on behalf of the defendant that the judge ought not to have ordered specific performance. Counsel for the defendant submits that the judge ought not to have ordered specific performance requiring the defendant to do that which he cannot do under the terms of the lease under which he holds the premises and which, if he did, would expose him to proceedings for forfeiture. In my judgment that submission is well founded. I can see nothing in this case to take it outside the practice of the court, in determining whether to exercise its discretionary power to grant the equitable remedy of specific performance, not to do so where the result would necessitate a breach by the defendant of a contract with a third party or would compel the defendant to do that which he is not lawfully competent to do (see Fry on Specific Performance¹; and *Willmott v Barber*²). Here the defendant is under an unqualified covenant in his lease not to underlet or part with possession of part only of the premises demised to him. To order him specifically to perform the contract by granting an underlease and so allowing the plaintiffs to retain possession would be to order him to do something he cannot do or, if he did it, would expose him to a forfeiture. As Lord Redesdale LC³ remarked in a passage quoted in Fry on Specific Performance¹:

e '[The plaintiff] must also show that, in seeking the performance, he does not call upon the other party to do an act which he is not lawfully competent to do; for, if he does, a consequence is produced that quite passes by the object of the Court in exercising the jurisdiction, which is to do more complete justice.'

f During the course of the debate I suggested to counsel that the position of the plaintiffs might be sufficiently and properly protected by a declaration that the plaintiffs were in possession of the workshop under the terms of the agreement of 3rd August 1971. That suggestion was supported by counsel for the plaintiffs with enthusiasm and I must deal with it. I have, for the following reasons, come to the clear conclusion that the suggestion was misconceived, and I regret having made it.

g It is not and never has been the contention of the plaintiffs that they are lessees at law under the agreement; and counsel for the defendant submitted, as I think correctly, that the *Walsh v Lonsdale*⁴ situation, where the intended lessee is treated as having the same rights as if a lease had in fact been granted to him, only applies if the lessee is entitled to specific performance (see the judgment of Sir George Jessel MR in *Walsh v Lonsdale*⁵). The equitable interests which the intended lessee has under an agreement for a lease do not exist in vacuo but arise because the lessee has an equitable right to specific performance of the agreement. In such a situation, that which is agreed to be and ought to be done is treated as having been done and carrying with it in equity the attendant rights. But the intended lessee's equitable rights do not in general arise when that which is agreed to be done would not be ordered to be done. The suggested declaration would thus not be justified.

h There is, I think, another objection to the making of such a declaration as I am discussing—or perhaps it is putting the same point in another way. The equitable right to be in possession under the agreement could only be protected by an injunction

1 6th Edn (1921) p 194

2 (1880) 15 Ch D 96 at 107

3 In *Harnett v Yielding* (1805) 2 Sch & Lef 549 at 553, [1803-13] All ER Rep 704 at 705

4 (1882) 21 Ch D 9

5 (1882) 21 Ch D at 14

and, if after the making of such a declaration the plaintiffs sought the equitable remedy of an injunction to protect their right to remain in possession, it would be an invitation to the court to grant part-specific performance of the agreement. Such an injunction, like the order for specific performance itself, would in its effect compel the defendant to continue to break the covenant not to part with possession of part only of the premises demised to him and be open to the same objection as an order for specific performance. The suggested declaration would be a misleading nuisance. For these reasons, the plaintiffs ought, in my judgment, to be left with their remedy at law, namely, damages for the repudiation by the defendant of his agreement to grant the plaintiffs a lease.

I must add this. At the end of his submissions counsel for the plaintiffs submitted, as an alternative to a decree of specific performance or a declaration such as that which I have considered, that he was at least entitled to a declaration, founded on the payment of a weekly rent, that the plaintiffs are weekly tenants. The purpose of such a declaration—which is, of course, a discretionary remedy—would be to give the plaintiffs an advantage in other proceedings. The question whether in truth the plaintiffs are entitled to be treated as weekly tenants was not dealt with by the judge in the court below because it was unnecessary; and it was not raised by any respondent's notice in this court. I would myself think that that question (which I am not sure has been fully ventilated in the arguments before us and on which no authority has really been cited on either side) would be better litigated in proceedings in which it is or may be relevant; and whatever the answer may be—on which I express no opinion—I would think it wrong to make such a declaration.

CAIRNS LJ. I entirely agree, and have nothing to add.

DAVIES LJ. I also agree, and only add a footnote on a point which, in view of the decision at which this court has arrived, is really irrelevant to the present appeal. That concerns the order that was drawn up as a result of the learned judge's judgment. It is on a printed form, form 141 (3), and, leaving out formal matters, it says: 'Cause of action: Damages, injunction, etc.'; 'Date of judgment'—so-and-so; 'Amount of judgment: See written judgment'—the learned judge having given a written judgment. That obviously is a quite unsatisfactory document if it was meant to include a decree of specific performance, which apparently it was. There is in the county court forms an appropriate form for a decree of specific performance. It is in the County Court Practice¹, and it is form 234: 'Judgment in Action for Specific Performance': and then it gives various standard forms that can be used or adapted for that purpose. It would appear, therefore, from the document to which I have just been referring that the staff at the Tonbridge County Court were not really carrying out their duties with the precision and accuracy which, of course, they should have shown.

Apart from that I have nothing to add to what Stamp LJ has said, and I entirely agree with the result.

Appeal allowed. Decree of specific performance set aside. Case remitted to county court for assessment of damages.

Solicitors: Wedlake Bell, agents for Pearless, de Rougement & Co, East Grinstead (for the defendant); Barnett & Barnett (for the plaintiffs).

F A Amies Esq Barrister.

Inland Revenue Commissioners v Joiner

CHANCERY DIVISION

GOULDING J

20th, 21st, 22nd MARCH 1973

b Surtax – Tax advantage – Counteracting – Transaction in securities – Tax advantage in consequence of transaction in securities – In consequence of – Liquidation of company – Taxpayer principal shareholder of company – Reconstruction of company – Agreement between taxpayer and other members of company providing for liquidation of company and valuation and distribution of company's assets – Sale of business to new company – Taxpayer receiving certain freehold property and securities of old company and substantial cash sum – Taxpayer in effect receiving share of accumulated profits of old company as capital sum in winding-up – Liquidation agreement carried out immediately – Taxpayer obtaining tax advantage – Whether tax advantage obtained 'in consequence of' liquidation agreement – Whether liquidation agreement a 'transaction in securities' – Income and Corporation Taxes Act 1970, ss 460 (1), 467 (1).

d At all material times the taxpayer owned 75 per cent of the shares in J Ltd ('the old company'), the remaining 25 per cent being owned by the trustees of his father's settlement. In addition the taxpayer also owned 75 per cent of the shares in A Ltd ('the new company') while 25 per cent of the shares therein were owned by the trustees of his own settlement. The last mentioned shares had no voting rights. On 10th April 1964 an agreement ('the liquidation agreement') was made between the taxpayer, the trustees of his father's settlement and C, one of the trustees. That agreement, having recited the parties' intent that the old company should be liquidated and that C should be appointed liquidator, provided how the principal assets of the old company were to be valued for the purposes of intended sale to the new company and for the purposes of distribution to the members of the old company. Under the agreement the taxpayer undertook to procure the new company to issue an unsecured loan note in an agreed form to the liquidator in payment of the sale price. It was also agreed that in the distribution of the old company's assets, certain freehold property and certain marketable securities should be allocated to the taxpayer, with consequential provisions for adjusting the division of assets between him and the trustees in the correct proportion of three to one. The liquidation agreement was carried into effect immediately, the old company going into voluntary liquidation on the same day. The new company immediately took over its business, and the taxpayer in due course received, apart from certain freehold property and investments, a substantial sum of cash as his share of the old company's assets. In effect the taxpayer received a 75 per cent share of the old company's accumulated profits as a capital sum in the winding-up. On 16th November 1970 the Board of Inland Revenue issued a notice to the taxpayer under the Income and Corporation Taxes Act 1970, s 460 (3)^a, specifying the adjustments which were requisite for counteracting

h *a* Section 460, so far as material, provides:

'(1) Where ... (b) in consequence of a transaction in securities or of the combined effect of two or more such transactions, a person ... has obtained, a tax advantage ... this section shall apply to him in respect of that transaction or those transactions ...

i '(2) ... a tax advantage obtained ... by a person shall be deemed to be obtained ... in consequence of a transaction in securities or of the combined effect of two or more such transactions, if it is obtained ... in consequence of the combined effect of the transaction or transactions and of the liquidation of a company.

'(3) Where this section applies to a person in respect of any transaction or transactions, the tax advantage obtained ... by him in consequence thereof shall be counteracted by such of the following adjustments ... on such basis as the Board may specify by notice in writing served on him as being requisite for counteracting the tax advantage so obtained or obtainable ...'

the tax advantage which had been obtained by the taxpayer on the basis that it had been obtained in consequence of a 'transaction in securities' within s 467 (1)^b of the 1970 Act. The taxpayer contended that the notice should be cancelled on the ground, *inter alia*, that the tax advantage had not been obtained 'in consequence of' a transaction in securities, within s 460 (1), but only in consequence of the liquidation of the old company. a

Held – The taxpayer had obtained a tax advantage in consequence of a transaction in securities and the board were entitled to serve on him the notice to counteract the tax advantage so obtained for the following reasons— b

(i) the liquidation of the old company had immediately supervened on the liquidation agreement as a step for effectuating the shareholders' intention expressed in the agreement and therefore the taxpayer had obtained a tax advantage 'in consequence of' the liquidation agreement (see p 393 h to p 394 a, post); c

(ii) the liquidation agreement was a 'transaction in securities' within s 467 (1) of the 1970 Act since it altered the rights attached to the shares of the old company by substituting agreed valuations and a conventional mode of distribution for the unmodified effect of the company's memorandum and articles of association and the statutory provisions governing a voluntary winding-up (see p 394 b and c, post). d

Notes

For counteracting tax advantages and the meaning of transaction in securities, see Supplement to 20 Halsbury's Laws (3rd Edn) para 276A, 1, 2, and for cases on the subject, see 28 (1) Digest (Reissue) 489-494, 1753-1762.

For the Income and Corporation Taxes Act 1970, ss 460, 467, see 33 Halsbury's Statutes (3rd Edn) 591, 600. e

Cases referred to in judgment

Greenberg v Inland Revenue Comrs [1971] 3 All ER 136, [1972] AC 109, 47 Tax Cas 240 [1971] 3 WLR 386, [1971] TR 233, HL.

Inland Revenue Comrs v Brebner [1967] 1 All ER 779, [1967] 2 AC 18, 43 Tax Cas 705, [1967] 2 WLR 1001, 46 ATC 17, [1967] TR 21, 1967 SC (HL) 31, HL, 28 (1) Digest (Reissue) 490, 1755. f

Inland Revenue Comrs v Horrocks, *Inland Revenue Comrs v Wainwright* [1968] 3 All ER 296, 44 Tax Cas 645, [1968] 1 WLR 1809, 47 ATC 279, [1968] TR 233, 28 (1) Digest (Reissue) 491, 1757.

Inland Revenue Comrs v Parker [1966] 1 All ER 399, [1966] AC 141, 43 Tax Cas 396, [1966] 2 WLR 486, 45 ATC 1, [1966] TR 1, HL, 28 (1) Digest (Reissue) 490, 1754. g

Cases also cited

Kirkness (Inspector of Taxes) v John Hudson & Co Ltd [1955] 2 All ER 345, [1955] AC 696, 36 Tax Cas 28, HL.

St Aubyn (L M) v Attorney-General (No 2) [1951] 2 All ER 473, [1952] AC 15, HL. h

Samuel, Re [1913] AC 514, PC.

Case stated

1. At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts ('the commissioners') held on 29th and 30th July 1971, Albert G Joiner (Junior) ('the taxpayer') appealed against a notice dated 16th November 1970, issued to him by the Commissioners of Inland Revenue ('the board') in accordance with i

^b Section 467 (1), so far as material, is set out at p 391 j, post

a the Income and Corporation Taxes Act 1970, s 460 (3), in regard to certain transactions in securities relating to A G Joiner & Son Ltd (now dissolved).

2. Shortly stated the question for the decision of the commissioners was whether the provisions of s 460 applied to the taxpayer in respect of the transactions described in the notice, and if so, whether the adjustments described in the notice were appropriate.

b [Paragraph 3 named the witnesses who gave evidence before the commissioners and para 4 listed the documents proved or admitted before them.]

5. As a result of the evidence both oral and documentary adduced before them the commissioners found the following facts proved or admitted. (1) A G Joiner & Son Ltd ('the old company') was incorporated on 12th August 1943 to acquire the engineering business founded by A G Joiner, the taxpayer's father ('the father').

c The old company's business consisted mainly of the production of precision turned components, principally for the motoring industry, but some for general engineering firms. (2) At 25th October 1970 the authorised capital of the old company, consisting of 1,000 ordinary £1 shares, had all been issued for cash. 750 shares were held by the taxpayer and 250 by the father. (3) On 25th October 1960 the old company's authorised capital was increased to 5,000 ordinary £1 shares and the sum of £4,000

d standing to the credit of the profit and loss account was capitalised and applied in paying up 4,000 £1 bonus shares, 3,000 of which were allotted to the taxpayer and 1,000 to the father. On 31st October 1960 the father renounced his allotment in favour of Aubrey Frederick Christlieb, a chartered accountant, and others who were the trustees of a settlement which the father had made on the same day ('the trustees of the father's settlement'). At that date the father was about 72 years of age and the bonus issue and settlement were carried out to save estate duty on his death and

e the device of a bonus issue was used to minimise stamp duties. On 29th February 1964 the father also transferred his original shares to the trustees. Thus at 10th April 1964 the shareholding in the old company was:

f	The taxpayer	3,750
	The trustees of the father's settlement	1,250
	Total	<u>5,000.</u>

Up to 31st December 1963 the father and the taxpayer were the directors of the old company. On that date Mr L Luke was co-opted as an additional director of the company, the father resigned as both director and secretary and Mr Luke was appointed secretary in his place. (4) Auto-Components and Engineering Co Ltd ('the new company') was incorporated on 23rd July 1946 and carried on business under that name as engineers until about 1950, when it had negligible reserves, ceased trading and became dormant. (5) The original authorised capital of the new company was 3,000 ordinary £1 shares and that was all issued for cash and was held

h at 31st December 1963 by:

The taxpayer	2,500
The father	500.

i The father was then over 75 years of age and wished to retire completely from business. On 5th March 1964 the taxpayer and his nominee bought the father's 500 ordinary shares in the new company, and on 27th March 1964, by special resolution, half of the 3,000 ordinary shares were designated 'A' ordinary shares and lost all voting rights (but otherwise continued to rank *pari passu* with the ordinary shares). (6) Thereupon, on the same day (27th March 1964), the taxpayer transferred 750 of the new 'A' shares in the new company to Mr Christlieb and others, who were the trustees of a discretionary settlement which the taxpayer made on the same day ('the

trustees of the taxpayer's settlement'). Thus on 27th March 1964 the shareholding in the new company became: a

	Ordinary	'A'	Ordinary
The taxpayer	1,499		750
Mr Christlieb and others as bare nominees of the taxpayer	1		Nil
The trustees of the taxpayer's settlement	Nil		750

Mr Christlieb was accountant to both the old and the new companies. (7) By an agreement ('the liquidation agreement') dated 10th April 1964 and made between (1) the taxpayer, (2) Mr Christlieb, Arthur Leonard Underwood, solicitor, Paul Strang, solicitor and the taxpayer (therein called 'the trustees' but collectively with the taxpayer called 'the members') and (3) Mr Christlieb (therein called 'the liquidator') it was provided as follows: b

'WHEREAS:

'A. IT is intended that A. G. Joiner & Son Ltd. (hereinafter called "the Company") shall forthwith go into Members' Voluntary Liquidation and that the Liquidator shall be appointed Liquidator of the Company. c

'B. THE Company has a paid up issued capital of £5,000 in 5,000 Ordinary shares of £1 each of which [the taxpayer] is the holder of 3,750 shares and the remaining 1,250 shares are held by the Trustees. d

'C. BY a Sale Agreement intended to be made immediately following this Agreement between the Liquidator of the one part and The Auto-Components and Engineering Company Limited (hereinafter called "Auto") certain of the assets of the Company are to be sold to Auto which is to assume and indemnify the Liquidator from certain of the liabilities of the Company leaving the Liquidator in possession of the remaining assets of the Company subject to certain of its liabilities and when the Accounts of the Company have been taken as at the date of the liquidation there will be found a net sum due from Auto to the Liquidator hereinafter called "the Sale Price". e

'D. THE Members have agreed amongst themselves that the net proceeds of the intended liquidation including the Sale Price shall be dealt with and distributed by the Liquidator in manner following and to direct the Liquidator accordingly and to indemnify him as hereinafter set out. f

'NOW THIS AGREEMENT WITNESSETH as follows:—

'I. The Members agree amongst themselves that for the purposes of the Sale Agreement referred to in Recital C and of the distribution to be made by the Liquidator in specie the following valuations of certain assets of the Company shall be accepted viz:—(a) Freehold property and buildings at Victoria Road, Feltham, Middlesex, the valuation of Mr. C. Kingston Neale, A.R.I.C.F. at £165,750 (b) Plant and Machinery, the valuation of [the taxpayer] at £90,590 (c) Goodwill the valuation of the Liquidator at £50,000 (d) Investments mentioned in the 1st Schedule hereto, the valuation of Messrs. Hichens, Harrison & Co., Stock Brokers, at the middle price of the date of liquidation of the Company. (e) Furniture, Fixtures & Fittings and Motor Cars, the book values at the date of liquidation of the Company. (f) Stock and Work in Progress, and Tools at the valuation of [the taxpayer] at the date of liquidation of the Company made in the same way and on the same basis as for the accounts for the year ending 31st August 1963. g

'2. [The taxpayer] will procure that after the liquidation Auto shall issue to the Liquidator or as he shall direct in denominations to be required by the Liquidator an Unsecured Loan Note in a form agreed between the parties and initialled for identification purposes for an aggregate amount equal to the Sale Price and to bear interest at 6% per annum from the date of the liquidation payable quarterly and repayable (a) on six months' notice at any time at the option h

a of Auto only or (b) immediately upon Auto going into liquidation or (c) upon
 six months' notice by the holders at any time after [the taxpayer] shall cease to
 hold in his own right 51% of the equity voting capital in Auto whichever shall
 first happen and the Liquidator at the request and direction of the Members
 shall accept such Unsecured Loan Note in satisfaction of the Sale Price as found
 to be due to him and in the distribution in specie of the Assets of the Company
 b by the Liquidator the Members agree to accept the said Unsecured Loan Note
 at par value.

c '3. (1) There shall be allocated to [the taxpayer] in respect of his shareholding
 in the Company the said freehold property in Victoria Road, Feltham and the
 Investments mentioned in the First Schedule hereto at the valuations as in
 Clause 1 (a) and (d) and to the extent that [the taxpayer's] entitlement as holder
 of 75% of the Capital of the Company shall exceed the aggregate figure of these
 two valuations such excess shall be made up by cash and so far as cash shall be
 insufficient then an allocation of part of the said Unsecured Loan Note so as to
 complete his entitlement. (2) In the event of [the taxpayer's] entitlement not
 amounting to the aggregate of the said two valuations [the taxpayer] shall either
 d at his option (a) nevertheless receive the said assets but shall mortgage the
 freehold property belonging to him and described in the Second Schedule
 hereto by way of second legal charge subject to the first charge mentioned in
 the Second Schedule hereto in usual form to the Trustees for an amount so that
 with such second charge taken at par and the remaining assets to be allocated
 by the Liquidator to the Trustees they shall receive assets of a value equal to
 25% of the net assets of the Company in its liquidation. The said second charge
 e shall carry interest at the rate of 6% per annum payable quarterly and shall
 not be repayable at the instance of the Trustees earlier than on six months'
 notice to expire seven years from the date thereof but [the taxpayer] may repay
 the same at any time on six months' notice in writing or (b) any shortfall shall
 be made up to the Trustees by an allocation of part of the said investments as
 may be directed by [the taxpayer]. (3) The Liquidator agrees that he will at
 f the request of [the taxpayer] at any time and from time to time after the date
 of liquidation sell all or any of the Investments mentioned in the First Schedule
 hereto and re-invest the proceeds as directed by [the taxpayer] for ultimate
 distribution in terms of this Agreement.

g '4. It is agreed that in consideration of the Liquidator accepting appointment
 as Liquidator of the Company upon the appropriate resolution being passed the
 Members hereby indemnify the Liquidator from and against all or any liability
 for which he may be or become responsible in connection with the liquidation
 of the Company and the carrying out of this Agreement.

h '5. The remuneration and expenses of the Liquidator together with the pro-
 fessional costs, charges and expenses of all parties in respect of the Sale Agree-
 ment the Liquidation and in relation to the carrying out of this Agreement
 (including the valuation fees) and to the negotiations leading to this agreement
 and the Sale Agreement shall be paid out of the net assets of the Company.

'AS WITNESS the hands and seals of the parties hereto the day and year first
 above written.

'THE FIRST SCHEDULE ABOVE REFERRED TO

£23,345	Barclays Bank Ltd. Ordinary Stock
£2,000	Cunard Steamship Ltd. Ordinary Stock
18,750	Spillers Ltd. 5/- Ordinary Shares
£360	British Petroleum Ltd. Ordinary Stock
7,087	House of Fraser Ltd. 5/- Ordinary Stock Units
28,125	Allied Breweries Ltd. 5/- Ordinary Shares

'THE SECOND SCHEDULE ABOVE REFERRED TO

Freehold Property	Letting	First Charge	a
Factory premises at Hanworth, Middlesex (Land Registry Title Nos. MX 275859 and MX 266552)	To the Merchant Adventurers of London Ltd. for a term of 21 years from the 25th December, 1959 at £6,500 p.a. (with provision for rent review)	For £16,000 @ 6½% p.a. to Northern Assurance Company Ltd.	b

(8) The goodwill referred to in cl 1 (c) of the liquidation agreement was not shown as an asset in the accounts of the old company. The investments referred to in cl 1 (d) of the agreement were eventually valued at £106,140. (9) On 10th April 1964, immediately after the agreement referred to in sub-para (7) above, the old company went into liquidation and a further agreement ('the sale agreement') also dated 10th April 1964 was made between (1) the old company, acting through its liquidator, Mr Christlieb, and (2) the new company, which provided as follows:

'WHEREAS: by a Resolution of even date herewith the members of the Old Company resolved that the same be wound-up voluntarily and that the said Aubrey Frederick Christlieb be appointed the Liquidator thereof.

'NOW IT IS HEREBY AGREED as follows:—

'1. THE Old Company shall sell and the New Company shall buy the following Assets hitherto used by the Old Company in connection with its business of Manufacturers of Component parts for machinery: (1) The fixed Plant and Machinery now situate at the Old Company's factory and premises at Victoria Road, Feltham in the County of Middlesex. (2) The furniture fixtures and fittings used by the Old Company at such premises. (3) The Old Company's motor vehicles. (4) The goodwill of the Old Company. (5) The Stock and Work in Progress of the Old Company. (6) The Tools of the Old Company.

'2. THE New Company shall assume and indemnify the Old Company from and against the following liabilities of the Old Company:—(i) Trade Creditors. (ii) Hire Purchase Liabilities. (iii) The Old Company's Overdraft with Barclays Bank Ltd. (iv) Such Income Tax if any as may be payable in respect of any accounting periods of the Old Company.

'3. THE consideration due from the New Company to the Old Company in respect of the assets referred to in Clause 1 hereof shall be computed as follows:—(1) The value of items (1), (3) and (4) in the said Clause 1. are respectively agreed at the following figures, that is to say:—(1) £90,590 (3) £2,000 (4) £50,000. (2) The value of the items (2), (5) and (6) referred to in Clause 1. above and the value of the liabilities referred to in Clause 2. hereof shall be such sums as shall be found due upon the taking of the Old Company's Accounts as at the date thereof and as shall be certified by the Liquidator acting as an expert and not as an arbitrator.

'4. THE amount of the consideration shall be the difference between the total value of the Assets referred to in Clause 1. hereof ascertained as above and the aggregate of the liabilities referred to in Clause 2. hereof ascertained as above.

'5. THE consideration shall be satisfied by the issue to the Old Company of an Unsecured Loan Note bearing interest at 6% per annum and in a form agreed and initialled by the parties such Note to be issued within 21 days of the ascertainment of the purchase consideration in accordance with the above provisions.

'6. THE New Company shall indemnify the Old Company and the Liquidator from and against all claims demands actions or other liabilities which may arise in any manner whatsoever under a Deed of Covenant dated the 21st day of January 1964 and Albert George Joiner Senior.

'IN WITNESS whereof the parties hereto have hereunto caused their respective hands to be affixed the day and year first before written.'

- a* (10) In pursuance of the sale agreement the new company took over the assets transferred by the old company and recommenced trading on 11th April 1964. On 15th April 1964 it changed its name to A G Joiner & Co Ltd. Its directors were the taxpayer and Mr L Luke. It occupied the freehold premises at Victoria Road, Feltham, which had been transferred to the taxpayer pursuant to the liquidation agreement and, without any written agreement to that effect, paid rent of £7,000 a year to the taxpayer for them until it bought them from the taxpayer for £184,780 some time between 24th August 1967 and 31st August 1969. (11) On the final valuation and after minor adjustments in respect of plant and motor vehicles £78,610 proved to be the purchase price payable by the new company for the net assets received from the old company, which was to be satisfied by the issue of an unsecured loan note for the same amount. Interest on that amount was paid by the new company to the liquidator from 10th April 1964, as required by the sale agreement and £15,000 was paid to the liquidator on 31st August 1966 in part redemption of the loan. By arrangement with the liquidator a loan note for the balance of £63,610 was issued by the new company on 22nd March 1967 to the trustees of the father's settlement in the following form:

- d* 'A. G. JOINER & CO. LIMITED
'Capital £3,000 divided into 1,500 Ordinary Shares of £1 each and 1,500 "A" Ordinary Shares of £1 each

'Issue pursuant to Clause 14 of the Articles of Association of the Company and to a Resolution of the Directors passed on the Tenth day of April 1964 constituting Unsecured Loan Notes for £63,610 carrying interest thereon at the rate hereinafter mentioned payable quarterly on the usual Quarter Days in each year the first payment to be made on the date hereof and to be calculated as from the Tenth day of April 1964.

- e* '1. A. G. Joiner & Co. Ltd. (hereinafter called "the company") will on the date referred to in Clause 2 below, pay Aubrey Frederick Christlieb and Paul Strang both of 9 Cavendish Square, London, W.1. the sum of £63,610.

- f* '2. The date referred to in Clause 1 above shall be such as the date principal monies hereby covenanted to be paid shall become due in accordance with the conditions endorsed hereon or such earlier date as may be specified by notice in writing from the Company to the registered holder of this Note being not less than six months after giving of the said Notice.

- g* '3. The Company will until payment of the principal sum hereby secured pay to the registered holder hereof interest on the principal sum hereby secured or so much thereof as shall remain unpaid at the rate of Six per centum per annum by equal quarterly payments on the usual Quarter Days in each year the first payment to be made on the date hereof and to be calculated from the Tenth day of April 1964.

- h* '4. This Note is issued subject to the conditions endorsed hereon. GIVEN under the Seal of the Company this 22nd day of March 1967. [signed] A. G. Joiner. Director: Secretary

- j* 'The Conditions within referred to:—(1) In the Winding-up of the Company this Note shall rank for payment *pari passu* with the Unsecured Creditors of the Company. (2) The Company will keep a register in respect of this Note and enter therein particulars of all transfers and changes of ownership of this Note or any part thereof. (3) The Company may in its absolute discretion refuse to register a transfer of this Note whether by way of absolute assignment or charge without assigning any reason for such refusal, except in respect of (i) Transfers by way of appointment of new trustees. (ii) Transfers by a noteholder or his legal personal representatives in favour of his or her spouse or any one or more lineal descendants of either of his or her grandparents or the husband or wife or

any such descendant. (iii) Transfers by the trustee in bankruptcy of any noteholder in favour of any such persons as are mentioned at 2 above or in favour of the noteholder. (iv) Transfers in favour of any person who is at the date thereof a registered holder of Ordinary Shares in the Company. (v) Transfers by trustees (other than legal personal representatives) to beneficiaries. (4) A transfer of this Note or any part thereof shall be in writing under the hand of the noteholder and of the transferee and shall be delivered to and retained by the Company. (5) On the death of the sole noteholder his personal representative and, on the death of a joint noteholder, the surviving noteholder shall be the only persons recognised by the Company as having any title to this note. (6) Any person entitled to this Note by reason of the death of the noteholder or otherwise by operation of law may be registered as the holder thereof upon such evidence being produced as the Company may reasonably require. (7) The Company may demand a fee of 2/6d. for the registration of any transfer or other change in the ownership thereof. (8) The Company shall recognise and treat the registered noteholder as the sole absolute owner hereof and as alone entitled to receive and give effectual discharges for the moneys hereby secured. No notice of any trust shall be entered in the Books of the Company against the title or the noteholder and the Company shall not be affected by notice of any right title or claim of any person to this Note other than the noteholder save that in the event of its receiving a transfer of this Note for registration it shall be entitled to such information as it shall require to satisfy itself as to whether or not such transfer falls within paragraphs (i) to (v) of Condition (3) above. (9) The moneys hereby secured shall be paid without regard to any equities between the Company and the original or any intermediate holder hereof and the receipt of the registered noteholder shall be a good discharge to the Company. (10) The principal under this Note when due will be paid at the registered office of the Company against surrender of the Note. Payment of interest will be made by the Company by cheque posted to the noteholder or to the first named of joint noteholders at his address as registered with the Company. (11) The principal monies hereby secured shall become immediately payable in any of the events following:—(a) If the Company gives three months' notice in writing to the noteholder of its intention to pay off this Note. (b) If the Company makes default for Twenty-eight days in the payment of any interest hereby secured and the noteholder before such interest is paid by notice in writing to the Company calls in the said principal monies. (c) If a distress or execution is levied or issued against any of the property of the Company. (d) If an order is made or an effective resolution is passed for Winding-up the Company. (e) If the Company makes default in the performance or observance of any covenant on the part of the Company to be performed or observed hereunder. (f) If [the taxpayer] shall at any time cease to be the registered holder of at least 51% of the Ordinary Shares (other than "A" Ordinary Shares) of the Company from time to time in issue. (12) Any notice may be served by the holder of this Note or by the Company by post and shall be deemed if addressed by the holder of this Note to the registered office of the Company or if addressed by the Company to the registered address of the holder or any joint holder of this Note in a prepaid letter to have been duly served within twenty-four hours of the time of posting thereof. (13) Any of the rights hereby conferred on the holder of this Note or any part thereof may at any time be varied with the consent in writing of the holder or all the holders of this Note.

(12) The reason for the loan note was that the trustees wanted something better than a book entry—they wanted some sort of document or security. (13) The following was a summary of the old company's balance sheets at 31st August 1963 and at 10th April 1964:

<i>a</i>			31st August 1963	10th April 1964
			£	£
Freehold land and buildings (See note (a) below)			115,386	120,512
Other fixed assets			83,181	74,845
Investments at cost			48,409	48,409
(MV £106,414)				(MV £106,849)
<i>b</i> Cash			11,838	17,053
Other current assets			52,324	52,961
			<u>311,138</u>	<u>313,780</u>
<i>c</i> Less	1963	1964		
Income tax	£26,000	£13,036		
Bank overdraft	£28,135	Nil		
			(see note (b) below)	
<i>d</i> Other current liabilities including profits tax	£77,908	£83,954 (see note (c) below)	132,043	96,999
		Net assets	<u>179,095</u>	<u>216,790</u>
<i>e</i>				
			31st August 1963	10th April 1964
REPRESENTED BY			£	£
Issued share capital			5,000	5,000
Future tax reserve			8,000	8,000
<i>f</i> Profit and loss account (see note (d) below)			166,095	203,790
			<u>179,095</u>	<u>216,790</u>
NOTES:				
<i>g</i>	(a) Victoria Road, Feltham: purchased and developed by the old company from 1960 onwards:			£
	31st August 1963 Cost £116,746 less depreciation			1,360*
	10th April 1964 Cost £123,297 less depreciation			2,785*
	(*Provided out of profit and loss account)			
<i>h</i>	(b) Overdraft at 10th April 1964			23,648
	Less advanced by the new company immediately after appointment of liquidator			25,074
	Credit balance (part of 'cash')			<u>1,426</u>
<i>i</i>	(c) Includes trade creditors			67,524
	(d) Includes capital profits—on exchange of investments			58
	On sale of foreign currency			791
				<u>849</u>

(14) Action under the Income Tax Act 1952, s 245, was taken against the old company in respect of the final accounting period 1st September 1963 to 10th April 1964 and gross actual income was apportioned for surtax purposes to: a

The taxpayer

The trustees of the father's settlement

£29,533

£9,845

£39,378 b

(15) The following items were received by the taxpayer in the liquidation of the old company: on or about 10th April 1964 in specie freehold property at Victoria Road, Feltham (as provided in the liquidation agreement). On or about 10th April 1964 in specie investments (as provided in the liquidation agreement). On or about 8th October 1965 cash £10,000. On or about 24th January 1967 cash £1,088 4s 4d. On or about 16th August 1967 cash £1,500. On or about 1st August 1969 cash £167 15s 10d. c

(16) On 2nd July 1970, in reply to a request made on behalf of the board for information as to, inter alia, the reasons, including the commercial reasons, for the liquidation of the old company and the transfer of certain assets of the new company, Messrs A F Christlieb & Co wrote on behalf of the taxpayer as follows:

'... The answers to the questions which you ask would appear to be as follows: d

1. The reason for liquidating the old Company was to extract from it assets which were surplus to its trading requirements. The remaining assets transferred to the new Company were those which were necessary to enable the new Company to resume the trade of the old Company.'

(17) On 2nd September 1970 a formal notification under s 460 (6) of the Income and Corporation Taxes Act 1970 was issued to the taxpayer, followed by the notice dated 16th November 1970, under s 460 (3) of the 1970 Act. The notice was in the following terms: e

'SECTION 460 INCOME AND CORPORATION TAXES ACT, 1970-

A. G. JOINER & SON LTD (NOW DISSOLVED)

'Whereas on 2 September 1970, the Board of Inland Revenue issued a notification to you, in accordance with subsection (6) of Section 460 of the Income and Corporation Taxes Act, 1970, that they had reason to believe that the said Section 460 (which relates to the cancellation of tax advantages from certain transactions in securities) might apply to you in respect of the transactions described in the accompanying schedule: And whereas you have not exercised the right under the said subsection (6) to make a statutory declaration to the effect that the said Section 460 does not apply to you in respect of the said transactions: Now therefore the Board, being of opinion that Section 460 of the Income and Corporation Taxes Act, 1970 applies to you in respect of the aforesaid transactions hereby give notice, in accordance with subsection (3) of that Section, that the adjustments described overleaf are requisite for counteracting the tax advantage thereby obtained or obtainable. f

'Dated this 16th Day of November 1970. g

'By Order of the Board of Inland Revenue. h

'The adjustments referred to:

'The computation or recomputation of your liability to surtax for the year of assessment 1964/65 on the basis that the sum of £137,116, computed as shown below (being part of the total distributions referred to at transaction B.5. in the accompanying schedule), should be taken into account as if it were the net amount received in respect of a dividend payable at the date of receipt thereof from which deduction of tax was authorised by subsection (1) of Section 184 of the Income Tax Act, 1952, and any assessment or further assessment to surtax which may be requisite to give effect to such computation or recomputation. i

'COMPUTATION

'The profit and loss account balance of the transferor company at 10 April 1964 £203,790
'LESS capital profits included therein £849

 £202,941

'ADD capitalised profits referred to at transaction A. in the accompanying schedule £4,000

 £206,941

'Your share of the sum of £206,941 distributed as a dividend by the transferor company,

$\frac{3750}{5000} \times £206,941 =$ £155,205

'LESS the net equivalent of the actual income of the transferor company for the period 1 September 1963 to 10 April 1964 charged to surtax upon you under Chapter III, Part IX, Income Tax Act 1952 (gross £29,533)

 £18,089

 £137,116
'The transactions referred to:

'A. the capitalization on or about 25 November 1960 by A. G. Joiner & Son Ltd (now dissolved) (hereinafter called "the transferor company") of the sum of £4,000 standing to the credit of the profit and loss account; the application of that sum in paying up in full 4,000 ordinary shares of £1 each; and the consequential allotment to you of 3,000 such shares;

'B. the scheme of reconstruction of the transferor company, including inter alia the following transactions:—

'1. the purchase by you on 5 March 1964 of 500 £1 ordinary shares in Auto-Components and Engineering Co Ltd., in which you already held 2,500 of the 3,000 issued ordinary shares, and which:—

- a. changed its name to "A G Joiner & Co Ltd" on 15 April 1964; and*
- b. is hereinafter called "the successor company";*

'2. the agreement on 10 April 1964 between yourself and others reciting, inter alia:—

- i. the intention to put the transferor company into members' voluntary liquidation, and*
- ii. the impending sale by the liquidator to the successor company of certain of the assets of the transferor company;*

and providing, inter alia:—

- iii. that you would procure the successor company to issue an unsecured loan note (hereinafter called "the security"), upon the terms set out in the said agreement; and*
- iv. that there should be allocated to you, in respect of your shareholding in the transferor company, certain assets including freehold property and investments;*

'3. the special resolution of 10 April 1964 for the voluntary winding up of the transferor company and for the appointment of Mr A F Christlieb as liquidator;

'4. the sale to the successor company by the transferor company of certain assets including goodwill, in accordance with the provisions of a further agreement made on 10 April 1964 between the transferor company (acting through the liquidator) and the successor company; and in consideration thereof, the con-

sequential issue by the successor company of the security on terms, inter alia, that the successor company would pay Messrs. A F Christlieb and Paul Strang the sum of £63,610, being the principal sum secured; and a

5. the receipt by you in the liquidation of the transferor company of money's worth and money as follows:—

i. on or about 10 April 1964

Money's worth (the value for this purpose being taken at cost):— b

Freehold property at Victoria Road Feltham £123,297 0 0

Sundry marketable investments £48,409 0 0

ii. On or about 8 October 1965 Cash £10,000 0 0

iii. On or about 24 January 1967 Cash £1,088 4 4

iv. On or about 16 August 1967 Cash £1,500 0 0

v. On or about 1 August 1969 Cash £167 15 10. c

6. It was conceded by the board that the tax advantage obtained by the taxpayer was not obtained in consequence of transaction B (1). The board did not contend that the transfers of the marketable investments referred to in 5 (i) above were relevant transactions in securities.

7. It was contended on behalf of the taxpayer: (a) that transaction A in the schedule to the notice was not a relevant transaction for the purposes of s 460 of the Income and Corporation Taxes Act 1970 since any tax advantage obtained by the taxpayer was not consequent on it, either alone, or in combination with the liquidation of the old company; (b) that none of the transactions B in the schedule (except B (2) (iii), which was part of the liquidation arrangements) was a 'transaction in securities' for the purposes of s 460; (c) alternatively, that if transaction B (4) in the schedule was to be regarded as a 'transaction in securities', it was only to be so regarded insofar as it included the transfer of investments to the value of £48,409 (see para 5 (13) above). (d) that the notice should be cancelled; alternatively that the adjustments therein specified were inappropriate. d

8. It was contended on behalf of the board: (a) that the circumstances required by s 461 D (1) of the Income and Corporation Taxes Act 1970 were satisfied; (b) that the taxpayer had obtained a tax advantage within the meaning of s 460 (1) of the 1970 Act; (c) that the tax advantage was obtained: (i) in part in consequence of the combined effect of the capitalisation in 1960 (transaction A in the schedule of the notice), and the liquidation of the old company in the scheme of reconstruction in 1964 (transactions B2-5 in the schedule). (ii) in part in consequence of: either the scheme of reconstruction in 1964 (transactions B2-5 in the schedule), which scheme of reconstruction should be treated as a whole as a transaction in securities, or the combined effect of the liquidation of the old company and either or both of transactions B2 and B4 in the schedule, each of which transactions was a transaction in securities; (d) that the notice and adjustments therein specified should be upheld. e

[Paragraph 9 set out the cases¹ referred to.] f

10. The commissioners who heard the appeal gave their decision in the following terms: g

'After hearing the evidence adduced and the arguments addressed to us we considered whether any of the transactions in the Schedule to the Notice was a "transaction in securities" for the purpose of Section 460 of the Income and Corporation Taxes Act, 1970. If one or more of those transactions was caught, h

¹ *Greenberg v Inland Revenue Comrs* [1971] 3 All ER 136, [1972] AC 109, 47 Tax Cas 240, HL; *Inland Revenue Comrs v Brehner* [1967] 1 All ER 779, [1967] 2 AC 18, 43 Tax Cas 705, HL; *Inland Revenue Comrs v Horrocks*, *Inland Revenue Comrs v Wainwright* [1968] 3 All ER 296, [1968] 1 WLR 1809, 44 Tax Cas 645; *Inland Revenue Comrs v Parker* [1966] 1 All ER 399, [1966] AC 141, 43 Tax Cas 396, HL i

a it was common ground that such transaction or transactions combined with the liquidation of the Old Company produced a liability for the [taxpayer]. It was also common ground that the liquidation itself was not a "transaction in securities", and that on its own it could not be relied on by the [board]. Applying the test of the statutory definition we held that transaction A was a transaction in securities, but that none of transactions B was such. Transaction A in our view clearly satisfied the statutory definition and we rejected the argument of the b [taxpayer's] Counsel that it was a transaction in securities too remote from or relevant to the causation of the liquidation. Transaction B1, B3 and B5 were clearly not within the statutory definition—they were in the nature of narrative or explanatory events. Transaction B2 (i) was, as stated, merely an intention, and not a transaction. B2 (ii) was somewhat similar, an "impending event". B2 (iv) c referred to transfers of assets, which might at first sight fall within the statutory definition, but in the present case they seemed to us part of the liquidation and not transactions in their own right. Transaction B2 (iii) and B4 seemed to us also part of the liquidation. The Notice suggested that there was some agreement apart from the liquidation around which the whole scheme revolved. In our view, however, the issue of the loan note was made under an agreement, with the liquidator, d forming part of the liquidation. We accordingly held that the appeal failed in principle as to transaction A but succeeded in respect of the remaining transactions B, and we adjourned the matter for agreement of figures between the parties.'

11. The parties having agreed that no adjustment of the taxpayer's liability was necessary to counteract any tax advantage resulting from transaction A, the commissioners determined the appeal on 4th January 1972 by cancelling the notice.

e 12. The board immediately after the determination of the appeal declared their dissatisfaction therewith as being erroneous in point of law and on 5th January 1972 required the commissioners to state a case for the opinion of the High Court pursuant to the Taxes Management Act 1970, s 56.

N C H Browne-Wilkinson QC and Patrick Medd for the board.

f F Heyworth Talbot QC and Barry Pinson for the taxpayer.

GOULDING J. This is an appeal by the Commissioners of Inland Revenue ("the board") from a decision of the Special Commissioners cancelling a notice served on the taxpayer, Albert George Joiner (Junior), under s 460 of the Income and Corporation Taxes Act 1970. That section enacts, that, in certain circumstances and g subject to certain provisos, any tax advantage obtained or obtainable by a person in consequence of a transaction in securities or of the combined effect of two or more such transactions shall be counteracted by an appropriate adjustment of his tax liabilities.

h It is not in dispute that the taxpayer has obtained a tax advantage within the scope of the section. The disputed question is whether he obtained it in consequence of a transaction or transactions in securities. Thus the definition of the expression 'transaction in securities' is all important. It is contained in s 467 of the Act, and is as follows:

j '(1) In this Chapter . . . "transaction in securities" includes transactions, of whatever description, relating to securities, and in particular—(i) the purchase, sale or exchange of securities, (ii) the issuing or securing the issue of, or applying or subscribing for, new securities, (iii) the altering, or securing the alteration of, the rights attached to securities.'

The same section 467 also provides that the term 'securities' includes shares and stock. Another material provision of the Act is s 460 (2). It provides that—

' . . . a tax advantage obtained or obtainable by a person shall be deemed to be obtained or obtainable by him in consequence of a transaction in securities or

of the combined effect of two or more such transactions, if it is obtained or obtainable in consequence of the combined effect of the transaction or transactions and of the liquidation of a company.' a

At all material times the taxpayer owned three-quarters of the authorised and issued share capital of a company called A G Joiner & Son Ltd. It carried on the family engineering business. The minority shareholding of 25 per cent belonged formerly to the taxpayer's father and later to the trustees of a settlement made by the father. In 1960, while the taxpayer's father still retained his holding, the company capitalised £4,000 standing to the credit of its profit and loss account and issued bonus shares in respect thereof. That operation was evidently a transaction in securities, but it is agreed that it does not of itself sustain the notice under appeal and I need not mention it further. b

On 10th April 1964 an agreement was made between the taxpayer, the trustees of his father's settlement (who had by then acquired the minority shareholding) and a Mr Christlieb, who was a chartered accountant and one of the trustees. In the agreement, Mr Christlieb is referred to as 'the Liquidator'. The agreement contains certain recitals which I shall read in full: c

'A. It is intended that A. G. Joiner & Son Ltd. (hereinafter called "the Company") shall forthwith go into Members' Voluntary Liquidation and that the Liquidator shall be appointed Liquidator of the Company. B. THE Company has a paid up issued capital of £5,000 in 5,000 Ordinary shares of £1 each of which [the taxpayer] is the holder of 3,750 shares and the remaining 1,250 shares are held by the Trustees. C. BY a Sale agreement intended to be made immediately following this Agreement between the Liquidator of the one part and The Auto-Components and Engineering Company Limited (hereinafter called "Auto") certain of the assets of the Company are to be sold to Auto which is to assume and indemnify the Liquidator from certain of the liabilities of the Company leaving the Liquidator in possession of the remaining assets of the Company subject to certain of its liabilities and when the Accounts of the Company have been taken as at the date of the liquidation there will be found a net sum due from Auto to the Liquidator hereinafter called "the Sale Price". D. THE Members have agreed amongst themselves that the net proceeds of the intended liquidation including the Sale Price shall be dealt with and distributed by the Liquidator in manner following and to direct the Liquidator accordingly and to indemnify him as hereinafter set out.' d

The company referred to in those recitals as 'Auto' was an inactive or dormant company in which the taxpayer held or controlled all the shares with voting rights. e

The agreement first of all provided how the principal assets of the Joiner company (as I will call it) were to be valued for the purposes of the intended sale to the Auto company and for the purposes of distribution of assets to the members of the Joiner company. Then the taxpayer undertook to procure the Auto company to issue an unsecured loan note in an agreed form to the liquidator in payment of the sale price mentioned in the recitals. Thirdly, it was agreed that in the distribution of the Joiner company's assets certain freehold property and certain marketable stocks and shares should be allocated to the taxpayer, with consequential provisions for adjusting the division of assets between him and the trustees in the correct proportion of three to one. The agreement also made provision for an indemnity to the liquidator and for his remuneration and expenses. f

Following the commissioners, I shall call the foregoing agreement 'the liquidation agreement'. It was quickly carried into effect: the Joiner company went into voluntary liquidation the same day. The Auto company immediately took over its business, and a few days later its name. The taxpayer, in due course, received the freehold property and investments and a substantial sum of cash as his share of the Joiner g

a company's assets. The trustees received a loan note of the Auto company, and it may be other assets as well.

At the date of the liquidation agreement more than £200,000 was standing to the credit of the Joiner company's profit and loss account. In effect, the taxpayer received his three-quarters share of that accumulation of profits as a capital sum in the winding-up of the company. The notice under appeal is designed to impose surtax on the taxpayer as though the accumulated profits had come to him in the form of income. The board seeks to support the notice by three alternative arguments. I deal with them in the order most convenient for my judgment, and identify them by the letters A, B and C.

A. It is submitted that the whole arrangement, beginning with the liquidation agreement, was one transaction with several elements, each element being a step necessarily interconnected with the others. The transaction, regarded as a whole, was the reconstruction of the Joiner company so as to transfer its business assets to another company and distribute surplus assets to the shareholders. Its constituent elements were the liquidation agreement, the voluntary winding-up of the Joiner company, the sale of assets to the Auto company in consideration of a loan note, and the receipt by the shareholders of surplus assets. The composite transaction related to securities, for it first altered and finally extinguished the rights attached to the Joiner company's shares, and also comprised the issue of a security by the Auto company. It has not been disputed before me that the loan note was a security within the definition. It was in consequence of the composite transaction that the taxpayer obtained a tax advantage. Hence, it is submitted, the requirements of s 460 are satisfied.

Counsel for the board supports the foregoing approach to the problem by reference to the observations of Lord Pearce in *Inland Revenue Comrs v Brebner*¹ and of Plowman J in *Inland Revenue Comrs v Horrocks*, *Inland Revenue Comrs v Wainwright*². I do not find it necessary to express a final conclusion on this argument A. On the whole, when there is a question of applying s 460 so as to fix the taxpayer with liability, I am not persuaded that the word 'transaction' should be interpreted as widely as counsel desires. The examples of transactions given in the statutory definition are all specific and individual steps taken in relation to securities.

B. Counsel for the board relies in the alternative on the liquidation agreement and the sale agreement between the two companies as being respectively transactions in securities. He says that the taxpayer obtained his tax advantage in consequence of those agreements or one of them, or in consequence of the combined effect of such agreements and the liquidation of the Joiner company. I can test the argument by considering the liquidation agreement, since the other agreement occupies a less central position in the sequence of events. Counsel for the taxpayer says that he did not obtain his tax advantage in consequence of the liquidation agreement but only in consequence of the liquidation. Given the fact of a winding-up, the taxpayer would have received property representing his three-quarters of the accumulated profits whether or not the shareholders had agreed on a particular way of dealing with the Joiner company's assets and liabilities. The tax advantage, in counsel's contention, owes nothing to any antecedent except the liquidation itself.

In my judgment, such reasoning is fallacious. I have, I think, to look at the facts of the particular case itself, as found by the commissioners, and to consider their relationship as antecedents and consequences. The liquidation did not spring up in isolation: it immediately supervened on the liquidation agreement as a step for effectuating the shareholders' intentions expressed therein. Under those circumstances, it seems to me that in the ordinary use of language the taxpayer obtained the tax advantage in consequence of the liquidation agreement. I think it is also true that he obtained it in consequence of the liquidation. The latter does not exclude the former. A child

1 [1967] 1 All ER 779, [1967] 2 AC 18, 43 Tax Cas 705

2 [1968] 3 All ER 296, [1968] 1 WLR 1809, 44 Tax Cas 645

is commonly thought of as a consequence of its conception, notwithstanding the intervening event of its birth. a

Counsel for the taxpayer also argued that the liquidation agreement was not a transaction in securities. It was a transaction, he suggested, for the liquidation or reconstruction of a company. It only indirectly related to securities, in that they would be affected by the carrying out of the shareholders' scheme. I am not persuaded by this argument. It is enough to say that the liquidation agreement to my mind undeniably altered the rights attached to the shares of the Joiner company by substituting agreed valuations and a conventional mode of distribution for the unmodified effect of the company's memorandum and articles of association and the statutory provisions governing a voluntary winding-up. Thus the liquidation agreement is in my judgment specifically caught by the definition of transactions in securities. b

C. Counsel for the board's third alternative submission was that a distribution of assets to a shareholder in a winding-up is itself a transaction in securities. He drew powerful support for this point from the wide interpretation of the term in *Inland Revenue Comrs v Parker*¹, where the redemption of a debenture was held to be within the definition. He also prayed in aid some observations in *Greenberg v Inland Revenue Comrs*². Counsel for the taxpayer answered his opponent by another forceful argument. The present s 460 (2) is derived by way of consolidation from s 25 (5) of the Finance Act 1962, itself passed by way of amendment of s 28 of the Finance Act 1960. Could Parliament possibly have made such an amendment, asks counsel for the taxpayer, if liquidations were already within the net to the extent suggested by counsel for the board? c

It is evident that the question is one of difficulty and one of importance, as likely to affect other cases. It was not raised in the present case before the Special Commissioners, and its resolution is not necessary to my judgment since the board gets home on argument B. I therefore think it better to express no opinion on argument C. In coming to that decision, I have not overlooked the point made by junior counsel, when following leading counsel for the taxpayer. He remarked that the distinction is a thin one, from a practical point of view, between a case like the present and one where the shareholders obtain an exactly similar tax advantage by resolving on voluntary winding-up without a preliminary agreement for the instruction of the liquidator. Yet if the board were right on argument B and wrong on argument C, liability to tax would be imposed in the one case and not in the other. On that, it is enough to say that legislation on this kind of subject, expressed in wide and general terms, and strictly interpreted as fiscal laws must be, often produces fine distinctions and unexpected results. Thus, having formed a clear view on argument B, I am prepared to adhere to it independently of the validity of argument C. d

Appeal allowed. Case remitted to the Special Commissioners to restore the notice. e

Solicitors: Solicitor of Inland Revenue; Underwood & Co (for the taxpayer). f

Rengan Krishnan Esq Barrister. g

1 [1966] 1 All ER 399, [1966] AC 141, 43 Tax Cas 396

2 [1971] 3 All ER 136, [1972] AC 109, 47 Tax Cas 420 h

Jackson (S M) v Jackson (E L)

FAMILY DIVISION

BAGNALL J

6th FEBRUARY 1973

Divorce – Financial provision – Application – Remarriage of party – Party not entitled to apply for order after remarriage – Apply – Meaning – Initiation of application – Party remarrying after application initiated but before hearing – Whether court having power to hear application after remarriage – Matrimonial Proceedings and Property Act 1970, s 7 (4).

On the true construction of s 7 (4)^a of the Matrimonial Proceedings and Property Act 1970, which prohibits a person whose marriage has been dissolved or annulled from applying for an order under s 2 or s 4 of the 1970 Act against his or her former spouse if he has since married another person, the word 'apply' refers to the petition, summons, notice or other process which initiates the application. Accordingly the court may entertain an application for an order under s 2 or s 4 by a former spouse who has since remarried provided that the application was initiated before the remarriage (see p 397 f, p 398 h and p 399 g, post).

Notes

For variation of marriage settlement, see 12 Halsbury's Laws (3rd Edn) 451-453, paras 1014, 1018, and for cases on the subject, see 27 (2) Digest (Reissue) 872-874, 6963-6970.

For the Matrimonial Proceedings and Property Act 1970, ss 2, 4, 7, see 40 Halsbury's Statutes (3rd Edn) 800, 802, 808.

Cases referred to in judgment

Andrew, Re, ex parte Andrew (1875) 1 Ch D 358, 45 LJBCy 57, 33 LT 556, CA, 4 Digest (Repl) 192, 1746.

Chittenden (dec'd), Re, Chittenden v Doe [1970] 3 All ER 562, [1970] 1 WLR 1618, Digest (Cont Vol C) 363, 9789a.

Wier, Re, ex parte Wier (1871) 6 Ch App 875, 41 LJBCy 14, 25 LT 369, 4 Digest (Repl) 143, 1289.

Petition

By a petition dated 26th April 1971 the petitioner prayed for the dissolution of her marriage to the respondent and applied for certain ancillary relief which included variation of two ante-nuptial settlements. The respondent consented to the variation.

The petitioner was granted a decree nisi on 13th July 1971 which was made absolute on 8th September 1971. On 16th September the petitioner remarried. At a subsequent hearing of the application for ancillary relief the registrar referred the matter to the court for the determination of the question whether there was jurisdiction to entertain it.

William Goodhart for the petitioner.

R Hedley Marten for the respondent.

Martin Buckley for the trustees.

BAGNALL J. I have before me an application by the petitioner for an order varying two settlements each dated 12th January 1953, and made between the Right Honourable Christina Joyce, Lady Allerton, as settlor, of the first part, the respondent of the second part, the petitioner of the third part, and certain trustees of the fourth part. Each of the settlements, in the events which have happened, made identical provisions, and each was made, and expressed to be made, in consideration of the marriage then intended between the respondent and the petitioner.

^a Section 7 (4) is set out at p 396 d, post

The marriage was solemnised on 14th January 1953 and there have been two children of the family, both daughters, aged respectively 18 and 15. The petition was dated 26th April 1971 and thereby the petitioner sought the dissolution of the marriage and also that she might be granted certain ancillary relief, which included a settlement of property order, a transfer of property order and a variation of settlement order, as might be just. The decree nisi on that petition was granted on 13th July 1971 and was made absolute on 8th December 1971. On 16th September 1972 the petitioner married her present husband. The respondent has also remarried.

For the purposes of this judgment nothing turns on the nature of the proposed variation. The respondent consents to it and I am satisfied that it is a proper variation, and for the benefit of the parties and of the children of the family. I should propose to make the order asked if I have power to do so, but the matter has been referred to me by the learned registrar because he had doubts whether such power existed having regard to s 7 (4) of the Matrimonial Proceedings and Property Act 1970, which is in the following terms:

'If after the grant of a decree dissolving or annulling a marriage either party to that marriage remarries, that party shall not be entitled to apply for an order under section 2 or 4 of this Act against the person to whom he or she was married immediately before the grant of that decree unless the remarriage is with that person and that marriage is also dissolved or annulled or a decree of judicial separation is made on a petition presented by either party to that marriage.'

Sections 2 and 4 of the Act referred to in that subsection are the familiar sections which enable various types of provision to be made, on or after a decree nisi, for the spouses and for the children of the marriage. Financial provision may be ordered under s 2, under three headings, (a), (b) and (c), the first two of which authorise orders for continuing periodical payments, and the third of which authorises an order for the payment of a lump sum. It has been held that the latter provision is a once-for-all provision, conferring on the court a power which may be exercised once only. Section 4 confers powers whereby the court may order various types of dispositions of property. Under para (a) an order may be made for the transfer of property by a party to the marriage to the other party or to any child of the family, or to any other specified person; para (b) authorises an order for a settlement of property; para (c)—which is relevant in the present case—authorises an order for the variation of an ante-nuptial, or post-nuptial, settlement; para (d) authorises an order extinguishing, or reducing, the interest of either of the parties to the marriage under any such settlement. It is to be observed that the powers under s 2 are confined to orders for the benefit of one or other of the parties to the marriage, whereas those under s 4 authorise orders to be made, in addition, for the benefit of the children of the family.

Between ss 2 and 4, s 3 authorises the court to make any one or more of several types of order for the benefit of the children of the family. The powers conferred by s 3 are not limited by s 7 (4), but are limited, subject to exceptions, by s 8.

I should also refer to s 24 of the Act and the rules made thereunder. Section 24 provides as follows:

'(1) Where a petition for divorce, nullity of marriage or judicial separation has been presented, then, subject to subsection (2) below, proceedings under section 1, 2, 3 or 4 of this Act may be begun, subject to and in accordance with rules of court, at any time after the presentation of the petition; but—(a) no order under section 2 or 4 of this Act shall be made unless a decree nisi of divorce or of nullity of marriage or a decree of judicial separation, as the case may be, has been granted; (b) without prejudice to the power to give a direction under section 25 of this Act, no such order made on or after granting a decree nisi of divorce or of nullity of marriage, and no settlement made in pursuance of such an order, shall take effect unless the decree has been made absolute.'

(2) Rules of court may provide, in such cases as may be prescribed by the rules—(a) that applications for ancillary relief shall be made in the petition or answer; and (b) that applications for ancillary relief which are not so made, or are not made until after the expiration of such period following the presentation of the petition or filing of the answer as may be so prescribed, shall be made only with the leave of the court.'

And then the expression 'ancillary relief' is defined as meaning relief under any of ss 1, 2, 3 and 4 of the Act.

Rule 68 of the Matrimonial Causes Rules 1971¹ was made pursuant to the power conferred by s 24 of the Act and provides as follows:

(1) Any application by a petitioner or by a respondent spouse who files an answer claiming relief, for [in effect, ancillary relief] shall be made in the petition or answer, as the case may be.

(2) Notwithstanding anything in paragraph (1), an application for ancillary relief which should have been made in the petition or answer may be made subsequently—(a) by leave of the court, either by notice in Form 10 or at the trial, or (b) where the parties are agreed upon the terms of the proposed order, without leave by notice in Form 10...

It is to be observed that if no rules had been made under s 24 of the Act, or in respect of any matter for which the rules do not provide, it would not be open to a party to begin proceedings under ss 1, 2, 3 or 4 in the petition, but only after the petition had been presented. Rule 68 reverses that situation and prescribes a procedure whereby normally proceedings for ancillary relief will be included in the prayer of the petition, but with provisions applying to the abnormal case where that is not done.

The verb 'apply' and the corresponding expression 'make an application' occur in many other places both in the 1970 Act and in the 1971 rules. Counsel for the petitioner and the respondent respectively submit that in all those instances the reference is to the petition, summons, notice, or other process which initiates the application. I have not been referred to any instance, nor have I myself found any instance, in which that proposition is not sound. I add that in my judgment, on a question such as this, I am entitled to derive assistance from the rules in construing the Act: see *Re Andrew*, *ex parte Andrew*² and *Re Wier*, *ex parte Wier*³.

I refer to two instances by way of example: r 73 provides that a petitioner or respondent spouse who has applied for ancillary relief in his petition or answer, and who intends to proceed with the application before a registrar, shall, subject to r 83, file a notice in form 12, and serve a copy on the other spouse, thus requiring procedural steps to be taken at a time which must be before the final determination of the matter but after the application has been made. In s 6 of the 1970 Act provision is made for one party to a marriage to obtain an order for payments to be made by the other party, if that other party, being the husband, inter alia, has wilfully neglected to provide reasonable maintenance. In contrast to the words 'may apply' which are to be found in sub-s (1) of that section, sub-s (2) provides that the court shall not entertain an application under the section unless it would have jurisdiction to entertain proceedings by the applicant for judicial separation; thus providing a verbal distinction between 'applying' or 'making an application' and 'entertaining the application' for the purpose, if proper, of making an appropriate order. Similar uses of the expressions are to be found in other Acts, both in *pari materia* with, and covering a different subject-matter from that, dealt with in the 1970 Act.

Again, I refer to some examples. In s 26 of the Matrimonial Causes Act 1965, as amended by the Family Provision Act 1966, it is provided as follows:

¹ SI 1971 No 953

² (1875) 1 Ch D 358

³ (1871) 6 Ch App 875

'(1) Where after 31st December 1958 a person dies domiciled in England and is survived by a former spouse of his or hers (hereafter in this section referred to as "the survivor") who has not remarried, the survivor may apply to the court for an order under this section on the ground that the deceased has not made reasonable provision for the survivor's maintenance after the deceased's death. An application under this section shall not, except with the permission of the court, be made after the end of the period of six months from the date on which representation in regard to the estate of the deceased is first taken out . . .'

Similarly, and on a similar subject-matter, the Inheritance Family Provision Act 1938, as amended by the Family Provision Act 1966, provides, by s 2 (1):

'Except as provided by section 4 of this Act, an application under this Act shall not, without the permission of the court, be made after the end of the period of six months from the date on which representation in regard to the estate of the deceased is first taken out.'

It seems to me that in the case of each of those statutory provisions the expressions 'applying' and 'making an application' can only refer to the time at which the initiating process is presented. The matter was considered in *Re Chittenden (decd), Chittenden v Doe*¹. In that case the rival submissions as to the relevant process were the presentation of the originating application and the service of that application. Ungood-Thomas J concluded that the application was made within the statutory provision when the originating summons for relief was issued. It was not argued that the reference could be to any date subsequent to the date of service, and, indeed, in my view could not have been so argued.

In a different sphere, the Landlord and Tenant Act 1954, by s 24, gave a tenant in certain circumstances the right to apply to the court for a new tenancy. In s 29 (3) it is provided that no application under s 24 of the Act should be entertained unless it was made not less than a defined period after the giving of a specified notice. There, again, is the distinction between the making and the entertaining of an application such as I have already noticed in s 6 of the 1970 Act. Further assistance can be obtained from s 8 of the 1970 Act. By sub-s (1) it is provided that, subject to sub-s (3) no order under s 3, s 4 (a) or s 6 of the Act shall be made in favour of a child who has attained the age of 18. The distinction between the Act precluding the making of an order in that section and precluding the making of an application in s 7 (4) is significant. Moreover, the powers conferred on the court by ss 3 and 4 of the Act are expressly made subject to the provisions of s 8, but there is no corresponding reservation making the powers conferred by s 2 and s 4 subject to the provisions of s 7 (4).

Relying on those considerations, counsel for the petitioner submits that the plain and universal meaning of the expressions which I have to construe contained in s 7 (4) is to preclude the initiation of an application after remarriage, leaving the court to entertain such an application after remarriage provided that it was initiated before remarriage. In the absence of any party before me interested in opposing this application, I invited counsel for the trustees to present the contrary argument. He did so cogently and concisely and with ability, and I am indebted to him for that.

First, it is said that making an application involves a continuous process starting with the initiating document and continuing until an order is made, or refused, and that in order to obtain an order the applicant must be entitled to make the relevant application throughout the whole period. It seems to me that that approach is inconsistent with the requirement that procedural steps have to be taken after the application has been made, and also inconsistent with the dichotomy, that I have referred to, found in s 6.

a Secondly, it is submitted that the purpose of s 7 of the 1970 Act, gathered from the whole of its terms and, in particular, from sub-s (1), (2) and (3) is to prevent a party who has remarried from obtaining financial benefit from a former spouse. But there is a significant difference between sub-s (4) and the earlier subsections. The earlier subsections are concerned with prescribing a maximum term for the duration of orders for periodical payments, which, in the absence of such a limitation, would go on until a further application to vary them was made and acceded to. Further, the provisions to which s 7 (1), (2) and (3) relate are all provisions exclusively for the benefit of one or other of the parties to the marriage. Subsection (4) is concerned with limiting the scope of provisions designed to benefit not only one or other of the spouses but also the children. It seems to me that if any common purpose is to be found in s 7 it is achieved by ensuring that a spouse is in jeopardy of an order such as is contemplated in sub-s (4) only from applications initiated before remarriage. There will be occasions when a contemplated remarriage is a circumstance to be taken into account by the court in deciding whether—and if so to what extent—to make provision under s 4 of the Act. Equally, it seems to me the court can properly take an actual remarriage into account, if and when an application falls to be entertained and determined after the remarriage, though made before it.

b Thirdly, it was suggested that some assistance might be obtained from the exception in sub-s (4). The exception allows an application to be made after a remarriage if the remarriage is with the former spouse and the remarriage is also dissolved or annulled or a decree of judicial separation is made on a petition presented by either party to the remarriage. The argument is that, since it cannot be known whether the remarriage is to be dissolved or annulled until the time comes to grant a decree nisi, then the exception cannot apply until that moment of time and, therefore, that is the moment of time at which, for the purposes of this subsection at any rate, an application is made. I was at first attracted by this argument, but I think the fallacy in it lies in the scheme of the Act whereby, apart from provision pendent lite, no order for ancillary relief can be made before the making of a decree. It therefore follows that every application made for ancillary relief in accordance with the provisions of s 24 and r 68 must be, so to say, a conditional application, the condition being the ultimate granting of a decree. In my view the wording of the exception in s 7 (4) does no more than recognise the conditional nature of such applications.

c Finally, each counsel sought to draw my attention to certain inconveniences that would ensue if one construction or the other were adopted. The inconveniences on one side, I think, very largely balanced those on the other. As I have reached a clear conclusion that counsel for the petitioner's submission, as a matter of construction, is well-founded I do not think it necessary, or desirable, to refer to considerations of convenience. In my judgment, the application in this case being included in the relief sought by the petition was made before the petitioner remarried and I have power to make the order prayed for in my discretion I think it right to do so.

d I should add that counsel for the petitioner presented an alternative argument if his principal submission should not be accepted. He said that since sub-s (4) precluded the party remarrying from applying for an order against the person to whom he or she was previously married, it had no effect in relation to an application such as this, because an application for an order varying a settlement is not an application made against the former spouse, since it does not call for any action to be taken by him, but is an order against the trustees, if, indeed, it is an order against anyone.

e I think it is not necessary for me to express a concluded view on this submission, having regard to the opinion I have already expressed. As at present advised I am of opinion that the alternative submission is not well-founded. The procedure in matrimonial causes, like the procedure in all other litigation in these courts, is adversarial in its nature, and I think that a process is made against any person on whom, according to the statutes and the rules, it has to be served, and who has the right to be heard in opposition to it.

On the whole matter, having regard to the opinion that I expressed on the merits at the outset, I propose to make the order as asked in the terms of the agreed minutes, subject to certain minor amendments which were announced during the hearing. a

It seems to me that the convenient course would be that counsel for the petitioner and counsel for the respondent and for the trustees should agree an amended form of minute and hand it in to the learned associate. b

Order for variation.

Solicitors: *Charles Russell & Co* (for the petitioner); *Withers* (for the respondent); *Currey & Co* (for the trustees).

S A Hatteea Esq Barrister. c

Practice Direction d

FAMILY DIVISION

Child – Matrimonial causes – Applications relating to children – Application for order prohibiting removal of child out of England and Wales – Ex parte application to registrar – Application to remove child out of England and Wales – Application to judge – Matrimonial Causes Rules 1971 (SI 1971 No 953), rr 94 (1), (3), 97, 114 (1) (a) (as amended by the Matrimonial Causes (Amendment) Rules 1973 (SI 1973 No 177), r 4). e

1. Under r 94 (1) of the Matrimonial Causes Rules 1971¹ (as substituted by r 4 of the Matrimonial Causes (Amendment) Rules 1973²), with effect from 1st June 1973 in any matrimonial cause begun by petition either spouse may at any time apply ex parte for an order prohibiting the removal of any minor child of the family out of England and Wales without the leave of the court except on such terms as may be specified in the order. f

Such an application may be made to a registrar (see r 114 (1) (a) of the 1971 Rules). At the Divorce Registry any such application should be made to the registrar for the day.

2. Under r 94 (3) of the 1971 Rules (substituted as aforesaid) subject to r 97 (2), which deals with transfer of an application from a divorce county court to the High Court, an application for leave to remove a child out of England and Wales must be made to a judge except: (a) where the application is unopposed; or (b) where the application is for temporary removal and is opposed on a ground which in the opinion of the registrar relates only to the arrangements for the care of the child during the removal or any other incidental matter. g

In causes proceeding at the Divorce Registry practitioners who are in doubt whether an application should be made to a registrar or to a judge should consult the registrar for the day. h

8th May 1973

D NEWTON
Senior Registrar i

1. SI 1971 No 953

2. SI 1973 No 177

R v Flemming

COURT OF APPEAL, CRIMINAL DIVISION

LAWTON, SCARMAN LJ AND MAY J

22nd FEBRUARY 1973

Criminal law – Sentence – Life imprisonment – Minimum period of imprisonment – Manslaughter – Power of court to recommend minimum period of imprisonment – Murder (Abolition of Death Penalty) Act 1965, s 1 (2).

F was convicted of manslaughter and sentenced to be detained for life in such a place and on such conditions as the Secretary of State might direct. The trial judge recommended that F should serve a minimum period of ten years' imprisonment.

Held – The court had no jurisdiction to recommend a minimum period of imprisonment on a conviction for manslaughter and the recommendations should be set aside. The jurisdiction conferred on the court by s 1 (2)^a of the Murder (Abolition of Death Penalty) Act 1965 to make such a recommendation in cases where the accused had been convicted of murder showed that the court had no power to do so in other cases (see p 403 g, post).

Per Curiam. No recommendation as to a minimum period made under s 1 (2) of the 1965 Act should be for a period of less than 12 years (see p 403 h, post).

Notes

For the punishment for murder and manslaughter, see 10 Halsbury's Laws (3rd Edn) 727, paras 1392, 1393.

For the Murder (Abolition of Death Penalty) Act 1965, s 1, see 8 Halsbury's Statutes (3rd Edn) 541.

Application

On 16th May 1972 at the Central Criminal Court before Thesiger J and a jury the applicant, Clive Everal Flemming, was acquitted of murder but convicted of manslaughter and was sentenced to be detained for life in such place and on such conditions as the Secretary of State should direct, Thesiger J recommending that the applicant serve a minimum of ten years. The applicant applied for leave to appeal against sentence. The facts are set out in the judgment.

B R M Hove for the applicant.

LAWTON LJ delivered the judgment of the court. This applicant, Clive Everal Flemming, on 16th May 1972, was acquitted of murder but convicted of manslaughter. He was sentenced by Thesiger J to be detained for life and in such place and on such conditions as the Secretary of State might direct. The judge went on to recommend a minimum period of ten years.

The applicant, before his trial for murder, had pleaded guilty to a charge of attempted theft, a charge which arose out of the same circumstances which led to his being charged with murder and convicted of manslaughter. Thesiger J remitted that count to his Honour Judge Sutcliffe, who had to sentence the applicant on two other indictments. On 22nd May 1972 Judge Sutcliffe passed no sentence on the theft out of which the conviction for manslaughter had arisen, but on the other two indictments, each of which charged robbery and to which the applicant had pleaded guilty, he ordered the applicant to be detained for two years under the provisions of s 53 of the Children

^a Section 1 (2) is set out at p 403 f, post

and Young Persons Act 1933. Judge Sutcliffe took no less than 22 other offences into consideration. The applicant now applies for leave to appeal against his sentence of life imprisonment. The application has been referred to the full court by a court of two judges. a

The facts out of which his conviction for manslaughter arose are as follows. At the time of the offence the applicant was 16 years of age, and he was charged with murder with another youth called Lewis, who was then 17 years of age. On 10th December 1971 these two youths were out and about looking for opportunities to commit robbery. Their method of working was as follows: to look for a shop in which there was only one or at the most two assistants, go in, threaten whoever was there, and take money from the till. On this particular day the contemplated victim was a middle-aged man called Hails, who was working on a temporary basis for a butcher in Islington. In the middle of the day Mr Hails was left by himself in the shop. Shortly after he had been left by himself, the applicant and Lewis went in. The applicant went to the till and opened it, whilst Lewis engaged Mr Hails in conversation. Lewis picked up a butcher's knife and stabbed Mr Hails on the left-hand side of the chest. The applicant and Lewis then ran away. At the trial Lewis gave some evidence which may be of some importance. He said that when they first went into the shop, the applicant grabbed Mr Hails by the throat, picked up a knife and held it to Mr Hails's throat, saying to him, 'Stand still or you will get hurt'. According to Lewis, he then passed the knife to him, saying 'Anyway it's your turn to do the rough stuff'. The applicant admitted in his evidence that he had used those words to Lewis, but he said it was at an earlier stage in the robbery. As a result of his injuries, Mr Hails died a week later. The wounds which he sustained were very serious ones indeed. b

The applicant was arrested early in 1972 and admitted that he had attempted to steal from the shop. He said his job had been to take money from the till, and Lewis's part in the plan was to hold, as the applicant put it, 'the geezer'. He said to the police that he did not think Lewis had a knife when the pair of them went into the butcher's shop, but he added, 'You wouldn't need one in a butcher's, there's always plenty about if you want one'. The next day he made a written statement setting out his version of what had happened. It is not surprising on those facts that the jury, after a fair summing-up, came to the conclusion that Lewis had committed murder and that the applicant, having been party to a plan to rob, was guilty of manslaughter. c

He has had the benefit of being represented in this court by counsel, and counsel has said everything which could be said on this applicant's behalf and he has said it well. The points which he has made are as follows. First, that having regard to the fact that no one suggested that the applicant was suffering from any mental imbalance, the right course would have been for the trial judge to pass a determinate sentence and not an indeterminate one, such as he did pass; secondly, he asks the court to bear in mind the applicant's age, which, at the material time, was only 16; he is now just 17; thirdly, he pointed out that before his arrest for this offence, the applicant had had a comparatively brief criminal record. But that record is not without significance. His first conviction was in June 1971 for assault with intent to rob, and the court which dealt with him took a very lenient view and made a supervision order. His next conviction was only a short time before the conviction in respect of which he is now before this court. It was a conviction for stealing cash from a till. d

What is of very considerable importance in this case is the number of offences to which he pleaded guilty before Judge Sutcliffe and which he asked to be taken into consideration. It is this aspect of the matter which has given this court very much concern. There were a total of 11 cases which had to be dealt with by Judge Sutcliffe. Three of them were committed before 10th December 1971, the date on which Mr Hails received his fatal wound, eight of them were committed after that date. In other words although this applicant knew that as a result of his criminal activities a man had received grave injuries, he went on committing the same kind of offences, e

a without of course the factor of death intervening. Of the 22 cases which were taken into consideration, 16 were committed before 10th December 1971, five committed after that date, and again it is not without significance that on the day on which Mr Hails received his fatal wound, this applicant had committed one other offence.

b What is to be done with a young man like this? He clearly has very serious delinquent problems. He is a dangerous young man. But the question is how long is he going to remain dangerous? Many a youngster has acute behaviour problems at this age, but when he matures, he outgrows them. If he did not outgrow them, he would be a very serious menace to those with whom he came into contact. Nobody can say with any degree of certainty what the future holds. The court cannot afford, with a young man like this, to take a risk. Those who will have charge of him in the years to come are in a far better position than any judge to say how this young man is developing. It may be that within a surprisingly short period he will show signs of maturity and social balance. On the other hand he may not. In the judgment of this court, this is the very sort of case in which an indeterminate sentence was appropriate.

c This leads the court to make one other observation. When Thesiger J came to pass sentence on the applicant, he did so in these terms:

d 'I pass a sentence of detention for life, giving the Secretary of State power to deal with the matter, and I recommend . . . that he be not released until at least ten years have elapsed.'

e As has already been said, the judge's reason for passing a sentence of life imprisonment is one which meets with the approval of this court. But that very reason shows in the judgment of this court, that the recommendation was wrong. First of all there is no jurisdiction in this court to make recommendations of that kind. The court reminds itself of the provisions of s 1 (2) of the Murder (Abolition of Death Penalty) Act 1965:

f 'On sentencing any person convicted of murder to imprisonment for life the Court may at the same time declare the period which it recommends to the Secretary of State as the minimum period which in its view should elapse before the Secretary of State orders the release of that person on licence under section 27 of the Prison Act 1952 . . .'

g The words of that section show that the power in the court to recommend a minimum period is confined to cases of murder, and no judge should seek to make a recommendation of a minimum period in any case other than murder. Indeed to do so, as a matter of principle and on grounds of policy, will have the effect of defeating the object of an indeterminate sentence in cases other than those in which such a sentence is mandatory. Further the court wishes to point out that even if a recommendation could properly be made in a case such as this, one of ten years is inappropriate. No recommendations under the Act itself should be for less than 12 years. In those circumstances, if and insofar as the recommendation appears on the memorandum of conviction endorsed on the indictment, the court orders it to be erased. Leave to appeal against sentence is refused.

h *Application dismissed. Recommendation set aside.*

Solicitor: Registrar of Criminal Appeals.

N P Metcalfe Esq Barrister.

Wood v Secretary of State for the Environment and another

QUEEN'S BENCH DIVISION

LORD WIDGERY CJ, CUSACK AND CROOM-JOHNSON JJ

22nd FEBRUARY 1973

Town and country planning – Development – Material change of use – Planning unit – Dwelling-house – Permitted use of premises – Use since before appointed day – Addition built on to premises – Agricultural smallholding – Permitted use of farmhouse for sale of home-grown and imported produce – Conservatory built on to farmhouse – Conservatory used thereafter for sale of produce – Enforcement notice requiring discontinuance of use of conservatory as retail shop – Whether conservatory to be regarded as separate planning unit – Whether use permitted for farmhouse permitted for conservatory.

The appellant was the owner and occupier of an agricultural holding consisting of a farmhouse, outbuildings and some seven acres of land. From a date earlier than 1st July 1948 agricultural produce grown on the farm, and produce brought in from outside, had been sold from various parts of the farmhouse and farm buildings. In 1968 a conservatory was built on to the house. Planning permission for the conservatory was not required since permission for a minor extension of that kind was given by virtue of Sch 1 to the Town and Country Planning General Development Order 1963^a. Thereafter the sale of produce took place mainly in the conservatory. In 1970 the local planning authority served an enforcement notice on the appellant alleging that the land, or part of parts thereof, had been used as a shop, and requiring discontinuance of that use. On appeal to the Secretary of State the inspector found that 'Although there had been a considerable increase in the last 2 years in the amount brought in, he did not consider that there had been a material change'. That finding was accepted by the Secretary of State in relation to the premises as a whole but he considered it right to treat the conservatory as a separate planning unit which could be described as a retail shop. Accordingly he amended the enforcement notice so as to exclude all the holding except the conservatory and to require the discontinuance of the use of the conservatory as a retail shop. On appeal,

Held – Where an addition was made to a building which was a permitted development under the General Development Order that addition was part of the original building and took on itself the characteristics of the original building in all respects. For planning purposes it was not in general permissible to dissect a dwelling-house and to regard a single room, rather than the whole building, as being the appropriate planning unit. It followed that a permitted use in the appellant's premises as a whole was a permitted use in the conservatory. Accordingly, the Secretary of State had erred in treating the conservatory in isolation; the appeal would be allowed and the case remitted to him for reconsideration (see p 408 j to p 409 a and d to h, post).

Notes

For a material change of use constituting development, see 37 Halsbury's Laws (3rd Edn) 259-263, para 366, and for cases on the subject, see 45 Digest (Repl) 328-334, paras 14-30.

For the Town and Country Planning General Development Order 1963, Sch 1, see 21 Halsbury's Statutory Instruments (Second Re-issue) 121.

Cases referred to in judgment

Brooks v Gloucestershire County Council (1967) 19 P & CR 90, 66 LGR 386, DC, Digest (Cont Vol C) 962, 30n.

- a* *Burdle v Secretary of State for the Environment* [1972] 3 All ER 240, [1972] 1 WLR 1207, DC.
- Williams v Minister of Housing and Local Government* (1967) 18 P & CR 514, 111 Sol Jo 559, 65 LGR 495, DC, Digest (Cont Vol C) 962, 30m.

Appeal

- b* This was an appeal by Lilian Madge Wood against a decision of the first respondent, the Secretary of State for the Environment, conveyed in a decision letter dated 26th March 1971, upholding with substantial amendments enforcement notices served on the appellant by the second respondents, Uckfield Rural District Council, on 20th April 1970 and 11th September 1970. The facts are set out in the judgment of Lord Widgery CJ.
- c* *A Garfitt* for the appellant.
M S Rich for the Secretary of State.
The second respondents did not appear and were not represented.

- d* **LORD WIDGERY CJ.** This is an appeal under s 246 of the Town and Country Planning Act 1971 which is brought before the court by the appellant, Mrs Lilian Madge Wood, against a decision of the Secretary of State for the Environment conveyed in a decision letter of 26th March 1971, whereby the Secretary of State upheld with substantial amendments one or both of two enforcement notices which had been served by the local planning authority on Mrs Wood as occupier of the appeal premises.

- e* I turn to the notices; the first one is dated 20th April 1970 addressed to the appellant at Jades Farm, Horney Common, Maresfield, Sussex; it recites that she is the owner and occupier of Jades Farm House identified on the plan attached, and that the land or part or parts thereof has been used as a shop within the meaning of class 1 of the schedule to the Town and Country Planning (Use Classes) Order 1963¹. It recites further that 'it appears to the District Council that the said use of the land involves a material change of use of the land constituting development'; accordingly the notice requires the appellant to discontinue or secure the discontinuance of the use of the land as a shop. The plan attached to the enforcement notice showed as being the site on which it was to operate the dwelling-house known as Jades Farm together with two cottages. That seems to have been an error, and accordingly a new enforcement notice was served on 11th September 1970, identical with the earlier one save for the fact that the cottages were excluded.
- f*

- g* The holding in question consists of farmhouse buildings, other outbuildings including some greenhouses and about seven acres of land. It has been farmed as a smallholding producing agricultural produce for very many years; indeed at the inquiry which was held in connection with this matter, evidence showed that the use had started before the original appointed day on 1st July 1948. Since before that date agricultural produce grown on the farm and also some bought in from outside had been sold from various parts of the farmhouse and farm buildings, and the various owners and tenants of the smallholding had all bought in produce from outside for sale.

- h*
- j* The importance of the fact that the sales included home produced produce and imported produce is, of course, that the sale of home produced produce on a holding of this kind is a use incidental to the agricultural activity, whereas the bringing in and selling of somebody else's produce is, as the Secretary of State put it in this case, a use quite separate from agricultural use of the land.

The first question which the inspector applied his mind to was whether these activities, which undoubtedly had been going on since before 1948, had been going on

in regard to the farmhouse and the farm buildings or only in regard to the farmhouse. This was an important matter for reasons not relevant to the present appeal, because the farmhouse had been subsequently reconstructed in the 1960s, and therefore there can have been no activities of this kind carried on in the farmhouse for a period at that time. Accordingly, if the use had been related to the farmhouse only, then questions might have arisen whether it had survived the rebuilding of the house; but the inspector found that the activities which I have described, the sales of home produce and imported produce, were not confined to the farmhouse. a
b

I read a passage from the decision letter which deals with this particular finding of the inspector. The Secretary of State says:

‘The Inspector, a copy of whose report is enclosed, concluded that the legal implications of the facts he had found were matters for the consideration of the Secretary of State and his legal advisers, but in his opinion an important issue was whether the retail sales use could be confined to the farmhouse building or whether it must be considered to attach to the farm buildings as a whole’ c

Then he goes on to point out what I have already pointed out, that the relevance of that question arose from the substantial rebuilding of the house in 1966. He goes on: d

‘The evidence showed that the sales had been made from several places in addition to the farmhouse, and the Inspector did not consider that the use could be confined to the farmhouse or the conservatory [of which more anon]. It was however necessary in his view to consider what this use amounted to. Jades Farm is a smallholding, an agricultural business, and it was necessary for the occupier of such a place to sell his produce, either at the site or elsewhere. In this case the sales had always taken place at the site, and the produce sold had been partly home-grown and partly bought in from outside. All the owners and tenants of this holding had, to a greater or less extent, bought in produce for re-sale, and Mr F M Wood was no exception. In the Inspector’s view, it was a matter of fact and degree whether the extent of the purchases for re-sale had risen so greatly that the character of the the use had been materially changed.’ e
f

I pause there to say that in my judgment, as indeed the Secretary of State confirmed, that was the question which had to be considered. The inspector’s view was that—

‘Although there had been a considerable increase in the last 2 years in the amount of produce bought in, he did not consider that there had been a material change.’ g

That is an extremely important finding, and it runs through the Secretary of State’s decision, that although there has been a stepping up of the importing and sale of produce not produced in the holding, at the time when the enforcement notice was served the inspector took the view that it had not reached that degree which would result in its being a material change in the use of the premises. The decision letter of the Secretary of State goes on in these terms in para 5: h

‘The sale of goods produced elsewhere, either on other local farms or purchased from a retailer, is however considered to constitute a use for retail sales quite separate from the agricultural use of the land and the introduction of such a use is capable of involving a material change of use constituting development requiring planning permission. This depends however on the degree of the use. In this case a use for retail sales has been shown to have commenced before the appointed day but the evidence does not show that the use of the farmhouse (excluding the conservatory) (or of any of the farmhouse buildings which are, strictly, outside the scope of this present action) for this purpose has at any time been on a scale sufficient to amount to a material change of use.’ i

a Accordingly, if one looks at the premises excluding for the moment the conservatory, it is apparent that the Secretary of State is accepting that the intensity of the sale of imported goods is not sufficient to amount to a material change of use.

b Now one comes to the special complication which has really brought this matter before the court, and it concerns the conservatory to which I have referred. We have been supplied with photographs which show a good looking and fairly modern looking house, and attached to it at the lefthand end as seen from the camera is a porch or conservatory which we are told measures 12 feet by eight feet. It is an extension and addition to the house; it shields the back door from the wind, and it is, on the evidence, a place where it is pleasant enough to sit out when the sun is shining. The origins of that conservatory are obscure; it is clear it was built about 1968, and it is clear that no express planning permission was granted in respect of it. What seems to have happened is that the owner had put in an application for planning permission, but had been told by the local planning authority, no doubt quite correctly, that planning permission for a minor extension of this kind is given by virtue of Sch 1 to the Town and Country Planning General Development Order 1963¹. Under Part I, item 1, of that order, planning permission is given for the enlargement, improvement or other alteration of a dwelling-house so long as the cubic content of the original dwelling-house is not exceeded by more than 1,750 cubic feet or one-tenth, whichever is the greater. So it can, I think, safely be assumed that when this conservatory was built, it was built without express planning permission, but by virtue of the deemed permission in the General Development Order.

e The conservatory having been built, it is evident from the inspector's finding that the appellant and her son, who manages these things for her, found it a convenient place in which to conduct these sales of produce. The son's evidence was that the conservatory was now mainly used for selling purposes, although it was used for sitting in from time to time. One gets, therefore, the picture that in this new addition to the house there is selling going on of a higher intensity than in other parts of the holding, but, in my understanding of the evidence in the report, still not so as to produce in the holding as a whole a material change of use within the meaning of the Act.

f However, the Secretary of State has considered it right to treat the conservatory as though it were a separate unit. He has looked at it in isolation, and looking at it in isolation, I have no doubt he has correctly assessed the position in this way, that he finds that the conservatory was used primarily for selling and can quite properly in isolation be given the description of a retail shop. Accordingly he has amended the enforcement notices so as drastically to reduce their effect, indeed so as to exclude from their operation the entirety of this holding except for the conservatory, and the conservatory remains in the enforcement notice on the basis that it is a retail shop, and as things stand the appellant is required to discontinue the use of the conservatory as a retail shop.

h The question for us is whether in reaching that conclusion the Secretary of State was right in law. I would approach this problem first of all by assuming that the conservatory had not been a later addition but had been a part of the original house when it was built. If that were the situation, it would seem to me abundantly clear that unless there are very special circumstances not shown in the documents before us, it would not be proper to regard the conservatory as a separate planning unit, that is to say separate from the building as a whole.

i There are many cases in this court in which we have had to discuss the correct identification of a planning unit to which the planning law has to be applied, and it has been said on more than one occasion that it is difficult and dangerous to try and lay down a hard and fast principle. But in no case known to me has it been said that unless the circumstances are highly special, it is permissible to dissect a single dwelling-house

into different parts and treat them as different planning units for this purpose. Indeed so far as authority goes, it all seems to me to go the other way. a

The first case that we have been referred to is *Brooks v Gloucestershire County Council*¹. That was a case where a dwelling-house had been used for residential purposes, and a room in it began to be used as a shop. This did not attract the attention of the planning authority in the first instance, but in 1965, which was some three years later, two other rooms began to be used for the sale of furniture and the service of meals to customers, and this did stir the local authority into activity. They served an enforcement notice on the occupier requiring him, amongst other things, to discontinue the use of the house as a restaurant. The owner of the house appealed against the enforcement notice to this court; he contended that the mere intensification of the shop use which had been in existence for more than four years prior to the service of the notice did not amount to a material change of use of the premises. The Minister held that the shop use had in 1965 increased to such an extent that it imported a substantial second use of the building as a whole, and, having considered the merits, dismissed the appeal. b

The interesting thing about that case in my judgment is that it does support the view that in that somewhat similar problem to the present, the proper approach was not to ask whether one room had become a shop and another room had become a restaurant, but to ask oneself whether the building as a whole had suffered a material change of use. That appears from my judgment where I said²: c

‘In my judgment, this is a case which the essential question for the Minister was whether there had been a material change of use in the four-year period prior to the service of the notice. He had to consider whether any such material change was one in the use of the premises as a whole, because not only was that the unit chosen by the enforcement notice, but, in my judgment, it was clearly the proper unit for consideration in this case.’ d

Similarly, in *Williams v Minister of Housing and Local Government*³ it was a nursery garden, and in the nursery garden there was a timber building which was used as a retail shop, and this produced from the local authority an enforcement notice seeking to prohibit the use of the building as a shop except for the sale of indigenous agricultural produce. It was held in this court that the premises as a whole, namely the nursery garden together with the building thereon, was the proper unit to be considered in deciding whether there had been a material change of use. The Minister had approached it in that way, and this court upheld him, so there again one finds a disinclination to cut a holding up into penny packets and treat them as separate planning units. e

There was a further decision of this court in *Burdle v Secretary of State for the Environment*⁴. In that case Bridge J gave the leading judgment, and set out certain principles which can often be conveniently applied in deciding what is the planning unit in a given case. I do not find his particular principles really relevant to the present case because he was dealing with a rather different type of problem, but he did say⁵: f

‘It may be a useful working rule to assume that the unit of occupation is the appropriate planning unit, unless and until some smaller unit can be recognised as the site of activities which amount in substance to a separate use both physically and functionally.’ g

That authority seems to me to support the view, which I would think to be right without such assistance, that it can rarely if ever be right to dissect a single dwelling- h

1 (1967) 19 P & CR 90, 66 LGR 386

2 (1967) 19 P & CR at 97, 66 LGR at 390

3 (1967) 18 P & CR 514, 111 Sol Jo 559

4 [1972] 3 All ER 240, [1972] 1 WLR 1207

5 [1972] 3 All ER at 244, [1972] 1 WLR at 1213 j

- a* house and to regard one room in isolation as being an appropriate planning unit for present purposes.

Then the question arises: does it make any difference that this conservatory was not an original part of the house but was added later? Does that in any way justify the conclusion to treat it in isolation as a separate planning unit? The position in regard to new buildings is now covered by s 33 of the Town and Country Planning Act 1971 which, in sub-s (2), provides:

- b* 'Where planning permission is granted for the erection of a building, the grant of permission may specify the purposes for which the building may be used; and if no purpose is so specified, the permission shall be construed as including permission to use the building for the purpose for which it is designed.'

- c* Counsel for the Secretary of State argues that this conservatory was erected under deemed planning permission derived from the General Development Order, that that permission was possible only because it was a dwelling-house which was being extended and improved, and therefore he says under s 33 (2) the only permitted use of this new part of the building, namely the conservatory, is for residential purposes. The argument is attractive, and no doubt s 33 applies strictly in accordance with its terms in the more common example of a case where a new separate building is erected, but it seems to me that one must have regard to the fact that where an addition is made to a building under the General Development Order, that addition is part of the original building. It is permitted only because it is an extension to or addition to the original building, and it seems to me that it would be almost unarguable that it did not take on itself the characteristic of the original building in all respects, and I think that that is so.

- e* Accordingly it seems to me that the permitted uses in the conservatory are the same as the permitted uses in the house, and since it has been found that since 1948 the uses in the house have included the sale of imported horticultural produce, well, so does the conservatory. It may, of course, be, and from some of the observations in the papers the day may be nearer than the appellant would like to think, that the level of sales of imported produce will rise to such a point that a change in use of the holding as a whole will take place and different considerations will arise, but in my judgment it was wrong for the Secretary of State to treat the conservatory in isolation. I would therefore allow the appeal and send the case back to the Secretary of State for him to reconsider it in the light of the court's opinion.

- g* **CUSACK J.** I agree.

CROOM-JOHNSON J. I agree.

- h* *Appeal allowed. Case remitted to the Secretary of State for reconsideration.*

Solicitors: *Peacock and Goddard*, agents for *G N Morice*, Forest Row (for the appellant); *Treasury Solicitor*.

Jacqueline Charles Barrister.

Re J (a minor) (adoption order: conditions) ^a

FAMILY DIVISION

REES J

29th, 30th, 31st JANUARY, 1st, 2nd, 8th FEBRUARY 1973

Adoption – Welfare of infant – Severance of adopted child from natural parents – Desirability – Circumstances in which adoption order may be made even though child may see natural parent thereafter. ^b

Adoption – Order – Terms and conditions – Terms and condition which may be imposed – Enforcement – Method of enforcement – Adoption Act 1958, s 7 (3). ^c

J was born in November 1966 when his mother was living with his father as his mistress in a house in London. The father, who was a Jew and a married man, spent a substantial part of each week with the mother and J until December 1969 when he and the mother separated. In January 1970 the mother married another man ('the husband'). J was accepted by the husband as a child of the family. J, with the approval of his mother and the husband, saw his father on one day a week until May 1971 and thereafter once a fortnight until November 1971 when the mother and the husband stopped access to the father because they believed it was having a serious adverse effect on J. They then instituted proceedings for leave to adopt J. In December 1971 wardship proceedings were instituted by the father. He sought an order making J a ward of court during his minority and giving the father reasonable access. He stated that he was devoted to J; that he had established a lasting relationship with him over the years and, because of their common racial characteristics, he had a special contribution to make in the future upbringing of J. The Official Solicitor was appointed guardian ad litem to J. Consultations took place with the parties and proposals were formulated and presented to the court for approval. The proposals were that an adoption order should be made subject to certain 'conditions' imposed pursuant to s 7 (3)^a of the Adoption Act 1958 and certain undertakings. Those were, inter alia, that the Official Solicitor should have an absolute discretion in giving information to the father as to J's education and welfare and supervising any future access by J to his father, and that the adopters should pay due regard to the Official Solicitor's advice as to, inter alia, the nature and extent of any communications between J and his father and the resumption of access. Liberty was to be given to the Official Solicitor to apply. The father was to undertake, inter alia, not to communicate with J or with the adopters during J's minority except with the written consent of the Official Solicitor. ^d ^e ^f ^g

Held – The court could and would in the circumstances make an order in the proposed terms for the following reasons—

(i) Although as a general rule contact between adopted child and natural parent had to be severed once an adoption order had been made, that rule could be disregarded in exceptional cases where the court was satisfied that by doing so the welfare of the child would be best promoted; in J's case the circumstances were exceptional for there were strong grounds for the view that contact at the right time and in the right manner between him and his natural father would be for J's real and lasting benefit (see p 417 h and j, post); dicta of Pennycuik J in *Re G (D M) (an infant)* [1962] 2 All ER at 550 and of Salmon LJ in *Re B (M F) (an infant)* [1972] 1 All ER at 900 followed. ^h ^j

(ii) The court had wide powers under s 7 (3) of the 1958 Act to impose any term or condition that it thought fit when making an adoption order provided that such term or condition was designed for the welfare of the minor and was not inconsistent

^a Section 7 (3) is set out at p 418 b, post

a with the fundamental concept of adoption itself as set out in s 13 (1)^b of the 1958 Act (see p 418 c, post).

(iii) Appropriate methods existed for the enforcement of the conditions and undertakings, which were suitably drawn; in the event of a breach occurring after the making of the adoption order an application could, for example, be made for J to become a ward of court and for directions as to compliance with the adoption order (see p 421 b and c, post); dicta of Ormerod and Pearson LJ in *Re G (T J) (an infant)* [1963] 1 All ER at 23 and 31 considered.

b Per Curiam. It should not be thought that the Official Solicitor would, in other cases, be willing to assume the role of a supervising officer which he was accepting in this exceptional case. This was done to avoid harmful and lengthy litigation which would otherwise have ensued (see p 416 f post).

c Notes

For the court's power to impose conditions on an adoption order, see 21 Halsbury's Laws (3rd Edn) 236, para 509; for the effect of such an order see *ibid* 238, paras 514, 515, and for cases on the subject, see 28 (2) Digest (Reissue) 840, 1416, 1417.

For the Adoption Act 1958, ss 7, 13, see 17 Halsbury's Statutes (3rd Edn) 645, 650.

d Cases referred to in judgment

A B (An Infant), *Re* [1949] 1 All ER 709, [1949] LJR 1032, 113 JP 353: sub nom *Re D X (An Infant)* [1949] Ch 320, 47 LGR 238, 28 (2) Digest (Reissue) 823, 1354.

B (M F) (an infant), *Re* [1972] 1 All ER 898, [1972] 1 WLR 102, 70 LGR 122, CA.

G (D M) (an infant), *Re* [1962] 2 All ER 546, [1962] 1 WLR 730, 60 LGR 281; sub nom *Re G 126 JP* 363, 28 (2) Digest (Reissue) 839, 1413.

e *G (T J) (an infant)*, *Re* [1963] 1 All ER 20, 127 JP 144, 61 LGR 139; sub nom *Re G (infant)* [1963] 2 QB 73, [1963] 2 WLR 69, CA, 28 (2) Digest (Reissue) 828, 1373.

Phillips (E F) & Sons Ltd v Clarke [1969] 3 All ER 710, [1970] Ch 322, [1969] 3 WLR 622, Digest (Cont Vol C) 1096, 3239a.

Wilson & Whitworth Ltd v Express & Independent Newspapers Ltd [1969] 1 All ER 294, [1969] 1 WLR 197, [1969] RPC 165, Digest (Cont Vol C) 1096, 3239b.

f Case also cited

F v S (adoption: ward) [1973] 1 All ER 722, [1973] 2 WLR 178, CA

Applications

By a summons dated 5th November 1971 the mother of an illegitimate boy aged six and her husband sought leave to adopt him into their family. The putative father wishing to maintain contact with the minor applied on 21st December 1971 for an order making the minor a ward of court during his minority and the father granting reasonable access to him. The mother was defendant in the wardship proceedings; by order of the court, the minor was also made a defendant and the Official Solicitor appointed guardian ad litem. Both applications came on for hearing together before Rees J who, after the conclusion of the reading of evidence and before any cross-examination had taken place, invited the parties to consider whether any proposals for the future of the minor could be agreed and placed before the court. A detailed agreement was reached between the parties and approved by the Official Solicitor. That agreement was presented to the court for its approval. Judgment was delivered in chambers and the case is reported by permission of Rees J. The facts are set out in the judgment.

j J W Miskin QC, Margaret Puxon and E S Cazalet for the natural father.
G H Crispin QC and R M N Band for the proposed adopters.
John W Wood QC and J D Waite for the minor.

Cur adv vult

b Section 13 (1) is set out at p 416 j to p 417 b, post

8th February. REES J read the following judgment. These wardship and adoption proceedings concern a minor who is an illegitimate little boy now aged six years whom I shall call J. His natural mother has married and she and her husband are exceedingly anxious to adopt J. His putative father opposed adoption but has always accepted that J should remain as part of the family of the proposed adopters, but very strongly desires to resume contact with J which he maintained until the boy was almost five years of age. This contact was disrupted by the proposed adopters acting, as they genuinely believed, in the best interests of J. The Official Solicitor has been appointed guardian ad litem to J and has recommended adoption as being in the best interests of J, while considering possible expedients to provide for a resumption of contact for J with his father at an appropriate time in the future.

The combined proceedings were opened before me by counsel for the natural father and the whole of the mass of affidavit evidence and the reports of the Official Solicitor were read. This process occupied about 2½ days and disclosed the grave prospect of a prolonged and heated dispute which was certain to embitter relations between those concerned and inevitably be harmful to the interests of J and cause the principal parties a good deal of suffering. Accordingly, after the conclusion of the reading of the evidence but before any witness was called for cross-examination I invited counsel for all parties to consider whether, even at that late stage, any proposals for the future of J could be agreed and placed before the court. In this way I hoped it might be possible to avoid the harmful consequences certain to follow a forensic battle forecast to extend over a period of some two to three weeks. The court's invitation was accepted and, in the event, discussions between counsel with the experienced advice of the Official Solicitor occupied two days. Finally a detailed agreement was reached between the parties and approved by the Official Solicitor. Briefly stated, this agreement proposed that the court should make an adoption order subject to conditions imposed pursuant to s 7 (3) of the Adoption Act 1958 and to certain undertakings. These proposed terms would give a discretion to the Official Solicitor to supervise the progress of the minor after adoption and, inter alia, to advise the adopters as to communications and access between the natural father and the minor. In their turn, the adopters would undertake to consult, and to pay due regard to the advice of, the Official Solicitor. As is apparent these proposals if they are to be implemented require decisions whether an adoption order should be made and, if so, whether it is legally open to the court to impose the suggested conditions under s 7 (3) of the 1958 Act, and exact the undertakings and, if so, whether they are proper in the circumstances and enforceable in law. There can be no doubt of the novelty of the agreed proposals nor of the many problems to which they give rise. Accordingly, I reserved my decision in order to deliver this considered judgment.

In order to make the decisions which are so vital to all the parties in this matter it is necessary for me to proceed on a basis of fact. Fortunately there is a substantial area of facts which is not in controversy. I have not heard the oral testimony of any witness nor have I heard argument from counsel for the adopters nor for the Official Solicitor. I shall therefore attempt to state the facts which I believe to be not in dispute and to set out the principal rival contentions without seeking to resolve them.

J was born in 1966. His natural father, who is now 57 years of age, apparently comes of a Jewish lineage of which he is proud. The father came to this country from abroad in about 1946 being accompanied by his wife whom he had married in 1943. He has lived in this country ever since and is now of British nationality. His marriage appears to be a stable one despite the frank admissions made by the father that he has supported a number of mistresses with, he asserts, the full knowledge and tacit acquiescence of his wife. One aspect of this case which has not been in issue is that his wife deservedly enjoys the respect and affection of a number of people who know her well. As Jews they both suffered grievous persecution in ghetto conditions during the last war before coming to this country. Between 1946 and the present time

a the father has developed from small beginnings an immense business enterprise which has made him an exceedingly wealthy man.

b The natural mother of J is now 35 years of age. She holds a university degree and has enjoyed some success in her chosen career. She first met the father early in the year 1964. At this time she was married although it appears that the marriage was in the process of breaking down. From a date late in the year 1964 onwards the mother became and remained the mistress of the father and occupied a house provided by him at an address in London. The mother's marriage was dissolved in 1968. The father continued to share with his wife what passed as a normal married life for them, mainly in one of two other homes he occupied in the country. He spent a substantial part of each week in residence with the natural mother at the house in London. The father and the mother agreed together to have a child and as a result J was born on 16th November 1966. The mother shortly afterwards changed her name by deed poll so the father's name became part of her surname and J's birth was duly registered in the name of the father.

c In December 1969 after their relationship as man and mistress had lasted for five years the father and mother separated. It is neither necessary nor helpful to say more about the causes of this separation than that each party ascribes the major share of the responsibility for it to the other and each suffered a good deal as a result of the break-up of the union.

d For the whole of this period J lived as part of a household in which his mother was a permanent feature and his father was a fairly frequent resident. At the time of the parting J was three years of age and looked on, and knew, his father as his father.

e In January 1970 the mother married her present husband and he and the mother are the proposed adopters in the adoption proceedings before me. J has been accepted into and lived as a child of the family of the proposed adopters continuously from January 1970 up to the present time. The mother's present husband, who is 55 years of age, had been married twice before he met the mother and each of those earlier marriages has been dissolved. He is a man of very substantial private means in a position to, and he does, provide an excellent home and schooling for J. The proposed adopters have had a daughter born to them in December 1972. The family occupy a home in the country as well as a London house.

f The father has in his affidavits and elsewhere expressed his deeply held conviction that the maintenance of contact between himself and J is of crucial importance to the proper development and balance of the boy. He insistently urges that he shares with his son J a temperament and Jewish heritage which enables him to offer a special and vital contribution towards the upbringing of J and one which the adopters are unable to make. There is a good deal of evidence to support the view that it is this conviction, added to the natural affection of a father who has to some extent shared a household with his son for three years, which explains the passionate dedication of the father to the task of ensuring, if possible, that he will be permitted to maintain his contact with J.

g There can be no doubt that when the separation took place the father had strong grounds to expect that his relationship as J's natural father would continue on a regular and permanent basis. In January 1970 he received from the mother a letter making proposals for access to the boy and which contains the following sentence:

'I am very glad your relationship with him [i e J] is so warm and this I respect and always shall.'

j Further there can be no doubt but that the mother's present husband then held the same views and expressed them in a letter written in the same month to a lady to whom the parties refer to as J's godmother. In this letter the mother's husband wrote these words:

'[J] carries [his father's] name. It is a name which he will always have cause to be proud of. He will continue to know his father and his father will continue to

know him through the child's various stages of emerging from babyhood into childhood into adolescence. I want that, [J's mother] want that. I think it goes without saying that [J's father] wants that. There is no problem unless any of us choose to manufacture one . . . But I will never do other than respect and foster the real relationship between J and his natural, actual, father.'

It was in this favourable atmosphere that access started between J and his father. In February 1970 J and a nannie spent five or six days at one of the father's homes in the country. There is a violent and, as yet, unresolved dispute whether that stay was successful or in the best interests of J. Access continued thereafter on the basis of one day each week. There is a dispute whether or not there were two further occasions of staying access with the father in the period up to September 1970. Certainly after that date staying access was refused by the proposed adopters, but access on one day each week continued until about May 1971 when J went to a school as a day pupil near the proposed adopters' country home. Access then became more difficult to arrange owing to the distance from London and also undoubtedly because the proposed adopters were reluctant to grant it. In these circumstances access tapered off to once a fortnight and finally, at the insistence of the proposed adopters, ceased altogether in November 1971.

In November 1971 the proposed adopters made it clear to the father that they objected to access to J because they believed that it was having very serious effects on J, and they also indicated that they were contemplating making application for leave to adopt J. Litigation about the future of J thereupon became inevitable. Proceedings in the High Court for leave to adopt J were instituted by the proposed adopters on 5th November 1971. Wardship proceedings were instituted on 21st December 1971 by the father as plaintiff and in which the mother was defendant. In the latter proceedings the father seeks an order that J should be made a ward of court and should so continue during his minority and that the father should be granted reasonable access to J as might be defined by the court. By orders of the court the minor has been added as a defendant to the wardship proceedings and the Official Solicitor appointed to act as his guardian ad litem; the evidence filed in the wardship proceedings was directed to stand as evidence in the adoption proceedings and both proceedings were referred for decision by a judge of this Division.

It is clear from the formal proceedings, from the evidence filed therein, and from the course which the matter took before me, that it is common ground between the parties that J should continue to live in the care and control, and as part of the family, of the proposed adopters of whom no criticism is made as parents. The sole issues in dispute were whether access to J for the father should re-start forthwith (as the father believes to be in the boy's best interests) or should be postponed for at least five or six years (as the adopters believe to be in the boy's best interests) and whether an adoption order is appropriate in the exceptional circumstances of this unusual case.

The case on behalf of the father was that summarised earlier in this judgment, namely that because of his racial characteristics which J shares he has a special contribution to make in the future upbringing of J. The father puts himself forward as a devoted and loving parent who has established a lasting relationship with J during the three years before the separation and the contact with him since. Some evidence of his interest in the boy is that the father had made J a devisee by his will of a large house and land in the country and a beneficiary under a substantial discretionary trust. In all these respects J has been treated on a basis of equality with the father's legitimate children. The father's claim that the welfare of J is likely to be best served by an immediate resumption of access is supported by the evidence of three consultant physicians, all of whom have read the affidavit evidence but none of whom has interviewed J or the adopters, although one had two interviews with the father. Two of these consultants further considered that adoption would not solve the problems facing

a J. Several witnesses deposed to the father's devotion to J and to his suitability to maintain contact with him.

The case for the adopters is that continued contact between J and his father is not in the best interests of J for two main reasons. The first is that the father's mode of life and moral character render him wholly unfit to have contact with, and to exercise influence over, J. A massive attack is made on the father in respect of his conduct in openly supporting mistresses (including, of course, the mother, among others). b This part of the adopters' case finds considerable confirmation in the admissions made in his affidavits by the father, although he strongly puts in issue a good deal of the case which is made against him. It is also alleged against the father that he is a ruthless and dominating person and that these characteristics tell against contact with a very young child. The second reason advanced on behalf of the adopters is that the evidence in their possession establishes that J was seriously and adversely c affected by the access to his father between January 1970 and October 1971. This evidence asserts that J showed a number of signs of stress immediately following each period of access followed by more or less lasting symptoms of insecurity and tension. The father's evidence is to the effect that such signs were at no time apparent to him nor to others during any occasion of access. There is the usual conflict between the parties, at present unresolved, whether signs of stress did follow occasions of access d and, if so, what the cause was. On the latter point there is a difference of opinion between the consultants deposing on behalf of the father and the consultant appointed by order of the court.

As I have indicated, no criticism of any kind has been made of the adopters in relation to their capacity as parents or of their affection or ability to provide an excellent home, education and guidance for J. There can be no doubt but that the mother's e husband is willing and able to provide for all the needs of J, financially and otherwise, as if he were his natural son.

The Official Solicitor as guardian ad litem of J has presented the results of his investigations in two reports which have been seen by the parties and also in the usual confidential report to the court in the adoption proceedings. With the consent of all f concerned the last mentioned report has been shown to counsel for the father. The recommendations of the Official Solicitor are, of course, based in part on the results of the very careful enquiries and interviews with all concerned carried out by his own staff, but in this case also on the report of the consultant physician appointed by order of the court. In summary form, the recommendations of the Official Solicitor may be stated in this way. He was of opinion that an adoption order would be in the best interests of J. In reaching that conclusion he took full account of the difficulties g involved in an adoption order in the present case where the child has a firm recollection of his natural father which will never be erased from his mind, especially where there has been regular contact between the child and the natural father until the child was almost five years of age. He was also of opinion that some suitable arrangements should be made so that contact can be re-established between J and his natural father when J has developed a sufficient degree of maturity to make that course h desirable in his best interests. The Official Solicitor relies on the opinion of the consultant physician appointed by the court that this stage might be reached in about five or six years from now when J becomes 11 or 12 years of age. The Official Solicitor recognises the manifold difficulties which arise in a case wherein it is contemplated, notwithstanding that an adoption order is made, that at some time in the future it i may be in the best interests of the child that contact with his known natural father should be resumed. One area of difficulty envisaged is who is to make the decision whether or not to resume the contact with the natural father, and whether any control over that decision should be maintained and if so by whom and how. One possibility considered was to rely exclusively on the unfettered discretion and goodwill of the adopters. Of course that solution could not be expected to be acceptable to the natural father in the context of the present case. Another was the possible

subjection of the adoption order to suitably worded conditions pursuant to s 7 (3) of the Adoption Act 1958. This also posed problems as will appear. a

As indicated at the beginning of this judgment after prolonged consultation the parties, with the approval of the Official Solicitor, have presented to the court agreed proposals dealing with all outstanding issues in the wardship and adoption proceedings. It is proposed that the court should make an order authorising the applicants in the adoption proceedings (namely the natural mother of J and her husband) to adopt J. It is further proposed that the usual form of order should contain the following terms which are intended to constitute 'conditions' pursuant to s 7 (3) of the Adoption Act 1958. The terms are: b

'It is in pursuance of the said Act ordered that the applicant be authorised to adopt the said minor upon the conditions set out in the Second Schedule hereto.'

Schedule 2 reads as follows: c

'1. The Official Solicitor may at his sole and absolute discretion (a) arrange visits from time to time to be made by a member of his staff or other suitable person to the home or school of the minor; (b) Give such information as he thinks fit concerning the health, education and welfare of the minor to his natural father, (c) Supervise any future access by the minor to his natural father. d

'2. The adopters and the survivor of them shall consult and pay due regard to the advice of the Official Solicitor as to (a) the future education of the minor; (b) the nature and extent of any communication between the minor and his natural father; (c) the resumption and continuance of access by the natural father to the minor.'

It is proper for me to add that in this exceptional case the Official Solicitor has agreed to accept a limited and discretionary role of exercising some of the functions of a supervising officer. Both parties have acknowledged their indebtedness to him for accepting this highly unusual and perhaps even unique role in adoption. It should not, I think, be assumed that he would be in a position, or willing, to assume even this limited role in other cases. As I understand the situation unless the Official Solicitor had been willing to accept this burden in the present case harmful and exceedingly lengthy litigation would have been inevitable. e

Finally, the proposed form of order would contain the following words: 'Liberty to the Official Solicitor to apply.' This is a type of enforcement provision designed to enable the Official Solicitor to apply to the court for further directions should matters so develop that he decides no other course is open to him in order to ensure the welfare of the minor. In such event it is contemplated that the court might, as a last resort, authorise fresh wardship proceedings with a view to enforcing the scheme envisaged by the terms of Sch 2. All parties are aware that it is in the highest degree desirable in everybody's interest that further resort to the court should, if at all possible, be avoided. f

Three questions immediately present themselves. The first is as to the propriety of access taking place between a natural father and his child after an adoption order has been made. The second is whether the proposed conditions may be validly made pursuant to s 7 (3) of the 1958 Act. The third is whether the method proposed or, indeed, any method, can be used to enforce the conditions to which an adoption order is expressed to be subject or to enforce an undertaking in the proposed terms. g

As to the first question I turn at once to the statement of the fundamental principles of adoption as it appears in s 13 (1) of the 1958 Act. The subsection reads thus: h

'Upon an adoption order being made, all rights, duties, obligations and liabilities of the parents or guardians of the infant in relation to the future custody, maintenance and education of the infant, including all rights to appoint a i

a guardian and (in England) to consent or give notice of dissent to marriage, shall be extinguished, and all such rights, duties, obligations and liabilities shall vest in and be exercisable by and enforceable against the adopter as if the infant were a child born to the adopter in lawful wedlock; and in respect of the matters aforesaid (and, in Scotland, in respect of the liability of a child to maintain his parents) the infant shall stand to the adopter exclusively in the position of a child born to the adopter in lawful wedlock.'

b In *Re G (D M) an infant*¹ Pennycuik J considered the terms of the subsection I have just read and basing himself on a decision of Vaisey J in *Re A B (An Infant)*² said this³:

c 'As regards the first of the two grounds relied on by counsel for the appellants, namely the importance to an adopted infant of complete severance from its natural parents, I understand that adoption societies and local authorities regard such severance as a primary consideration, and I do not doubt that it is normally desirable that the adopted infant should be completely cut off from its natural mother; but there is no mandatory requirement of this nature in the Adoption Act, 1958, and it would be impossible for me, consistently with the terms of the Act and with authority, to attempt to lay down any fixed rule on this point.'

d The Court of Appeal gave approval to this approach to the point in *Re B (M F) (an infant)*⁴. Salmon LJ said⁵:

e 'The only other point that I should deal with is the fact that [the adopters] take the view that [the parents], for whom they have much sympathy, should from time to time visit the children, and particularly that these two boys should be kept in touch with their sister Pauline. It is quite true that in law Pauline will cease to be their sister after the adoption order is made, but Pauline will remain their natural sister and no order of any court can alter that fact. As a rule, it is highly undesirable that after an adoption order is made there should be any contact between the child or children and their natural parents. This is the view which has been taken, and rightly taken, by adoption societies and local authorities as it has been by the courts in dealing with questions of adoption. There is, however, no hard and fast rule that if there is an adoption it can only be on the terms that there should be a complete divorce of the children from their natural parents. I refer to *Re G (D M) (an infant)*¹, which in effect followed the dictum of Vaisey J in *Re A B (An Infant)*². Although the courts will pay great attention to the general principle to which I have referred, namely, that it is desirable in normal circumstances for there to be a complete break, each case has to be considered on its own particular facts.'

h The conclusion which I draw from the terms of the 1958 Act and from the authority cited above is that the general rule which forbids contact between an adopted child and his natural parents may be disregarded in an exceptional case where a court is satisfied that by so doing the welfare of the child may be best promoted. I have no doubt that the instant case is an exceptional one and also that there are very strong grounds existing at present to support the view that at the right time and in the right manner contact between J and his father is likely to be for J's real and lasting benefit.

j The second and third questions fall to be dealt with together having regard to the

1 [1962] 2 All ER 546, [1962] 1 WLR 730

2 [1949] 1 All ER 709 at 710, [1949] Ch at 320

3 [1962] 2 All ER at 550, [1962] 1 WLR at 736

4 [1972] 1 All ER 898, [1972] 1 WLR 102

5 [1972] 1 All ER at 900, [1972] 1 WLR at 104

views expressed in the Court of Appeal in *Re G (TJ) (an infant)*¹ to which I shall refer. I therefore consider whether the terms proposed may be validly imposed as conditions under s 7 (3) of the 1958 Act, and also concurrently whether any and what means may be devised to enforce such terms whether imposed as conditions or otherwise. Section 7 (3) reads as follows:

‘The court in an adoption order may impose such terms and conditions as the court may think fit, and in particular may require the adopter by bond or otherwise to make for the infant such provision (if any) as in the opinion of the court is just and expedient.’

The terms of that subsection are unambiguous and, on the face of it, give the court unfettered power to impose any term or condition that the court may think fit. No doubt any condition imposed must not be inconsistent with the fundamental concept of adoption itself, as set out in s 13 (1) of the 1958 Act. Thus, in my judgment, it would not be a valid exercise of the power given by the subsection to make a final order of adoption subject to the condition that the child should remain in the care and control of some person other than the adopters. Also, no doubt, any condition imposed must be at least designed to be for the welfare of the minor.

Save for the assistance which may be derived from the views expressed in *Re G (TJ) (an infant)*¹ mentioned earlier I have not been referred to, nor have I discovered, any direct authority defining the scope and limits of s 7 (3), nor any reported case in which any conditions have been imposed thereunder. There are two provisions in the 1958 Act which seem to afford at least some indication of the kind of terms which might be imposed as conditions. Section 4 (2) provides that the consent of a parent to the making of an adoption order may be given ‘subject to conditions with respect to the religious persuasion in which the infant is proposed to be brought up . . .’ I have been told at the Bar that it is the experience of the Official Solicitor that a significant number of adoption orders are made subject to such a condition—no doubt for this purpose s 7 (3) is used. Section 7 (3) itself contains a particular example of a condition which may be imposed, namely, that the court—

‘. . . may require the adopter by bond or otherwise to make for the infant such provision (if any) as in the opinion of the court is just and expedient.’

I have no information as to the extent to which this power is used, nor of the form of any such order. It has been observed that the 1958 Act contains no express sanction to enforce any condition imposed. This is plainly so. Speaking for myself, I should be slow to reach the conclusion that the absence of any express term providing for enforcement was an accidental omission in drafting, still less that the legislature intended in the vitally important field of adoption that courts should be given powers to impose conditions which were unenforceable. If no means exist to enforce, for example, a condition relating to religious upbringing, a parent who had been persuaded to give consent to adoption subject to that condition might be grossly deceived. Rather I would venture to think that means for enforcement of suitable conditions were thought to be obvious and readily available. Two possible methods of enforcement have been suggested and are referred to in the judgment of Pearson LJ in *Re G (TJ) (an infant)*¹. One is to exact an undertaking from the adopter on the making of the adoption order to comply with the conditions imposed. Such an undertaking might be enforced by appropriate committal proceedings. It goes without saying that the conditions would need to be drafted with care and precision so that a breach could be strictly proved. I invite attention in this context to the difficulties which faced Plowman J in *Wilson & Whitworth Ltd v Express & Independent Newspapers Ltd*². In that case the parties had agreed on the terms of an undertaking in ‘Tomlin’

1 [1963] 1 All ER 20, [1963] 2 QB 73

2 [1969] 1 All ER 294, [1969] 1 WLR 197

a form before the Court of Appeal. Plowman J found it impossible to grant an injunction to restrain an alleged breach of the undertaking owing to the vague terms in which it was couched. He took account of the warning given by the Court of Appeal at the time when the undertaking was recorded that it would, or might be, unenforceable for vagueness. On the question of committal I think account should be taken of the possibility that an undertaking exacted on the making of an adoption order in the 'Tomlin' form might not be enforceable directly. It might first need an order of the court requiring the party in breach to perform his obligation and committal proceedings would then follow (see the judgment of Goff J in *E F Phillips & Sons Ltd v Clarke*¹).

b Another method which might be available to enforce suitable conditions or undertakings is for application to be made for the child to become a ward of court and to seek directions of the court as to compliance with the conditions of the adoption order, of the undertakings given by the adopters. Once an adoption order has been made the infant becomes a child of the adopters to the same extent as a child of the adopters' family. Adopted children like natural children are subject to the jurisdiction of the court to give directions, inter alia, as to access. Indeed, s 13 (2) of the 1958 Act specifically so provides in these terms:

d 'In any case where two spouses are the adopters, the spouses shall in respect of the matters aforesaid, and for the purpose of the jurisdiction of any court to make orders as to the custody and maintenance of and right of access to children, stand to each other and to the infant in the same relation as they would have stood if they had been the lawful father and mother of the infant and the infant shall stand to them in the same relation as to a lawful father and mother.'

e Accordingly, if suitable conditions dealing with the upbringing of, and/or access to, a child are embodied in an adoption order or are the subject of undertakings, I am not aware of any reason why in the event of non-compliance an application should not be made for the child to be made a ward of court. Thereupon, directions could be sought generally and also in respect of any disputed obligation. It may well be that this method has advantages over proceedings by way of committal.

f I now turn to consider the important decision in the present context of *Re G (T J) (an infant)*² which I mentioned earlier in this judgment. In that case a county court judge had before him an application by a stepmother to adopt a 12 year old boy. The natural mother and the paternal grandparents opposed the adoption, and the natural mother refused her consent. The main ground for the opposition to the making of the order was that the grandparents and the natural mother wished to establish a relationship with the boy by having access to him. They feared that if an adoption order were made there was a real risk that the stepmother might refuse access. The county court judge was not prepared to make an adoption order subject to any condition as to access for the grandparents and the natural mother because he held that there was no effective sanction to enforce such a condition. He refused to make the adoption order and the stepmother appealed. In relation to the imposition and enforcement of conditions under s 7 (3) of the 1958 Act there are two important passages in the judgments delivered in the Court of Appeal. The first is a passage in the judgment of Ormerod LJ in these terms³:

j 'The objections taken by counsel, on behalf of the [stepmother] here, were mainly under four heads and they were as follows: (1) That the judge was wrong in directing himself that there was no sanction to enforce any conditions that might be made. Section 7 (3) of the Adoption Act, 1958, provides as follows: [and then the learned Lord Justice read it]. Section 8 of the same Act in sub-s. (1) gives

1 [1969] 3 All ER 710 at 711, [1970] Ch 322 at 324

2 [1963] 1 All ER 20, [1963] 2 QB 73

3 [1963] 1 All ER at 23, [1963] 2 QB at 88, 89

the court power to make interim orders for a period not exceeding two years by way of a probationary period on such terms as seem proper, but no question of an interim order arises in this case. So far as a final order is concerned, the position appears to be that the court may by s. 7 (3) impose such terms and conditions as it may think fit, but there seems to be no provision in the Act of Parliament, and certainly none has been suggested by counsel, to impose sanctions for the enforcement of those conditions. The learned judge, therefore, was right in the first paragraph of his judgment when he said "in any event there is no power to revoke the order if the conditions were broken". In those circumstances, I do not see how the judge was in error in refusing to make an order subject to conditions. It may be true that some form of order may at some later stage be made under the Guardianship of Infants Act, 1925. This order may impose conditions on one party or another or may exact undertakings. Those, however, are circumstances with which this court is not concerned and about which it cannot prophesy.^a

The second passage is in the judgment of Pearson LJ¹ when he said:

"The judge decided not to make the adoption order. He said, having referred to "the boy's real interests", "In my view those are bound up with the continuance of his association with the [stepmother] coupled with reasonable access for the grandparents and the mother. If I grant this adoption the [stepmother] will have the sole voice in the matter. I do not think it will be in the boy's interests for his mother and grandparents to be in a position of begging favours from the [stepmother] which may or may not be granted."^b

Pearson LJ continued²:

"The judge also said: "By s. 7 (3) of the Adoption Act, 1958, the court may impose terms and conditions of adoption. This is a very wide discretion, but I do not think I could impose terms as to access by the mother and grandparents. In any event, there is no power to revoke the order if the conditions were broken."^c

Then Pearson LJ went on³:

"There was some argument in this court as to the effect of s. 7 (3), but it was not shown that conditions as to access could be effectively imposed. It was suggested that the desired result could be achieved by the making of an adoption order on an undertaking by the [stepmother] with regard to access for the mother and the grandparents. I use the vague phrase "with regard to access" advisedly, because no draft of any specific undertaking was put forward. I have not been satisfied that the machinery of an undertaking, with the sanction of an application for committal, is suitable machinery for the continuing regulation by the court of a matter so complicated and variable and controversial as access. Another suggestion is that the child could be made a ward of court, if reasonable expectations were not fulfilled."^d

And the appeal from the order of the county court judge was dismissed. It is plain that the county court judge and Ormerod and Pearson LJ¹ were of opinion that since no sanction for the enforcement of any conditions as to access imposed under s 7 (3) was provided in the 1958 Act it was not a wrong approach (and inferentially therefore a correct approach) to refuse to impose any such conditions. Pearson LJ gave consideration to the two possible methods of enforcement of an adoption order or the subject of undertakings to which I have already referred in some detail. As to the method of exacting an undertaking with regard to access which could be enforced by committal proceedings he made two objections. The first³ was that the

¹ [1963] 1 All ER at 31, [1963] 2 QB at 102

² [1963] 1 All ER at 31, 32, [1963] 2 QB at 102

³ [1963] 1 All ER at 32, [1963] 2 QB at 102

a court had not been given any draft of a specific undertaking being left with what he described as 'a vague phrase' with regard to access. The second¹ was that the machinery of an undertaking with a sanction of committal proceedings was not suitable 'for the continuing regulation . . . of a matter so complicated and variable and controversial as access'. As to the method of enforcement by the institution of wardship proceedings Pearson LJ expressed no opinion one way or the other as to its legal validity or its practicability. Accordingly, provided I am right in thinking that the institution of wardship proceedings is a valid and practical means of enforcing properly drawn conditions or terms or undertakings as to access imposed on the making of an adoption order this method does provide a means of enforcement which falls outside the ambit of any adverse comment made by any member of the Court of Appeal in this case. Further, it follows that if my views be correct a sanction for the enforcement of terms as to access imposed on adoption does exist which was not fully considered by the Court of Appeal and certainly not condemned. Accordingly, what appears to have been a main objection to imposing terms as to access on adoption has disappeared. Nevertheless, two guiding principles derived from the judgment of Pearson LJ¹ require emphasis. The first is that the terms (whether agreed or imposed by the court) should be so clearly drafted as to be readily capable of enforcement in the event of breach. The second is that means must be apparent which will enable what Pearson LJ¹ described as 'the continuing regulation by the court of a matter so complicated and variable and controversial as access'.

In the instant case, of course, provision has been made through the good offices of the Official Solicitor for the regulation of access. Accordingly, it is on the basis of these principles that I approach the decision whether I should make an adoption order on the terms agreed between the parties and approved by the Official Solicitor.

In my judgment, having regard to the paramount consideration of the welfare of J, and all the other circumstances, it is plainly right that an adoption order should be made provided that provision is made to enable contact to take place between J and his natural father at the right time and in the right manner. I have reached this conclusion without difficulty after considering the whole of the material placed before me. Both parties have agreed to it and it is supported by the recommendation of the Official Solicitor. The fact that the orders proposed represent the agreed conclusions of all concerned for J's welfare have a number of advantages for J. He will not suffer from the effects which a bitter legal contest between his natural father and the adopters is bound to have on the relationships on which his present and future happiness so much depend. He will not suffer the delays and unsettling effects of appeals which appear to have been inevitable in this hotly contested case. Nor is it irrelevant to observe that an agreed solution which can be approved by a court in a case involving a child has in my opinion a greater chance of success so far as the welfare of the child is concerned than one imposed by order of the court, after a disputed hearing, even though the court's order may be superior when objectively regarded.

I shall resist the temptation to attempt to amend the detailed terms of the orders so painstakingly agreed between the parties and their legal advisers. The orders constitute a carefully constructed edifice designed to achieve a compromise between the passionately held convictions on either side. To attempt alterations at this stage might result in a disastrous collapse in what may still be a delicate situation. Of course, if there are any proposals for amendment of the draft proposed orders which are agreed I shall be very glad to consider them after the conclusion of this judgment. Subject to that observation I shall make the orders in the forms drafted and agreed. I have set out earlier the terms of the proposed adoption order. The proposed terms of the order in relation to the wardship proceedings are as follows:

"The [father] by his counsel undertaking not to communicate, or attempt to communicate, directly or indirectly, with the minor, or with the adopters during

the minority of the minor, save with the written consent of the Official Solicitor; (2) Stating that having regard to the facts recited in paragraphs (a) to (c) hereof he no longer opposes the adoption of the minor by the defendant, and that such facts are:—(a) it is in the best interests of the minor that these proceedings be resolved by agreement without a contested hearing; (b) the consent of the defendants to the conditions of such adoption set forth in the schedule to the adoption order in the adoption proceedings which are for convenience also recited in the schedule hereto; (c) it is anticipated that the adopters and the Official Solicitor have due regard to the natural heritage of the father, and the first and second defendants undertaking not to communicate or attempt to communicate, either directly or indirectly, with the [father] during the minority of the minor save with the written consent of the Official Solicitor, and the Official Solicitor, by his counsel, stating that he does not object to this order, order: (1) confirm wardship until further order; (2) De-ward minor upon production to the Registrar of the said adoption order.'

There follows the schedule containing the conditions to which I have already referred and need not repeat.

No doubt counsel will ensure that all parties who give undertakings to the court in this matter clearly understand their binding force and the possible consequences of any breach.

Order granted in the agreed terms.

Solicitors: *Charles Russell & Co* (for the natural father); *Macfarlanes* (for the proposed adopters); *Official Solicitor*.

R C T Habesch Esq Barrister.

Practice Direction

CHANCERY DIVISION

Practice – Chancery Division – Lists – Witness list – New arrangements for Part 2.

1. Actions estimated to last three days or less may now be set down for hearing in the Witness List Part 2.

2. Actions already set down for hearing in the Witness List Part 1 but for which no date has been fixed and which are not estimated to last more than three days may be transferred to Part 2 of the list on application to the cause clerk by the solicitors to both parties or by the parties if in person.

3. The procedure set out in para 1033A of the Supreme Court Practice 1973¹ is modified accordingly.

By the direction of the Vice-Chancellor.

3rd May 1973

R E BALL
Chief Master

¹ See vol 2, p 246

Phillips v Phillips

COURT OF APPEAL, CIVIL DIVISION

EDMUND DAVIES, STEPHENSON AND ROSKILL LJJ

23rd FEBRUARY 1973

Injunction – Husband and wife – Matrimonial home – Exclusion of spouse from matrimonial home – Parties divorced – Parties joint tenants of former matrimonial home – Parties continuing to live in home – Circumstances in which injunction will be granted – Injunction against husband – Conditions making it intolerable for wife and child to continue sharing accommodation with husband – Husband's behaviour endangering mental health of wife and child – No evidence of physical assault or apprehension of violence.

The wife obtained a decree of divorce having satisfied the court that the husband had behaved in such a way that she could not reasonably be expected to live with him. By consent the wife was granted custody of the son who was aged 14. After the decree the parties continued to live together in the former matrimonial home, a council house, of which they were both joint tenants. Subsequently the wife applied for an injunction requiring the husband to leave the matrimonial home. She complained of the husband's hostile attitude to herself and the son. The family doctor deposed in an affidavit that the wife was 'hardly able to bear the strain of living under the same roof with her ex-husband', and the son was 'a disturbed boy who actually ran away from home . . . saying that he could not bear living there with his father'. The doctor also stated: 'I believe that, unless something is done to enable the [wife] and [the son] to live separately from the [husband] they will both become psychiatric invalids.' There was no evidence that, since the divorce, the husband had assaulted the wife or son.

Held – (i) An injunction excluding from the former matrimonial home a divorced husband who was lawfully entitled to be there would only be made where the circumstances clearly demonstrated that such an order was both imperative and necessary in that the conditions in the home made it intolerable for the wife and any children of the marriage to continue to share the accommodation with the husband. Thus an order would be granted where it was necessary for the protection of the health, physical or mental, of the wife or child (see p 425 f, p 426 d and e, p 428 h and j and p 429 f, post).

(ii) It followed that an injunction should be granted because there was clear evidence that the continued presence of the husband and his behaviour was endangering the health of the wife and the son; it was not necessary for the wife to prove physical assaults or a reasonable apprehension of them (see p 426 c, p 428 b c and f and p 429 c d f and h, post).

Hall v Hall [1971] 1 All ER 762 applied.

Notes

For the grant of injunctions in divorce proceedings, see 12 Halsbury's Laws (3rd Edn) 477, para 1067, and for cases on the subject, see 27 (2) Digest (Reissue) 936, 937, 7549-7565.

Cases referred to in judgments

Blessing v Blessing (9th November 1972) unreported, [1972] Bar Library transcript 337, CA.

Hall v Hall [1971] 1 All ER 762, [1971] 1 WLR 404, CA, 27 (1) Digest (Reissue) 299, 2242. *Montgomery v Montgomery* [1964] 2 All ER 22, [1965] P 46, [1964] 2 WLR 1036, 27 (2) Digest (Reissue) 936, 7555.

Stewart v Stewart [1973] 1 All ER 31, [1973] Fam 21, [1972] 3 WLR 907.

Appeal

On 25th July 1972 the wife obtained a decree nisi of divorce against the husband and on 27th October the decree was made absolute. On 15th January 1973 at Bedford County Court his Honour Judge Youds refused an application by the wife for an injunction ordering the husband to vacate the former matrimonial home and thereafter restraining him from entering or attempting to enter the home or its precincts. The wife appealed. The facts are set out in the judgment of Edmund Davies LJ.

N A R Wilson for the wife.

P H Counsell for the husband.

EDMUND DAVIES LJ. This is a particularly unfortunate and unhappy case. It has certain special features which, I would stress at the outset, in my view, distinguish it from many of the cases which have in the past come before this court, some of them appearing in the law reports. It comes before us by way of an appeal by the wife who obtained from the husband a decree absolute dissolving the marriage on 27th October 1972. On 8th November she gave notice of intention to apply to the learned judge, sitting at the Bedford County Court, for an order that the husband vacate the former matrimonial home and that he be thereafter restrained by himself, his servants or agents from entering or attempting to enter those premises or their precincts. The matter came before the learned judge on 14th November and again on 15th January 1973, when, as he expressed it, 'with considerable regret' he refused to grant the injunction sought by the wife. It is against that order refusing the relief sought that the wife now appeals to this court.

The marriage took place on 23rd December 1950. There are two children, S, who is just over 20 (and we are not concerned with him except peripherally), and M, born in June 1958, who is accordingly about three months short of his 15th birthday.

On 25th July 1972, on a petition which was served in February, the wife obtained a decree nisi against her husband in an undefended suit, the basis of that decree being that the wife brought herself within s 2 (1) (b) of the Divorce Reform Act 1969, which provides: 'The court hearing a petition for divorce shall not hold the marriage to have broken down irretrievably unless the petitioner satisfies the court of one or more of the following facts', sub-para (b) continuing, 'that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent'.

The petition contained a series of allegations against the husband. Some were of physical assaults, but in the main they were complaints of callous conduct towards her and the child M. The husband sought to say that, while he accepted that the marriage had irretrievably broken down, he did not accept that he was guilty of those matters alleged against him in the petition. But we have had produced before us the husband's affidavit of means. I do not propose to refer to it in detail, and restrict myself to saying that it contains a number of admissions regarding certain of the important complaints advanced in the wife's petition.

The wife, as I have said, obtained her decree nisi in July 1972, and that was made absolute on 27th October. On 8th November there followed this application for an injunction. That arose in this way. The parties live in a small house which is the property of the Stevenage Development Corporation, and they were and remain joint tenants of those premises. There are three bedrooms, a living room and a kitchen.

Certain affidavits were before the learned judge when the matter first came before him on 14th November. There was one sworn by the wife. She recited that in the dissolution proceedings the custody of M had by consent been granted to her, she complained of the way in which he behaved at home saying, *inter alia*, that virtually every weekday evening and every weekend the husband stays in the matrimonial home and occupies the living room, loudly playing his gramophone—and the husband does say, one of his pastimes being listening to music, that he does play

a the gramophone loudly. She went on to complain about his unfatherly attitude towards M, that at times he said that he was minded to leave the matrimonial home but at other times said that he would never be prevailed on to leave it, and that she herself had approached the Stevenage Development Corporation with a view to persuading them to rehouse her and M. She was then, apparently, told that if she obtained an order for M's custody it might be possible to rehouse them. She got b an order for M's custody by consent of the husband, but nevertheless the corporation have done nothing to rehouse her and M and they remain in the matrimonial home. She went on to say that it would be much easier for the husband to find reasonable accommodation for himself than for her to find a place.

c In an affidavit sworn by Dr Dawson, the family doctor, on 18th November (that is, after the decree absolute) he dealt with the situation in which the parties were living. He said that M had become very difficult to deal with and was spending a great deal of time in his bedroom, and that the situation was causing the wife mental illness. In an affidavit of 13th November by the husband he denied a number of the allegations which the wife had made. He did not agree that the gramophone was played exceptionally loudly, and he indicated his awareness of the present unhappiness in the house, saying that he had unsuccessfully endeavoured to find other accommodation.

d That was the state of the evidence when the matter first came before the judge on 14th November. He did not dispose of it then. He expressed the view that it would be better for the husband to leave the premises, and he adjourned the matter for two months in the hope that meanwhile accommodation would be found by the husband. But it was not. When the matter was heard again on 15th January 1973 e the learned judge, as I have already said, came to the regretful conclusion that he could not grant the wife the relief she sought.

f What she was asking the court to do was very drastic. For here we have two parties, equally entitled to occupation of premises, and what the wife sought was an order that one of them, her former husband, who was lawfully entitled to be there, be turned out—and turned out completely and forever. The court has said in a number of cases that so drastic a remedy should be granted only in the circumstances demonstrating clearly that such an order was both imperative and inescapable.

g The learned judge was referred in particular to *Hall v Hall*¹. That was a case where the court was dealing with a similar application but on very different facts from those which exist in this case, and the application was made pending determination of the matrimonial dispute. The learned county court judge here appears to have extracted from *Hall v Hall*¹ the principle that such an order can be made only where it is essential for the wife's protection. While accepting that the parties and M were living in circumstances of the greatest unhappiness, there being no suggestion that there had been any physical cruelty towards the wife during any material period, he said:

h '... I have to apply my mind to whether the wife has established that the situation here is so serious that she needs protection, or the situation is so serious that it is in the interests of this son of hers that I should make this order.'

He referred to the affidavit before him, and said that this struck him as, to use a colloquialism, one where the wife was scraping the barrel for complaints against her husband. He continued:

j '... she does not make any suggestion in the affidavit that there has been anything in the form of assaults on her person, serious rows of any sort, and that indeed the only communication apparently was an approach by her ex-husband, as he now is, to talk about the matter of some agreement regarding the tenancy ... there is no suggestion that there has been any serious trouble, and, in my

view, she has not proved that in this case the situation is so serious or the matter calls for such drastic action that I should order the husband to leave his home. After all, a husband, however unpleasant he may be, still has some rights.'

He concluded by saying:

'... at the moment I am not satisfied that she has brought herself within the terms that the Court of Appeal had in mind [again referring to *Hall v Hall*¹] ... it is with considerable regret—because I realise the difficulties under which this lady is living—that I have to refuse this application ...'

It may be that the learned judge, as counsel for the wife has submitted, mistakenly read *Hall v Hall*¹ as requiring that something in the nature of a physical assault on the wife or the reasonable apprehension thereof must be proved before this drastic relief could be granted her. I am not satisfied that the learned judge did fall into any misapprehension of that kind. There are grounds for thinking that he may have, but I am not able to say that, on the material which was before him, the learned judge was demonstrably in error in refusing, as he did, the relief sought by the wife. But this should be made clear: if the idea is entertained that physical assaults are essential before the remedy sought in this case can be obtained, it is completely wrong. In *Hall v Hall*², for example, Lord Denning MR was careful to point out that such an order ought not to be made unless it is proved to be impossible for the parties to live together in the same house. That is the test which, as I see it, this court is presently called on to apply. Has it been established that the conditions which now prevail in the former matrimonial home are such as to make it quite intolerable for the wife and her 14 year old son to continue to share that accommodation with the husband?

Whatever be the correct answer to that question when it arose for determination on 15th January, it is only right and proper to make clear that this court is now possessed of material not then available to the learned county court judge. Though it would be idle to speculate, I venture nevertheless to think that it is at least possible that, had it been, he might then have arrived at a different conclusion.

Be that as it may, we have to consider the further affidavits which, with the consent of both parties, have been looked at. I should earlier have referred to one sworn by the wife on 10th January, just a few days before the learned county court judge finally disposed of this matter, in the course of which she swore that the husband had told her: 'I have told my solicitors and I will tell you I will not go into lodgings.' Then she went on to say that the 20 year old son, S, and his wife had offered the husband accommodation in their home, but that he had refused it on the ground that when the case came on for hearing it might be adjourned indefinitely.

The fresh material now available to this court consists of three affidavits, one further affidavit of the wife's, another by Dr Dawson and a further affidavit which the husband has undertaken to file today and which we have received. That of the wife of 9th February relates to what happened after she failed in the county court, that the husband behaved rudely to her, that M, who was present, became upset and broke down, whereupon the husband told him that he ought to behave like a boy, not a girl, and demanded of him the return of a Christmas present of a cassette recorder. The affidavit goes on to deal with a matter to which I personally attach importance, namely, that on 20th January M left his home. It appears that he was not out of bed by the time the wife left home for work at 8.30 a.m., and there was nothing surprising about that, for this manifestly wretchedly unhappy boy has been lying clothed in bed during the daytime on a number of occasions. When the mother got home at about 6.20 p.m. the child was nowhere to be seen, and she became frantic. Then at 10.15 p.m. a policeman called and said that M was at King's Cross police station. When the mother saw her child he told her that he had run away

¹ [1971] 1 All ER 762, [1971] 1 WLR 404

² [1971] 1 All ER at 764, [1971] 1 WLR at 406

a because he could not stand life at home with his father any more, but that as darkness fell he became frightened, and so he went to King's Cross police station.

What about Dr Dawson? He said:

b 'I was horrified to learn that the earlier situation at the matrimonial home was still continuing and that the Court had felt able to do nothing to alleviate it... In spite of taking psychotropic drugs, the [wife] is hardly able to bear the strain of living under the same roof with her ex-husband. And as for [M], he is a disturbed boy who actually ran away from home shortly after the Judge's decision, saying that he could not bear living there with his father. [M] is also an enuretic... I believe that, unless something is done to enable the [wife] and [M] to live separately from the [husband], they will both become psychiatric invalids. For [M], I foresee probable further trouble at school and an interruption of his normal psychological development such as will leave scars for the rest of his life. I also believe that his enuresis will, if anything, tend to get worse while he and the [husband] remain under the same roof.'

d The husband admits that he did not behave in a very dignified way towards his wife after he had scored a victory on 15th January at the county court. He says that M was present, that M did cry, and that he did tell M that he ought to have been born a girl. He says that he did not see M at all on the Saturday when the boy absconded, indeed that he had not seen him for the previous five days. He had no knowledge of anything wrong until the police officer arrived. Indeed, he even adds, 'I did not speak to him on his return, nor have I spoken to him since'. I find that a remarkable statement. It is right to add that the explanation, such as it is, that the father proffers is: 'I have not spoken to him, in order to attempt to keep the peace, as I feel any possible contact causes the [wife] to interfere and create problems.' He said that he could see no difference in M recently.

e 'He has grown up in the difficult atmosphere in the home over the years... I thought he had ceased being an enuretic several years ago.'

f Then he went on to say that he had tried to obtain alternative accommodation, but none was available in Stevenage.

g It is particularly unsatisfactory to have to dispose of a matrimonial dispute of this gravity and to decide an application for such drastic relief as is here sought solely on the basis of affidavits. But, looking at the whole body of evidence, reminding oneself of how it came about that the wife obtained a decree absolute, bearing in mind the conditions which prevail in the home, having due regard to the affidavit evidence of the doctor (who we naturally treat as a gentleman having proper regard to the necessity for expressing an independent opinion), it would not be excessive to describe this 14 year old boy as presently living in what is for him a perilous situation.

h Counsel for the husband, who has done all he could in difficult circumstances, and has had to concede that the husband acknowledges that great unhappiness prevails in the home, has stressed the absence of any allegation of physical assault on the wife since 1971. He has submitted that, whereas the court can protect the wife from the husband's physical molestation or a threat thereof, no allegation of that kind has been advanced in this case. He accepts, in the light of the authorities (including *Stewart v Stewart*¹), that not only has the court jurisdiction to make, under its inherent powers, the order sought in this case, but that the interests of the child as well as those of the wife have to be taken into consideration. In *Stewart v Stewart*¹ (again a case quite different on its facts from the present case) the court was minded to grant the relief which resulted in the husband's being turned out of the matrimonial home, of which he was the registered proprietor, on the ground that there were two young children whose interests were such that the court ought to protect

them. Counsel for the husband also accepted as correct the observations of Ormrod J in *Montgomery v Montgomery*¹ that 'if the welfare of the children was in jeopardy ... the court has wide powers to intervene for their protection'.

Doing the best I can to deal on these affidavits with the question of where the truth lies, I feel myself compelled to the conclusion that the future well-being of this boy is in jeopardy if the present state of affairs continues for a day longer than can be avoided.

Then what of the wife? Counsel for the husband has made what he roundly accepted was a bold submission. He said that it matters not that the wife, because of the situation in which she finds herself, is enduring mental torture; that this is quite immaterial to the question whether the relief sought should be granted, provided that the husband's conduct is not aimed at the wife and calculated to cause her to bring about that result. I have to reject that submission out of hand. I do not think that can be sound. If a child can be placed in jeopardy without blows being struck on him, so can the wife. I know of no authority for the proposition that blows have to be struck and that there must be physical assault before the health of a spouse may be considered to be endangered. Health can be impoverished and imperilled by assaults of a mental kind just as much as by blows. And, according to the recent affidavit of Dr Dawson, unless something is done very soon, both mother and child are going to be psychiatric wrecks. I think that this situation cannot be allowed to continue.

I have not overlooked some of the difficulties confronting the husband. I am bound to say, on the other hand, that I think that his affidavit evidence of attempts to find other accommodation does not strike me as very strong and, if I had to come to a conclusion on the matter, I should not find myself satisfied that he had done everything he reasonably could to find accommodation elsewhere. Be that as it may and difficult though it may prove for him to find another place, he must make efforts to do so.

We have had some discussion, though not of a spacious kind, whether one might make something in the nature of an interlocutory or interim order, not to operate until some future date. But I have come to the conclusion that that would not do, for it would merely prolong the agony. I think that the time has come when this situation should be terminated. I would accordingly be for allowing this appeal in the light of the fresh material made available to us. Counsel for the husband asked for some time before the injunction should come into operation and, counsel for the wife agreeing to 14 days, I would be for allowing the appeal and granting the injunction prayed, but staying its operation until 14 days from today.

I should add that counsel for the husband has expressed to the court the husband's undertaking that during the 14 days which is allowed for him to remain on the premises he will be of good behaviour towards the wife and their son.

STEPHENSON LJ. I agree with the judge that to exclude a divorced husband from the matrimonial home of which he is the paying tenant is a drastic order. It may be that it can be made when the court regards the continued presence of the divorced husband in the only available matrimonial home as creating an impossible situation. In *Blessing v Blessing*² I said that there may be extreme cases where the right of the judicially separated wife to live in the matrimonial home may be rendered inoperative by the mere presence of the husband in the house. This case demonstrates to me that there may be cases where the same right of a divorced wife is destroyed in the same way. I am ready to accept for the purposes of this case the more restricted principle that no court ought to make such an order as we are asked to make unless it is proved to be necessary for the protection of the health, physical or mental, of the divorced wife or any child of the marriage living with her. She cannot be allowed to gain sole occupation of the house for which he pays by scraping the bottom of the barrel to

¹ [1964] 2 All ER 22 at 24, [1965] P 46 at 51

² (9th November 1972) unreported

a find complaints against her husband's past conduct or even its continuation since the decree absolute. A certain amount of tension between parents and children living together in a small house after a divorce granted on any ground is inevitable, and there must be many families who find that after a marriage is dissolved they have to grin and bear continuing to live in too close proximity to a man who has behaved in such a way that a woman cannot be expected to live with him.

b In many, if not in most cases, as in *Blessing's* case¹, a chance should be given to the husband to reform his ways or to confine himself where possible to a separate part of the house, or to permit the wife to pursue some other remedy, not, unhappily, available to this divorced wife, before the extreme step is taken by the court of ordering him out of his own house forever. I can understand how the judge came to refuse that order in this case; but we have now what he had not, strong evidence from the doctor that this husband's behaviour since the order was refused, coming on top of years of intolerable conduct, is endangering the mental health of this divorced wife and their 14 year old son.

c I therefore agree that we should not be justified in running the risk of there being a real danger to the health of both these people by allowing the present situation to continue for more than another fortnight. For these reasons I would allow the appeal, and I concur in the order proposed.

d **ROSKILL LJ.** I agree that the injunction sought should be granted in the terms proposed by Edmund Davies and Stephenson LJJ. I only add to the two judgments that have been delivered in order to emphasise that the course which this court has taken is a drastic course in a case which I regard as special and indeed extreme. The ex-wife and ex-husband are joint tenants of a Stevenage Corporation house. Therefore the ex-husband, along with the ex-wife, has equal right to occupy that house by reason of his joint tenancy with her. It is that right which this court is now proposing to restrain. As has been said in earlier cases (and as Edmund Davies and Stephenson LJJ have repeated) it is an extremely grave matter to restrain that right, and it can only be in the most exceptional cases that a court is justified in proceeding to such an extreme measure. In *Hall v Hall*² Lord Denning MR said that such an order ought not to be made unless the situation is impossible. It might perhaps also be said that such an order ought not to be made unless a situation was not only impossible but, as in this case, is quite intolerable. But the stage has been reached, I am satisfied on the evidence, of there being a serious risk to the mental health of both the wife and of the son M if the husband is allowed to continue his occupation: and accordingly it is for that reason, on the basis of evidence which was not before the learned county court judge, that I think that this injunction should issue. Were the court not to interfere at this stage, what I regard as both an impossible and intolerable situation would inevitably obtain. It is difficult to see how the situation can be remedied so long as this divorced couple are living under the same roof with the boy. Things, it would seem, cannot get better; they can only get worse; and it is for that reason only, namely the need to protect the wife from the deterioration of her health, the boy from the deterioration of his health and the wife from the deterioration of the boy's health that I think that this is a clear case for the exercise of this drastic remedy. I therefore agree with order proposed.

j *Appeal allowed. Order that the husband vacate, not later than 9th March 1973, the former matrimonial home and that he be thereafter restrained by himself, his servants or agents from entering or attempting to enter the home or the precincts thereof.*

Solicitors: Heckford, Norton & Co, Stevenage (for the wife); Gates, Williams & Co, Luton (for the husband).

Ilyas Khan Esq Barrister.

1 (9th November 1972) unreported

2 [1971] 1 All ER 762 at 764, [1971] 1 WLR 404 at 406

Langston v Amalgamated Union of Engineering Workers and another

NATIONAL INDUSTRIAL RELATIONS COURT

SIR JOHN DONALDSON P, MR R BOYFIELD AND MR C HENNIKER-HEATON

19th 27th FEBRUARY 1973

Industrial relations – Unfair industrial practice – Pressure on employer to infringe rights of workers – Complaint – Who may make complaint – Person against whom action taken – Action deemed to be taken against employer not worker – Threat by union against employers to take industrial action if employee allowed to work – Employee suspended by employers in consequence of threat – Complaint of unfair industrial practice by employee against union – Whether competent for employee to make complaint against union – Industrial Relations Act 1971, ss 33 (3) (a), 101 (1) (c), 105 (1).

An employee made a complaint to the Industrial Court against a trade union claiming that they had been guilty of an unfair industrial practice under ss 33 (3) (a)^a and 101 (1)^b of the Industrial Relations Act 1971. The employee alleged that the union had threatened his employers that, if he were allowed to work, they would organise or procure a strike or industrial action short of a strike. The employee further alleged that in consequence of the threat his employers had been obliged to suspend him on full pay.

Held – The complaint would be dismissed because on the true construction of s 101 (1) (c) of the 1971 Act (as modified by s 105 (1)^c) a complaint of an unfair industrial practice based on s 33 (3) (a) of the 1971 Act could only be made by an employer and not by a worker (see p 435 a to c and p 436 c d and g, post).

Per Curiam. Such a construction does not infringe the guiding principle laid down in s 1 (1) (d)^d of the 1971 Act since, if an employer resists pressure by a union, the worker's rights are not infringed; alternatively, if the employer does not resist the pressure the worker has a remedy against the employer under s 5^e

a Section 33 (3), so far as material, provides: 'It shall be an unfair industrial practice for any person (including any trade union or other organisation of workers or any official of a trade union or of such an organisation) to take any action to which this section applies, if the purpose or principal purpose for which that action is taken is—(a) knowingly to induce an employer, or a person acting on behalf of an employer, to take any action which (whether by virtue of subsection (1) of this section or otherwise) is or would be an unfair industrial practice, in accordance with section 5 (2) or section 22 (1) of this Act, on the part of the employer or of the person acting on the employer's behalf ...'

b Section 101 (1) is set out at p 434 e and f, post

c Section 105, so far as material, is set out at p 434 g to j, post

d Section 1 (1), so far as material, provides: 'The provisions of this Act shall have effect for the purpose of promoting good industrial relations in accordance with the following general principles, that is to say ... (d) the principle of freedom and security for workers, protected by adequate safeguards against unfair industrial practices, whether on the part of employers or others.'

e Section 5, so far as material, provides:

'(1) Every worker shall, as between himself and his employer, have the following rights, that is to say,—(a) the right to be a member of such trade union as he may choose; (b) subject to sections 6 and 17 of this Act, the right, if he so desires, to be a member of no trade union or other organisation of workers or to refuse to be a member of any particular trade union or other organisation of workers; (c) where he is a member of a trade union, the right, at any appropriate time, to take part in the activities of the trade union (including any activities as, or with a view to becoming, an official of the trade union)

(Continued on p 431)

- a or s 22^f, and the employer then has a right to compensation from the union under s 119^g (see p 435 f and g, post).

Notes

- For pressure on an employer to infringe the rights of workers, see Supplement to 38 Halsbury's Laws (3rd Edn) para 677B, 27, and for complaints to the Industrial Court of unfair industrial practices, see *ibid*, para 677F, 4.
- b For the Industrial Relations Act 1971, ss 1, 5, 22, 33, 101, 105, 119, see 41 Halsbury's Statutes (3rd Edn) 2067, 2073, 2088, 2098, 2133, 2136, 2146.

Case referred to in judgment

- Heatons Transport (St Helens) Ltd v Transport and General Workers Union* [1972] 3 All ER 101, [1973] AC 15, [1972] 3 WLR 431, [1972] ICR 308, HL.

Authority also cited

36 Halsbury's Laws of England (3rd Edn) 387, 389, 395, paras 578, 583, 594.

Complaint

- d On 25th January 1973 the complainant, Joseph Langston, gave notice under s 101 of the Industrial Relations Act 1971 to the National Industrial Relations Court of a complaint against K Walton and the Amalgamated Union of Engineering Workers ('the union') of an unfair industrial practice. The complaint alleged that Mr Walton, a works

(Continued from p 430)

- e and the right to seek or accept appointment or election, and (if appointed or elected) to hold office, as such an official.
- '(2) It shall accordingly be an unfair industrial practice for any employer, or for any person acting on behalf of an employer,—(a) to prevent or deter a worker from exercising any of the rights conferred on him by subsection (1) of this section, or (b) to dismiss, penalise or otherwise discriminate against a worker by reason of his exercising any such right, or
- f (c) except in accordance with the next following section, to refuse to engage a worker on the grounds that, at the time when he applied for engagement, he was a member of a trade union or of a particular trade union, or that he was not then a member of a trade union or other organisation of workers or of a particular trade union or other organisation of workers or of any of two or more particular trade unions or other such organisations ...'
- f Section 22, so far as material, provides: '(1) In every employment to which this section applies every employee shall have the right not to be unfairly dismissed by his employer; and accordingly, in any such employment, it shall be an unfair industrial practice for an employer to dismiss an employee unfairly ...'
- g Section 119, so far as material, provides:
- '(1) The provisions of this section shall have effect where, in any proceedings on a complaint under section 106 of this Act, an industrial tribunal or the Industrial Court makes an award of compensation to be paid by an employer in consequence of action taken by the employer or by a person acting on his behalf, and the employer claims—(a) that the action so taken by him or on his behalf was induced by pressure exercised on him by another person (in this section referred to as "the third party") by means of action to which section 33 of this Act applies, and (b) that by virtue of subsection (3) of that section the action taken by the third party, whereby pressure was so exercised on the employer, constituted an unfair industrial practice.
- '(2) In the circumstances specified in the preceding subsection the employer may, in accordance with industrial tribunal regulations or Industrial Court rules, as the case may be, require the third party to be joined as a party to the proceedings; and if in the proceedings the industrial tribunal or the Industrial Court finds that the claim of the employer (as specified in paragraphs (a) and (b) of the preceding subsection) is well founded, then, subject to subsection (4) of this section, the tribunal or Court may, if it considers that it would be just and equitable to do so, make an order requiring the third party to pay to the employer a contribution in respect of the compensation awarded against him ...'
- j

convenor, and others, acting on behalf of the union, had refused the complainant access to his work and had threatened the complainant's employers, Chrysler United Kingdom Ltd ('Chryslers'), with strike action if the complainant were permitted access to his work. Chryslers were added as a party to the proceedings under r 22 of the Industrial Court Rules 1971¹ and, at the request of the court, counsel was instructed by the Treasury Solicitor as *amicus curiae*. The complaint against Mr Walton was subsequently withdrawn. The facts are set out in the judgment of the court. a
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The complainant appeared in person.

R J Harvey QC and A E C Thompson for Chryslers.

Peter Scott as *amicus curiae*.

The union did not appear and were not represented.

Cur adv vult c

27th February. **SIR JOHN DONALDSON P** read the following judgment of the court. In this matter we have had to consider a preliminary question of law of considerable general importance and no little difficulty. That question is whether, on the true construction of ss 101 and 105 of the Industrial Relations Act 1971, a worker can make a complaint concerning an unfair industrial practice under s 33 (3) (a) of the 1971 Act. d

The background to the complaint appears from a decision of the industrial tribunal sitting in Birmingham which was given on 28th December 1972. The complainant was for many years a member of the union or of its predecessor. However, in recent years he has become disenchanted with the union and this disenchantment has no doubt been reciprocated. At all material times he was employed as a welder, first by Rootes Ltd and then by his present employers, Chrysler United Kingdom Ltd. According to the evidence which he gave to the tribunal, union officials were in the habit of holding card checks with a view to ensuring that no one other than a union member was employed in the factory. The complainant objected to this as being an attempt to enforce an unlawful closed shop. e

In July 1972 the complainant issued proceedings before an industrial tribunal seeking a determination that he had a right to choose not to be a member of a trade union. The respondents were Chryslers and 'all the trades unionists and the management executives' employed in the factory. The proceedings were abandoned because of difficulties in identifying and serving the respondents other than Chryslers and because Chryslers had not challenged his right not to belong to a union. Further proceedings were begun in August 1972, but again there were difficulties in the way of identifying the intended respondents. f
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At about this time the complainant seems to have resigned from the union and in October 1972 he sought a determination from the Birmingham industrial tribunal that he had a right not to belong to the union who were named and served as respondents. The union did not appear and on 28th December 1972 the complainant obtained the determination which he had been seeking. It is a matter of common industrial knowledge that news of this decision was greeted with something less than enthusiasm by some of the complainant's fellow workers. h

In other cases we have expressed our regret that the union's policy of not appearing before industrial tribunals or this court effectively prevents both from seeking an agreed settlement by conciliation. So far as this court is concerned conciliation is a major role. Of the 30 complaints of alleged unfair industrial practice which were disposed of by the end of last month, 20 were withdrawn following a settlement and only ten had to be decided by the court. Of the further 17 cases which were then outstanding, most stood adjourned with a view to the achievement of an agreed solution. i

a It is particularly regrettable that the union did not appear before the Birmingham tribunal or appeal against its decision. Had it done so, the determination would probably never have been made or, if made, would have been set aside on appeal for lack of jurisdiction and some industrial unrest might have been avoided. The right to choose whether or not to belong to a trade union (whether or not registered) is conferred by s 5 (1) of the Industrial Relations Act 1971, but—and this point seems b to have escaped the notice of the tribunal—it is a right which exists only as between a worker and his employer. Section 5 (1) declares the basic right and s 5 (2) proscribes certain specific actions in breach of that right as unfair industrial practices. These are all actions by an employer and not by a union. Consistently with this fact, when one comes to the enforcement provisions, s 106 entitles a tribunal, on a complaint of an unfair industrial practice under s 5 of the 1971 Act, to determine the rights of c the complainant and of the employer in relation to the action specified in the complaint. There is no mention of a trade union. Neither in that section nor in any other section is a tribunal empowered to determine as between a worker and a union that the worker need not join that union. The determination of the tribunal seems to us to have been made without jurisdiction but the union must accept some responsibility for this having occurred.

d The complainant has now filed a complaint in this court alleging that the union and Mr Walton (the works convenor) have threatened to take industrial action against Chryslers if he is allowed to come to the factory to work. As a result, Chryslers have decided that their interests would be better served if for the time being the complainant were suspended from duty on full pay. The complainant regards this as an infringement of his right to earn his living and strongly resents being put in a position which he regards as the equivalent of living on charity.

e Only Mr Walton and the union were named as respondents to the complaint and the complainant made it clear that he does not criticise or complain against Chryslers. However, it seemed to the court that Chryslers were a proper party to the proceedings as they were deeply involved in the industrial relations situation which had given rise to the complaint and would be in a position to assist were f conciliation possible. Chryslers were accordingly joined as additional respondents against whom no relief was claimed pursuant to r 22 of the Industrial Court Rules 1971¹. Due to the absence of the union, conciliation has been impossible, but Chryslers have appeared and been represented by counsel. By their answer Chryslers contended, inter alia, that the complainant was not a competent person to bring the complaint and we are greatly indebted to them and to counsel for Chryslers for g putting forward legal argument in support of this contention. In the light of the difficult issues of law which were obviously involved and their importance in the public interest, the court asked the Treasury Solicitor to instruct counsel to appear and argue the case for workers in the complainant's position being competent to complain. As a result we have had the advantage of argument by counsel, for which we are equally indebted.

h In the course of the meeting for directions, we were told by the complainant that Mr Walton had at all times been acting on behalf of the union in respect of the matters of which complaint is made. The complainant accepted the court's view that in such circumstances, and in the light of the opinion of the House of Lords in *Heatons Transport (St Helens) Ltd v Transport and General Workers Union*² proceedings against Mr Walton as an individual were inappropriate and he agreed to withdraw them. Accordingly his complaint is now against the union alone.

i The basic assumptions of fact which have been made for the purposes of this argument are that the union has uttered a threat to Chryslers that in the event of Chryslers permitting the complainant to come to work in the factory the union would organise

1 SI 1971 No 1777

2 [1972] 3 All ER 101 at 108, [1973] AC 15 at 98

or procure a strike or industrial action short of a strike and that in consequence of that threat Chryslers have suspended the complainant on full pay. But we must emphasise that these are assumptions only. Whether they are correct in fact can only be determined if and after we have determined that the Industrial Relations Act 1971 permits the complainant to make this complaint. a

On these assumptions the complainant would say that as a matter of law Chryslers have committed an unfair industrial practice contrary to s 5 (2) (b) of the 1971 Act by discriminating against a worker by reason of his having exercised his right as between them and him to refuse to be a member of any particular trade union or other organisation of workers. To that complaint it would be no defence that Chryslers were acting under pressure from the union (see s 33 (1) of the 1971 Act). But, as we have said, the complainant makes no complaint against Chryslers and if ever he does so it will be for an industrial tribunal and not for this court to determine his complaint, subject only to the possibility of the complaint being transferred to this court under s 111 of the 1971 Act. b

Turning now to the position of the union, on these assumptions it is clear that the union has committed an unfair industrial practice contrary to s 33 (3) (a) of the 1971 Act, namely threatening to organise or procure a strike or industrial action short of a strike the purpose of this action being knowingly to induce Chryslers to take action which would be an unfair industrial practice in accordance with s 5 (2) of the 1971 Act, that action being the dismissal of, or discrimination against, the complainant for not being a member of the union. c

This brings us to the problem of who can complain of this unfair industrial practice. The general right to complain to this court of unfair industrial practices is governed by s 101 (1) of the 1971 Act which is in these terms: d

'A complaint may be presented to the Industrial Court by any person (in this section referred to as "the complainant") that—(a) action specified in the complaint has been taken by a person so specified (in this section referred to as "the respondent"); (b) in accordance with any provision of this Act, other than sections 5 and 22, that action constituted an unfair industrial practice on the part of the respondent; and (c) the complainant is the person against whom the action was taken.' e

This right is, however, modified in relation to complaints under s 33 (3) (a), the section on which the complainant relies, and under s 98. This modification is contained in s 105 (1) and (2) of the 1971 Act which reads: f

'(1) For the purposes of the application of section 101 (1) (c) of this Act to a complaint that action specified in the complaint constituted an unfair industrial practice in accordance with section 33 (3) (a) of this Act, the reference in section 101 (1) (c) to the person against whom the action was taken shall be construed as a reference to the employer and not to the worker. g

'(2) For the purposes of the application of section 101 (1) (c) of this Act to a complaint that action specified in the complaint constituted an unfair industrial practice in accordance with section 98 of this Act, the reference in section 101 (1) (c) to the person against whom the action was taken shall be construed as a reference to either of the following, that is to say—(a) the person who was induced to break the contract to which the complaint relates or who was prevented from performing that contract, and (b) the party to the industrial dispute in question with whom that contract was made.' h

It is common ground that there can be difficulties in deciding whether any particular complainant is the person against whom the action was taken within the meaning of s 101 (1) (c). For example, is a commuter or a gas consumer in this category in relation to industrial action taken by unions in the railway or gas industries? j

a It is further common ground that sub-ss (1) and (2) of s 105 are intended to remove these difficulties in the context of complaints under ss 33 (3) (a) and 98. Counsel for Chryslers submits that s 105 (1) is intended to modify s 101 (1) (c) so that in effect it reads 'the complainant is the employer and not the worker' and accordingly such complaint can only be brought by the employer concerned. Counsel for the Treasury Solicitor, on the other hand, submits that s 101 (1) (c) is to be read in light of s 105 (1) b as 'the employer and not the worker is the person against whom the action was taken', thus leaving it open to anyone to complain, although the court would no doubt refuse relief to a complainant who had no interest in the matter on the grounds that to do otherwise would be neither just nor equitable (see s 101 (2)).

c We prefer the construction for which counsel for Chryslers contends. Guiding principle (d) in s 1 of the 1971 Act is that of freedom and security for workers, protected by adequate safeguards against unfair industrial practices, whether on the part of employers or others. 'Others' in this context clearly includes trade unions. This protection takes two principal forms. Under ss 5 (2) (b) and 22 (1) the worker gains protection from dismissal, penalisation or discrimination by his present employer for reasons or in circumstances which would infringe the rights conferred on him by the 1971 Act. In addition, ss 5 (2) (c) and 7 extends this protection so far as relevant to cover discriminatory actions by a prospective employer. So far as trade unions d are concerned, the worker is protected by ss 65 and 66 of the 1971 Act if he is a member. If he is not a member of the union concerned, he is only at risk if the union can induce the employer to take action against him or can procure that his fellow workers do so. In the case of an action by the employer, the employee is effectively safeguarded by ss 5 and 22. The case of direct action by fellow workers is much e more difficult and Parliament may well not have intended the 1971 Act to provide a remedy. However, in certain circumstances the criminal law and the law of tort will provide the worker with protection by means of action in the traditional courts. Furthermore, industrial action of this kind will usually involve indirect action against the employer and give rise to an unfair industrial practice.

f Accordingly, we do not consider that a construction of s 105 (1) which denies the complainant a direct remedy against the union infringes the guiding principle. If the employer resists the pressure by the union, the worker's rights are not infringed. If the employer does not resist the pressure, the worker has a remedy against the employer under ss 5 or 22 and the employer has a right over against the union under s 119. It is true that the compensation which can be awarded to the worker is limited by s 118. Nevertheless, the remedy of compensation is not so inadequate as to force us to conclude from guiding principle (d) in s 1 of the 1971 Act that some additional g remedy must have been provided.

h Section 33 itself is *prima facie* solely concerned with pressure on the employer. Thus sub-s (1) provides that such pressure shall afford the employer no defence to a complaint by a worker of action induced by that pressure and sub-s (3) declares the pressure to be an unfair industrial practice. This latter subsection enables the employer to take action against the union in circumstances in which he has resisted the pressure and so, not having himself committed an unfair industrial practice, has no right to claim a contribution from the union under s 119.

i Accordingly, s 33 does not disclose any reason why an individual worker has any need to be able to proceed directly against the union in circumstances such as those with which we are concerned. It is true that a worker has a direct right of action against a union under s 101 and paras (b) and (c) of s 33 (3), but there is a logical distinction between these paragraphs and para (a) in that they refer back to s 7 (pre-entry closed shop) in respect of which the worker has an express right to seek a declaratory judgment under s 7 (3). Furthermore, whatever the reason may be, Parliament has itself singled out para (a) of s 33 (3) for special treatment in s 105 (1).

In considering the construction of s 105 (1), it is clearly useful to look at s 105 (2) which modifies s 101 (1) (c) in relation to complaints under s 98 using a formula

similar to that used in s 105 (1) and giving rise to a like problem. Section 98 is concerned with industrial action undertaken with a view to procuring a breach of a contract between a party to an industrial dispute and a third party. Is the subsection intended to make s 101 (1) (c) in effect read as 'the complainant is the party to the industrial dispute or is the third party' or as 'the party to the industrial dispute or the third party is the person against whom the action was taken'? It may be arguable that the third party is not the person against whom the action is really being taken and the former construction resolves this doubt in his favour. The latter construction merely has the effect of allowing anyone to make a complaint, for it is inherent in a s 98 situation that action is being taken against the party to the industrial dispute and/or the third party and this condition will therefore always be satisfied. The only effect of the amendment would be to remove the requirement that the complainant is the person against whom the action is being taken. a

Applying a similar approach to s 105 (1), the intention of Parliament must have been that, in relation to a s 33 (3) (a) complaint, s 101 (1) (c) shall be read as 'the complainant is the employer and not the worker'. No doubt it may be objected that if this is what Parliament intended, the Act could have said just that in s 105 (1). When this point was put to counsel for Chryslers by the court he replied that 'one cannot but be aware of the tautological beauties of some of the sections of the Act'. This was, of course, a spontaneous reaction and may not have been wholly fair. However, those members of the court who work with the Act day by day feel at times that the undoubted technical brilliance of the exposition of Parliament's wishes owes little to simplicity and something to the art of the anagram. In the circumstances it is not a weighty objection to a particular construction that it could have been stated more simply or directly. b

Quite apart from the argument based on similarity of approach to the adjacent subsection of s 105, a construction which modified s 101 (1) (c) to read 'the employer and not the worker is the person against whom the action was taken' would be surprising on at least two grounds. First, as has already been mentioned, it would open the way to any officious intermeddler to file a complaint. Secondly, the condition would always or never be satisfied in the context of a s 33 (3) (a) complaint. It would always be satisfied if all that had to be proved was that the action was taken against the employer. It would never be satisfied if on the true construction of the modified provision the complainant had to prove that the action was being taken against the employer but not against the worker. c

At the outset of this judgment we said that the point was of no little difficulty. We do not resile from that opinion, but, for the reasons which we have given, we have no doubt that Parliament intended, and the Act on its true construction provides, that complaints based on s 33 (3) (a) can only be made by the employer concerned. The complaint must therefore be dismissed. The remedy for any wrong which the complainant suffers must be against his employer. d

In conclusion, we should like to draw attention to the underlying industrial relations problem. Situations can arise irrespective of issues as to a closed shop in which personality problems arise between an individual worker and the group with which he works. The remedy lies not in litigation, but in good personnel management by the fitting of the odd shaped peg into the nearest approach to a similarly odd shaped hole which may be available—and encouragement by both management and unions of the traditional tolerance of the British worker for the more or less harmless eccentric. But situations can also arise in which members and officials of some trade unions feel passionately and with some reason that the non-members who benefit from the advantages obtained by the unions should also bear their share of the burden. The 1971 Act recognises this problem and provides a solution in the form of the agency shop agreement under which men in the complainant's position would be required to pay appropriate contributions to the union unless allowed on conscientious grounds to pay similar amounts to charity. The obstacle e

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- a to such an agreement between Chryslers and the union is, we assume, the fact that the union would have to register under the 1971 Act. Unless and until the union enters into such an agreement either following registration or an amendment of the Act rendering registration unnecessary for this purpose, problems of this nature will always be liable to arise.

Complaint dismissed.

- b Solicitors: *A B Jackson* (for Chryslers); *Treasury Solicitor*.

Gordon H Scott Esq Barrister

c Law v Jones

COURT OF APPEAL, CIVIL DIVISION
RUSSELL, BUCKLEY AND ORR LJJ
1ST, 2ND MARCH, 10TH APRIL 1973

- d *Sale of land – Contract – Memorandum – Circumstances in which memorandum must evidence existence of contract – Effect of qualification ‘subject to contract’ – Waiver of qualification – Waiver by subsequent oral agreement – Solicitors’ letters – Oral contract concluded by parties prior to solicitors’ correspondence – Vendor’s solicitors’ letter referring to ‘proposed purchase . . . subject to contract’ – Vendor’s solicitors forwarding draft contract – Parties subsequently entering into new oral agreement based on increased purchase price – Vendor’s solicitors’ letter acknowledging ‘increase in purchase price has been mutually agreed’ – Letter not expressed to be subject to contract – Whether qualification in earlier letter waived by new oral agreement – Whether subsequent letter read with earlier correspondence and draft contract constituting a note or memorandum of new agreement – Law of Property Act 1925, s 40 (1).*

- f By an oral agreement made on 17th February 1972 the defendant agreed to sell, and the plaintiff to buy, a freehold property for £6,500. There was no intention that the agreement should be subject to contract. On 18th February the defendant’s solicitors wrote to the plaintiff’s solicitors referring to the plaintiff’s ‘proposed purchase of the . . . property for £6,500-00 subject to Contract’ and stating that they would obtain the title deeds and submit a draft contract as soon as possible. On 25th February they wrote again referring to the earlier letter and enclosing the draft contract. On 13th March the parties agreed on an increased price of £7,000. Again the agreement was oral but it was intended to be binding; the defendant assured the plaintiff that he would not go back on his word. On 17th March the defendant’s solicitors wrote a letter to the plaintiff’s solicitors in which they said: ‘We understand that an increase in the consideration has been mutually agreed and we shall therefore be obliged if you would amend the Contract in your possession to read a purchase price of £7,000-00.’ Subsequently a date for completion was agreed and on that date the plaintiff’s solicitors forwarded the purchaser’s part of the contract signed by the plaintiff. The defendant, however, believing that he could obtain a better price elsewhere, refused to complete. In an action for specific performance the defendant claimed that the contract of 13th March was unenforceable on the ground
- j that the relevant correspondence and the draft contract were incapable of constituting a ‘note or memorandum’ of the contract for the purposes of s 40 (1)^a of the

- a Section 40 (1) provides: ‘No action may be brought upon any contract for the sale or other disposition of land or any interest in land, unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing, and signed by the party to be charged or by some other person thereunto by him lawfully authorised.’

Law of Property Act 1925 since they did not look back to a concluded oral contract, but related exclusively to a different written contract to be concluded in the future. a

Held (Russell LJ dissenting)—The contract was enforceable for the following reasons—

(i) Where an oral contract for the sale of land had been proved, it was sufficient, for the purposes of s 40 (1) if the note or memorandum recorded the terms agreed on; it was not necessary that the note or memorandum should itself acknowledge the existence of the contract unless, in the absence of such an acknowledgment, the document would be read as denying the existence of the contract (see p 444 h, p 445 e and f and p 447 e and f, post). b

(ii) Where a document contained the words 'subject to contract', it was open to the parties subsequently to waive that stipulation orally, thus creating a contract. In such a case the document might thereafter serve as a sufficient note or memorandum if the waiver could be established by oral evidence (see p 445 g to j and p 447 e g and h, post). c

(iii) Even if the insertion of the words 'subject to contract' by the defendant's solicitors prevented the letter of 17th February and the subsequent correspondence up to 13th March from constituting a note or memorandum, the letter of 17th March was a written acknowledgment signed by the defendant's solicitor, acting within his authority, that the parties had entered into a new contract on the terms of the draft contract save for the alteration of the purchase price. That acknowledgment was not expressed to be 'subject to contract' and any effect which that qualification in the letter of 17th February had had on the earlier correspondence was nullified by the firm oral agreement between the parties on 13th March. Since the terms of the oral agreement were to be found incorporated in the letter of 17th March read with the earlier correspondence, and the draft contract, with which it was linked, those documents contained a note or memorandum of the oral agreement of 13th March within the meaning of s 40 (1) (see p 443 j to p 444 b, p 446 c to f and p 447 e and j to p 448 b, post). d

Griffiths v Young [1970] 3 All ER 601 applied. e

Notes f

For the need for a note or memorandum in writing if action is to be brought on a contract of sale of land, see 34 Halsbury's Laws (3rd Edn) 207-210, paras 346-348, and for cases on the subject, see 40 Digest (Repl) 21-38, 82-205.

For the Law of Property Act 1925, s 40, see 27 Halsbury's Statutes (3rd Edn) 399.

Cases referred to in judgments g

Chinnock v Marchioness of Ely (1865) 4 De G J & Sm 638, 6 New Rep 1, 12 LT 251, 29 JP 279, 11 Jur NS 329, 46 ER 1066, LC, 12 Digest (Reissue) 167, 982.

Daniels v Trefusis [1914] 1 Ch 788, 83 LJCh 579, 109 LT 922, 12 Digest (Reissue) 198, 1222.

Griffiths v Young [1970] 3 All ER 601, [1970] Ch 675, [1970] 3 WLR 246, 21 P & CR 770, CA, Digest (Cont Vol C) 862, 98a. h

Griffiths (John) Cycle Corpn Ltd v Humber & Co Ltd [1899] 2 QB 414, 68 LJQB 959, 81 LT 310, CA; *revsd on other grounds*, sub nom *Humber & Co v Griffiths (John) Cycle Co* (1901) 85 LT 141, HL, 12 Digest (Reissue) 199, 1233.

Lever v Koffler [1901] 1 Ch 543, 70 LJCh 395, 84 LT 584, 12 Digest (Reissue) 191, 1148.

Munday v Asprey (1880) 13 Ch D 855, 49 LJCh 216, 42 LT 143, 12 Digest (Reissue) 164, 958. j

New Eberhart Co, Re, ex parte Menzies (1889) 43 Ch D 118, 59 LJCh 73, 62 LT 301, 1 Meg 441, CA, 9 Digest (Repl) 318, 1990.

Parker v Clark [1960] 1 All ER 93, [1960] 1 WLR 286, Digest (Cont Vol A) 269, 7b.

Reuss v Picksley (1866) LR 1 Exch 342, 4 H & C 588, 35 LJ Ex 218, 15 LT 25, 12 Jur NS 628, Ex Ch, 12 Digest (Reissue) 193, 1173.

- a* *Rossiter v Miller* (1878) 3 App Cas 1124, [1874-80] All ER Rep 465, 48 LJCh 10, 39 LT 173, 42 JP 804, HL, 12 Digest (Reissue) 108, 575.
Thirkell v Cambi [1919] 2 KB 590, 89 LJKB 1, 121 LT 532, 24 Com Cas 285, CA, 12 Digest (Reissue) 170, 1005.
Warner v Willington (1856) 3 Drew 523, 251 LJCh 662, 27 LTOS 194, 20 JP 774, 2 Jur NS 433, 61 ER 1002, 12 Digest (Reissue) 183, 1091.

b **Appeal**

- By a writ issued on 25th April 1972 the plaintiff, Joseph Law, brought an action against the defendant, Stuart Martin Jones, claiming (i) an injunction restraining the defendant from selling or otherwise disposing of the defendant's freehold dwelling-house known as Dingleberry Cottage, Yarningale Common, Claverdon, Warwickshire ('the cottage') except to the plaintiff, (ii) specific performance of an agreement by the defendant to sell the cottage to the plaintiff and (iii) damages for breach of contract. By his defence the defendant denied that there existed a binding contract to sell the cottage to the plaintiff and, in the alternative, relied on the provisions of s 40 of the Law of Property Act 1925 and denied that letters, correspondence and a draft conveyance which had passed between the defendant's and plaintiff's solicitors or any of them constituted a note or memorandum of the alleged contract. The defendant counterclaimed for a declaration that there was no binding contract between the plaintiff and the defendant for the sale of the cottage and an order that the registration of a class C (iv) land charge in respect of an estate contract between the plaintiff and the defendant which the plaintiff had caused to be registered in the register of land charges be vacated. On 27th July 1972 Ungood-Thomas J granted the plaintiff the decree of specific performance sought and dismissed the defendant's counterclaim. The defendant appealed. The facts are set out in the judgment of Russell LJ.

A J Balcombe QC and *D Gidley Scott* for the defendant.
D J Nicholls for the plaintiff.

Cur adv vult

- f* 10th April. The following judgments were read.

- g* **RUSSELL LJ.** We are concerned in this appeal from the late Ungood-Thomas J with the question whether there is a sufficient note or memorandum under s 40 of the Law of Property Act 1925 of an oral contract for the sale by the defendant-appellant to the plaintiff of a freehold property, Dingleberry Cottage. The judge found on the evidence that there was an open oral contract for sale and purchase at a price of £7,000 made on 13th March 1972 and would, had it been relevant, have been prepared to hold that this was an agreed variation of price under an earlier oral open contract for £6,500 in February 1972. Those findings are not challenged in this court.

- h* Section 40 provides that no action such as the present one, which is a purchaser's action for specific performance of an oral contract for the sale of land, shall be brought unless there is a note or memorandum in writing of the contract (the word used is 'thereof') signed by the defendant or his agent thereunto authorised.

- j* Following on the oral contract of February 1972, solicitors for the defendant on 18th February 1972 wrote to solicitors for the plaintiff in these terms:

'Dear Sirs, *Dingleberry Cottage, Claverdon* We understand you act for Mr J. Law of Westgrove House, Stratford Road, Alcester in connection with his proposed purchase of the above property for £6,500-00 subject to Contract. We have been instructed on behalf of the Vendor and we are obtaining his title deeds and shall submit a Contract to you as soon as possible. Yours faithfully...'

It is to be particularly noted that this letter refers to a 'proposed purchase', states that it is 'subject to Contract', and states that a contract will be submitted, meaning of course a proposed form or draft of a contract for the sale and purchase of the property. We know as a fact that there was, in the judge's view, already in existence an oral contract, subject to the impact of s 40. But the language of this letter that I have stressed plainly negatives the existence of a contract. It is as if it had said 'Our clients are in negotiation for the purchase' etc, etc. a

On 25th February the defendant's solicitors wrote further in the following terms to the plaintiff's solicitors: b

'Dear Sirs, *Dingleberry Cottage* Further to our letter of the 18th February we herewith enclose Contract in this matter in duplicate for your approval. Please also find two copies of a rough plan which you may find useful when making your Local Searches. We now look forward to hearing from you at your earliest convenience.' c

The draft contract enclosed of course named the parties and the property and stated the price of £6,500. It incorporated certain general conditions of sale and made some provision for title. The plaintiff's solicitors on 7th March wrote acknowledging the two letters and the draft contract and sent what were described as 'preliminary enquiries', appropriate of course to a situation in which no contract had been reached. On 10th March the defendant's solicitors acknowledged the letter of 7th March, and on 17th March wrote as follows: d

'Dear Sirs, *Dingleberry Cottage, Claverdon* Further to our letter of the 10th March we herewith enclose our replies to your preliminary enquiries. We understand that an increase in the consideration has been mutually agreed and we shall therefore be obliged if you would amend the Contract in your possession to read a purchase price of £7,000.00.' e

In my judgment, the language of the writings prior to the letter dated 17th March could not constitute a sufficient memorandum of the oral contract of February at the price of £6,500 because of the language of the first letter in the chain dated 18th February. I am unable to conclude that the language of the letter dated 17th March, written as part of a chain of writings dependent on the first letter dated 18th February, and recording that the parties have agreed on a variation in price which is to be inserted in the draft contract, can be taken as indicating anything more than an agreed variation of a term in a contract still in the course of negotiation. f

There are many phrases in judgments which, taken by themselves, suggest that all that is needed for a memorandum under the section is a signed document which contains all the terms that were in fact comprised in the oral contract: and of course the writings in this case do that. For myself, I think there is much to be said for the proposition that the memorandum after an oral contract should positively point in some way to the pre-existence of an agreement or concluded bargain. Section 40 says that the memorandum must be of the contract ('thereof'). Against this it is pointed out that it is well recognised that a written offer before any contract can suffice for the section if orally accepted: this shows, it is said, that a memorandum need not point to a contract. This well-recognised legal proposition is I think to be explained on the ground that the writing in terms envisages a contract, is a proposal of an agreement, is regarded as continuously in existence, and is ultimately simultaneous with the formation of the contract: see *Warner v Willington*¹ and *Reuss v Picksley*². I cannot think that in such cases the court would find a memorandum if the letter had not been in form a firm offer or proposal, but for example 'I might consider selling Blackacre to you for £10,000', an oral contract following being constituted by a firm oral offer and acceptance. Accordingly, I do not think that it follows that g
h
j

¹ (1856) 3 Drew 523 at 532

² (1866) LR 1 Exch 342 at 350

a a post-oral-contract memorandum need not point positively in some way to the pre-existence of a contract: and I note that Fry J in *Re New Eberhart Co, ex parte Menzies*¹ thought that this use of a written offer as a memorandum of the contract constituted by the acceptance rather stretched the section.

b But assuming that it is not necessary that a post-oral-contract memorandum should point positively in some way to the existence of a contract, we are here concerned with documents of which the language negatives such a pre-existing contract. Now it is quite clear in law that a denial of the alleged contract, though coupled with a rehearsal of the terms that in fact were comprised in it, is not a memorandum under s 40. Suppose a letter, from one party to an oral contract to the other, asserting that an oral contract had been made between them for sale and purchase of Blackacre for £10,000: suppose the letter in answer to be 'I agree that in the course of negotiation we had arrived at a figure of £10,000, but the whole matter is still in the course of negotiation; we have not finally agreed'. That would not be a sufficient memorandum. Why? Because, although the answer states what were in fact the terms of the oral contract, it points away from any contract, even though it does so falsely.

d What then of this case? I cannot see that it can be said that the documents to which I have referred point any less away from the existence of any contract. I conclude that for this reason the documents do not constitute a memorandum under the section. As I have indicated already, it may be that such a memorandum should point positively in some way to an existing contract: but it is not necessary to decide that point.

e I should mention a particular point put in argument which I find of persuasive force, namely the possible outcome of a decision in favour of the plaintiff. A vendor's solicitor, on receiving his instructions, must look out for the risk that it would be held that his client has incautiously entered into an open contract. If he in those circumstances acts in the perfectly normal way, as did the defendant's solicitor, then if the argument for the plaintiff is right, he commits his client by signing a sufficient memorandum. If this were so, he must communicate with the other solicitor by telephone in the first instance, and subsequently by forwarding documents containing and accompanied by nothing which could be construed as a signature, warning in each case by telephone that when he receives by post, for example, a draft contract for the proposed sale from an undisclosed source it will be from him. If a decision in favour of the plaintiff would lead to this kind of farcical conduct, there would be in my view something wrong with the decision.

g I add that argument for the plaintiff was based on the decision of this court in *Griffiths v Young*². In that case the plaintiff purchaser's solicitor wrote on 2nd May to the defendant's solicitor setting out terms agreed between the clients, stating them to be subject to contract and seeking a draft contract. On 3rd May it was proved that it was orally agreed by the clients and solicitors that the contract should be absolute. On 3rd May the defendant's solicitor thereafter wrote referring to the letter of 2nd May and confirming his instructions to sell. The letter of 3rd May incorporating by reference the letter of 2nd May was held to be a sufficient memorandum by the defendant notwithstanding the words 'subject to contract' in the 2nd May letter. The basis of the decision was expressed to be that 'subject to contract' was to be regarded as merely a suspensive condition which had been later orally agreed to be waived and was therefore to be treated as not incorporated in the letter of 3rd May. h It does not in my judgment follow from that decision that we have in the present case a sufficient memorandum. On the contrary, I think that the particular grounds which this court found necessary for that decision demonstrate that it does not assist the plaintiff in the present case. j

1 (1889) 43 Ch D 118

2 [1970] 3 All ER 601, [1970] Ch 675

I have been unwilling to decide this appeal in favour of the defendant. He is a man who was worried lest he had paid his fiancée too much for her interest in the property: who agreed firmly to sell to the plaintiff at £6,500: who assured the plaintiff, when he jumped him up to £7,000, that his word was his bond, that the plaintiff could rely on it and go ahead with his own arrangements on the faith of it: and who then backed out in a letter saying that he would never be able to forgive himself if he sold to the plaintiff for less than he could get elsewhere. But there is the statute, passed and maintained for good reasons: and distaste must not admit unsound law. a
b

I would therefore allow the appeal and dismiss the action.

BUCKLEY LJ. Ungood-Thomas J found as a fact that the plaintiff and the defendant entered into an oral contract on 17th February 1972 for the sale by the defendant to the plaintiff of Dingleberry Cottage at £6,500. There was then a concluded contract, albeit an unenforceable one because unwritten. There was, as the learned judge found, no intention that the accord between the parties should be subject to contract. They shook hands to indicate that a deal had been made. The parties then proceeded to instruct their solicitors. The solicitors on 18th February 1972 wrote letters which crossed in the post. The defendant vendor's solicitors' letter was in the terms that Russell LJ has already read. c
d

Since we are concerned in this case to discover whether a written note or memorandum of a contract exists satisfying the requirements of the Law of Property Act 1925, s 40, it is relevant to notice that this letter (a) refers to a 'proposed purchase', (b) contains the words 'subject to Contract', (c) does not identify the vendor, and (d) declares an intention to submit a contract. The judge found that there was no indication in the evidence that the defendant instructed his solicitors to write 'subject to Contract'. They put in these words on their own initiative. He found that the plaintiff certainly did not instruct his solicitors that the deal was subject to contract. e

On 25th February the defendant's solicitors, referring to their letter of 18th February, sent a draft contract to the plaintiff's solicitors for approval. On 7th March the plaintiff's solicitors acknowledged receipt of the draft contract and forwarded 'preliminary enquiries'. The draft contract supplied the identity of the vendor. The other essential terms of the contract—the identity of the property and of the purchaser and the price—as incorporated in the draft contract were naturally in accordance with the defendant's solicitors' letter of 18th February. f

The next event was the defendant's unattractive attempt on 10th March to extract an additional £1,000 from the plaintiff notwithstanding their previous bargain. On 13th March the parties agreed on an increased price of £7,000. Once again the agreement was oral, but that it was intended to be binding admits of no doubt whatever. The defendant assured the plaintiff that he would not go back on his word; that it was his bond; and that the house was then the plaintiff's. The judge accepted the plaintiff's evidence about this. On 17th March the defendant's solicitors wrote to the plaintiff's solicitors in terms which again Russell LJ has already read. g

By solicitors' letters of 24th and 27th March a completion date of 21st April was agreed. On the latter date the plaintiff's solicitors forwarded the purchaser's part of the contract signed by the plaintiff. By his letter of 13th April, which I can only describe as deplorable, the defendant for the second time attempted to evade obligations into which he had entered, on the second occasion at any rate, in the most explicit terms. The question is whether the law protects him in so doing, and this depends on the effect of s 40 in this case. h
i

Do the documents to which I have referred contain a note or memorandum of the contract sued on, that is, of the contract for sale at £7,000 agreed on on 13th March? At the trial counsel for the defendant made a concession which possibly led to some misunderstanding. He conceded that the documents contained all the necessary elements of a note or memorandum in writing of the contract to satisfy the

a section. The learned judge, not surprisingly, took this to mean that the only outstanding question was whether the defendant's solicitors had authority to sign the letters of 18th and 25th February and 17th March. He concluded, for reasons from which I see no reason to differ, that the defendant's solicitors had such authority. But junior counsel who appeared for the defendant in the court below tells us that he did not intend to make so wide a concession and did not make it. He conceded that the documents contained particulars of all the essential terms of the contract without admitting that the documents were of a character capable of constituting a note or memorandum of the contract for the purposes of the section, not on the ground of lack of authority but because they are documents, it is said, which do not look back to a concluded oral contract, but relate exclusively to a different written contract to be concluded in the future. This contention has been thoroughly canvassed in this court, and I think we are bound to deal with it, whatever concession counsel for the defendant may have been understood to have made at the trial.

b Oral agreements for the sale of land are not common, but they are certainly not unknown. Where laymen have entered into such an agreement, it would, I think, be natural for them to expect that, when the matter had been put into the hands of their legal advisers, the contract would be given a more formal written embodiment. This is what appears to have happened in the present case. The defendant in cross-examination said that what he intended his solicitor to do was to implement the contract. Presumably his instructions to his solicitor were to that effect. It is well settled that, where there has been a definite acceptance of an offer, the fact that the parties intend that it shall be put into a more formal shape does not relieve either party from his liability under the contract (see Halsbury's Laws of England¹ and cases there cited). As Lord Blackburn observed in *Rossiter v Miller*²:

e 'I think the decisions settle that it is a question of construction whether the parties finally agreed to be bound by the terms, though they were subsequently to have a formal agreement drawn up.'

f Where, as in the present case, the agreement was oral, it is a question of finding the facts on the evidence, rather than one of construction. Such a case is entirely different from an agreement 'subject to contract', where the use of that expression indicates that the parties do not intend to be immediately bound, or, to put it into Latin, that they have no present animus contrahendi.

g When laymen enter into an oral contract for the sale and purchase of land, intending that a more formal written contract shall follow, it is very probable that that written contract, as subsequently agreed, will contain terms as to such matters as root of title, completion date, requisitions and so forth, which will vary to a greater or less extent from the effect of the open oral contract. In such a case the written contract, when exchanged, will supersede and discharge the oral contract. It will technically be a new contract. But, unless the parties have agreed to vary the essential terms of the oral contract, those terms are bound to be found in the written contract. Where a solicitor is instructed to prepare a formal written contract to give effect to a precedent oral contract, the terms of that oral contract must be found incorporated in the written contract. The solicitor would not otherwise have obeyed his instructions.

h Accordingly, in the present case the essential terms of the oral contract of 13th March—that is to say, the identity of the parties, the identity of the property and the price to be paid—are all to be found in the defendant's solicitors' letter of 17th March read in conjunction with the draft contract, which is linked with that letter by a letter of the defendant's solicitor dated 10th March acknowledging receipt of the preliminary enquiries, which itself refers back to a letter of the plaintiff's solicitor

i 3rd Edn, vol 8, p 76, para 130

2 (1878) 3 App Cas 1124 at 1152, [1874-80] All ER Rep 465 at 475

dated 7th March, which acknowledged receipt of the draft contract. In this way it is possible to find in these documents material which can be said to constitute a note or memorandum of the oral contract of 13th March without going back to the letter of 18th February, which related, not to the agreement sued on, but to an earlier transaction which was superseded by the agreement of 13th March. But one should not, I think, stop reading the correspondence at that point, for these documents should be read in the context of the earlier correspondence out of which they grew. One should go back to the letter of 18th February. Just as in *Griffiths v Young*¹ extraneous evidence was admitted to show that two letters, which on their faces appeared to be an offer and a counter offer, in fact constituted a written memorandum of a concluded contract, so conversely in the present case consideration of the terms of the vendor's solicitor's letter of 18th February may disclose that the correspondence from 7th March onwards cannot be treated as a memorandum in writing of the contract of 13th March. Naturally great reliance has been placed by counsel for the defendant on the language of the letter of 18th February.

Taking the points which arise on that letter in the order in which they are mentioned earlier in this judgment, the expression 'his proposed purchase' is, in my opinion, of small significance. Although no doubt it is accurate to say that a purchase takes effect as soon as there is a contract for sale, every conveyancer knows that there is many a slip between contract and completion. Until completed, a purchase can very appropriately be described as 'proposed'.

It is clear that where a principal has entered into a binding contract, neither he nor his solicitor can thereafter deprive it of its binding effect by unilaterally treating the transaction as 'subject to contract'; but it is contended that, by writing as he did, the defendant's solicitor made clear that by his letters he did not intend to make the oral contract which his client had entered into enforceable; that is, he did not intend to bring into existence any written note or memorandum of that oral contract. He was concerned only with negotiating the anticipated formal contract. I will return to this in a moment.

The lack of identification of the vendor in the letter of 18th February has since been amply supplied, and nothing turns on this.

The intention declared in the letter to submit a contract as soon as possible involves similar considerations to the 'subject to contract' point. It is now, I think, authoritatively settled that, where an agent with his principal's authority, express or implied, signs a document on his principal's behalf which constitutes a note or memorandum of a contract entered into by the principal, it matters not that the document may not have been intended to serve as such a note or memorandum or that the agent never contemplated that it might do so (*John Griffiths Cycle Corp'n Ltd v Humber & Co Ltd*²; *Daniels v Trefusis*³). When the contract is itself in writing, as for instance where a written offer is accepted in writing by the defendant, no need for a note or memorandum arises. Section 40 is satisfied by the contract itself being in writing. Where the contract is oral, it may be evidenced by some writing which expressly or by necessary implication recognises the existence of a contract, as for example by referring to 'our agreement' or to a 'sale' effected by one party to the other. But it is not, in my judgment, necessary that the note or memorandum should acknowledge the existence of a contract. It is not the fact of agreement but the terms agreed on that must be found recorded in writing. Of course, I do not ignore that the section uses the words 'note or memorandum thereof' in a context where 'thereof' clearly relates to the contract sought to be enforced, but the section presupposes the existence of a contract and in case after case in the books one finds the existence of the contract established by extraneous evidence. In *Rossiter v Miller*⁴ Lord Cairns LC cited with

¹ [1970] 3 All ER 601, [1970] Ch 675

² [1899] 2 QB 414 at 418

³ [1914] 1 Ch 788

⁴ (1878) 3 App Cas at 1139, [1874-80] All ER Rep at 471

a approval this passage from Lord Westbury LC's judgment in *Chinnock v Marchioness of Ely*¹:

'As soon as the fact is established of the final mutual assent of the parties to certain terms, and those terms are evidenced by any writing signed by the party to be charged or his agent lawfully authorized, there exist all the materials, which this Court requires, to make a legally binding contract.'

b In an immediately preceding passage Lord Westbury LC said¹:

'... if there had been a final agreement, and the terms of it are evidenced in a manner to satisfy the Statute of Frauds, the agreement shall be binding, although the parties may have declared that the writing is to serve only as instructions for a formal agreement, or although it may be an express term that a formal agreement shall be prepared and signed by the parties.'

c In *John Griffiths Cycle Corpn Ltd v Humber & Co Ltd*² A L Smith LJ said:

'It is... undoubted law that a signature to a document which contains the terms of a contract is available for the purpose of satisfying s. 4 of the statute, though put alio intuitu and not in order to attest or verify the contract...'

d It is well established law that an offer in writing signed by or on behalf of the offeror may serve as an effective note or memorandum in writing, although accepted only orally. In such a case the writing clearly cannot record or acknowledge a contract existing at the time of writing. *Lever v Koffler*³ was one such case. There the writing referred only to a 'proposal', and in fact contained two alternative proposals.

e Where the writing relied on denies the existence of a contract, or denies the existence of a contract on any terms which are in writing, it cannot for self-evident reasons constitute a written note or memorandum for the purposes of the section. *Thirkell v Cambi*⁴, to which our attention was drawn, was such a case. But the position is different if the writing is in the nature of a confession and avoidance, that is to say, if in effect it acknowledges a contract the terms of which are recorded either in that document or in some other which can properly be read with it, but denies liability under that contract. In such a case—and I think only in such a case—must the fact of agreement be acknowledged in the writing, because otherwise the case would fall within the class of a simple denial of the existence of the contract.

f Where parties enter into an agreement, whether oral or in writing, which is expressly made 'subject to contract', or to a stipulation having the like effect, they demonstrate by this stipulation that they have no immediate intention of contracting. Nevertheless, if thereafter they waive that stipulation orally, thus creating a contract, a written record of the 'subject to contract' agreement made before the waiver, at a time when there was no contract to record, may serve as a note or memorandum of that contract, even if the writing contains such words as 'subject to contract', and the waiver can be established by oral evidence (*Griffiths v Young*⁵). Such a case is, I think,

g closely analogous to the written offer cases. In each class of case the writing relied on is shown by the evidence to contain terms which at the time of writing were not contractual but later ripened into a contract. In each class the document by its nature or its terms contemplates some further event before a concluded contract can arise. In neither class does the circumstance that the document does not record or acknowledge an existing contract disenable it from constituting a note or

h memorandum sufficient to satisfy the section.

1 (1865) 4 De GJ & S 638 at 646

2 [1899] 2 QB at 418

3 [1901] 1 Ch 543

4 [1919] 2 KB 590

5 [1970] 3 All ER 601, [1970] Ch 675

The present case, is in my judgment, a stronger case than *Griffiths v Young*¹. There the original agreement was 'subject to contract' and so was not contractual. Here the original agreement of 17th February was contractual. There the letter relied on was written when as yet no contract existed. In the present case there was already a concluded agreement before any letter was written. Had the matter rested on the contract of 17th February, I doubt whether the defendant could have been heard to say that the letters of 18th and 25th February and the draft contract did not relate to the oral contract of 17th February and contain a record of the terms of that contract, notwithstanding that his solicitor, apparently without authority, inserted the words 'subject to contract' in his first letter; but that does not arise for decision. In *Griffiths v Young*¹ the waiver of the 'subject to contract' stipulation was necessary to bring into existence a contract on the terms originally agreed. In the present case there was an entirely new contract on 13th March. The terms of that contract must in part be ascertained by reference to the terms of the earlier contract of 17th February and of the correspondence arising out of it, but the letter of 17th March is, in my judgment, a written acknowledgment signed by the defendant's solicitor, acting within his authority from the defendant, that the parties had entered into a new contract on the terms of the draft contract save that the price should be £7,000 instead of £6,500. This acknowledgment was not, in my opinion, in any way qualified by the words 'subject to contract' in the letter of 18th February. If, however, I am wrong in this and those words should be regarded as in some way affecting the quality of the correspondence down to 13th March, then, in my opinion, the firm agreement entered into between the plaintiff and the defendant on that date must have had the effect of eliminating any qualifying effect which the presence of the words may have had in the previous correspondence, so that that previous correspondence as imported into the memorandum of the agreement of 13th March constituted by the letter of 17th March should be read without any such qualifying effect.

All the terms of the oral agreement of 13th March are to be found incorporated in the letter of 17th March read with the earlier documents with which it is linked. Those documents afford written evidence which corroborates the evidence relating to the oral agreement. In my judgment, they contain a written note or memorandum of that oral agreement within the meaning of s 40. Accordingly, in my judgment, this appeal fails.

I would only add some brief observations on three dicta in cases to which we were referred. In *Munday v Asprey*² Fry J said:

'The statute requires that a concluded agreement existing at the time when the memorandum is signed should be proved by the Plaintiff, whereas the document, as I have said, shews no actual existing agreement.'

In that case the agreement sued on does not seem to have been established aliunde the documents relied on. The plaintiff was relying on the letter dated 10th April 1878 and the enclosed engrossment of conveyance to prove the existence of a contract. The learned judge's dictum should not, in my judgment, be read as being of general application.

In *Thirkell v Cambi*³ Scrutton LJ said:

'In order to make that position good it is necessary to prove two things, which may be one thing containing two elements, a signed admission that there was a contract and a signed admission of what that contract was.'

The Lord Justice was there dealing with what I have termed the confession and avoidance class of case in which, exceptionally, an acknowledgment of the fact of agreement is necessary.

¹ [1970] 3 All ER 601, [1970] Ch 675

² (1880) 13 Ch D 855 at 857

³ [1919] 2 KB at 597

a In *Parker v Clark*¹ Devlin J said: 'The memorandum must not only contain a statement of all the terms but its language must be such as to show an intention to contract.' The learned judge, as I understand him, was there referring to cases where the document relied on consists of a written offer. He was, I think, emphasising that in cases of that kind the document must indeed be an offer, capable of giving rise to a contract by acceptance, and not merely something in the nature of an enquiry.

b Finally I would observe that the difficulties which, it is suggested, would confront a solicitor acting for a vendor who has entered into an oral open contract for the sale of land do not oppress me. No doubt it would be the duty of such a solicitor to advise his client about the disadvantages to a vendor of an open contract and as to the effect of s 40. In the light of that advice it would be open to the vendor promptly to repudiate the contract with a view to negotiating an agreement on the same terms but subject to contract. If, on the other hand, he elects to stand on the contract, it lies ill in his mouth to complain of any difficulties he may thereafter encounter in keeping his options open. The purpose of s 40 is to avoid parties being held to contracts the terms of which they have not agreed, not to facilitate the escape of a party from a contract the terms of which he has agreed. If the vendor's solicitor is instructed to proceed to implement the contract after having advised his client in the sense I have indicated, he will presumably make sure that he has proper instructions and authority from his client to take those steps which that process will involve.

d I would dismiss this appeal.

ORR LJ. I have in this case come to the same conclusions as Buckley LJ, and for substantially the same reasons.

e I accept entirely the proposition that a document which denies the existence of a contract cannot be relied on as a memorandum for the purposes of s 40 of the Law of Property Act 1925 but on the authorities I agree with Buckley LJ that it is not necessary to find in the memorandum any positive admission of a contract save in cases where that document itself contains a denial of liability which could, but for the admission, be read as embracing a denial of the existence of the alleged contract.

f On the question whether in the present case the terms of the letter of 18th February 1972 point away from the existence of a contract I find myself, in agreement with Buckley LJ, unable to attach any real weight to its reference to a 'proposed sale', which appears to me to be as capable of being a reference to the proposed completion of a conveyance as to the proposed conclusion of a contract, nor to its declared intention of submitting a contract, since that intention would not in my view, either in theory or in practice, be inconsistent with a pre-existing open contract.

g It would, I accept, be a possible view of the words 'subject to contract', although not on the evidence inserted on any instructions of the defendant, that they should be treated as a denial of any then existing contract. But in *Griffiths v Young*² it was held by this court that the same words were not to be treated as a denial of a contract but only as imposing a suspensive condition, the subsequent waiver of which could be established by oral evidence, with the result that the letter there in question was held to constitute, in conjunction with another document, a sufficient memorandum of a proved oral contract subsequent in date; and I see no reason to doubt the validity of that conclusion which seems, to me also, to have been analogous to those reached in the written offer cases to which Buckley LJ has referred.

j In the present case the terms of the oral contract found by Ungood-Thomas J to have been concluded on 13th March are to be found in part in the letter of 17th March and in part in the earlier correspondence, including the letter of 18th February which contains the words 'subject to Contract'. Assuming, as I am for this purpose prepared to do, that these words are to be treated as qualifying the whole of the correspondence prior to 13th March, the effect of the reasoning in *Griffiths v Young*², with

1 [1960] 1 All ER 93 at 103, [1960] 1 WLR 286 at 296

2 [1970] 3 All ER 601, [1970] Ch 675

which I respectfully agree, is in my judgment that, by virtue of the firm oral contract on 13th March, such qualifying words not only cannot be read into the letter of 17th March but are also to be treated as excluded from the earlier correspondence for the purpose of deciding whether it provides, in part, a memorandum of that contract. a

Like Buckley LJ, I do not find it necessary to decide, and I express no view on, the question whether the correspondence prior to 13th March would have constituted a sufficient memorandum of the earlier contract found by the judge to have been concluded on 17th February. b

I would only add a brief reference to two matters. The first is that I should be sorry if the conclusion I have reached in this case were to involve serious difficulties for solicitors, but for the reasons given by Buckley LJ I have not been satisfied that this is so. The second is that I have borne in mind in reaching a conclusion that it is the duty of the courts to apply the statute however distasteful may be the conduct of a defendant who could not forgive himself for agreeing to sell to the plaintiff at a lower price than he could obtain elsewhere but was able to forgive himself for resiling from an oral agreement entered into by him, as found by the judge, with the most solemn protestations and assurances. c

I would dismiss this appeal.

Appeal dismissed with a variation of the order below substituting 10th May 1973 for 7th September 1972 as completion date. d

Solicitors: *Tuck & Mann & Geffen, T D Jones & Co*, agents for *Lyon Clark & Co*, West Bromwich (for the defendant); *Kingsford, Dorman & Co*, agents for *Glaisyer, Porter & Mason*, Birmingham (for the plaintiff). e

S A Hatteea Esq Barrister.

Grimes v London Borough of Sutton f

NATIONAL INDUSTRIAL RELATIONS COURT

SIR HUGH GRIFFITHS, MR J H ARKELL AND MR H BRIGGS

26th JANUARY, 19th FEBRUARY 1973

Master and servant – Contract of service – Written particulars of terms of employment – Delivery to employee – Failure to deliver – Reference to tribunal – Limitation period – Employment having ceased – Reference to be made within three months of employment ceasing – Written particulars of change in terms of employment – Employee ignorant of change until more than three months after termination of employment – Whether tribunal having jurisdiction to entertain reference – Whether power to extend limitation period in cases of equitable fraud or mistake – Contracts of Employment Act 1972, s 8 (8). g

Statute – Retrospective operation – Procedural provision – Limitation period – Statute introducing limitation period – Whether provision retrospective in operation – Contracts of Employment Act 1972, s 8 (8). h

The employee commenced work on 1st April 1965. His contract of employment was terminated by his employers on 31st May 1971. On 26th April 1972 an industrial tribunal, in awarding the employee a redundancy payment, held that there had been a change in the employee's position in his employment in 1968. At the time of that change his employers had not given the employee a written statement as required j

- a by s 4 (4)^a of the Contracts of Employment Act 1963. On 27th July 1972, the date on which the Contracts of Employment Act 1972, replacing the 1963 Act, came into force, the employee made an application under s 8 (1)^b of the 1972 Act requiring a reference to an industrial tribunal to determine the particulars of the change in the terms of his employment which should have been given to him by his employers in 1968. An industrial tribunal dismissed the employee's application holding that, in view of the mandatory terms in which s 8 (8)^c of the 1972 Act was expressed, they had no jurisdiction to entertain it since it was out of time under the provisions of s 8 (8). On appeal, the employee contended (i) that s 8 (8) was not retrospective and did not apply to a dismissal prior to the Act coming into force, (ii) alternatively, that even if s 8 (8) was retrospective it would be unjust that it should operate in his case since he had not become aware of the change in his employment until April 1972.

c **Held** – The appeal would be dismissed for the following reasons—

- (i) Section 8 (8) of the 1972 Act was procedural and properly to be regarded as a limitation section which did not affect the jurisdiction of the tribunal to entertain the employee's reference. Thus the tribunal had erred in holding that they lacked jurisdiction. However, s 8 (8) was retrospective in its operation and applied to the employee's case despite the fact that he had been dismissed more than three months before the 1972 Act came into force. The employee's application was therefore out of time and the tribunal's refusal to proceed with the reference would be supported on that ground (see p 452 d and j to p 453 b, post); dicta of Lord Diplock in *Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd* [1970] 2 All ER at 893 and of Lord Uthwatt in *Pegler v Railway Executive* [1948] 1 All ER at 562 applied.
- e (ii) Although the 1972 Act contained no provision postponing the operation of limitation period prescribed by s 8 (8) in cases of fraud or mistake, it might well be that the courts would be prepared to apply the equitable doctrine that the running of time should be postponed where the plaintiff would otherwise suffer a real injustice by

f a Section 4, so far as material, provides:

- '(1) Not later than thirteen weeks after the beginning of an employee's period of employment with an employer, the employer shall give to the employee a written statement identifying the parties, specifying the date when the employment began, and giving the following particulars of the terms of employment as at a specified date not more than one week before the statement is given, that is—(a) the scale or rate of remuneration, or the method of calculating remuneration, (b) the intervals at which remuneration is paid (that is, whether weekly or monthly or by some other period), (c) any terms and conditions relating to hours of work (including any terms and conditions relating to normal working hours), (d) any terms and conditions relating to—(i) holidays and holiday pay, (ii) incapacity for work due to sickness or injury, including any provisions for sick pay, (iii) pensions and pension schemes, and (e) the length of notice which the employee is obliged to give and entitled to receive to determine his contract of employment . . .

- h '(4) If after the date to which the statement relates there is a change in the terms to be included, or referred to, in the statement, the employer shall, not more than one month after the change, inform the employee of the nature of the change by a written statement and, if he does not leave a copy of the statement with the employee, shall preserve the statement and ensure that the employee has reasonable opportunities of reading it in the course of his employment, or that it is made reasonably accessible to him in some other way . . .'

- j b Section 8 (1) provides: 'Where an employer is required by section 4 (1) or section 5 (1) of this Act to give an employee a written statement, and the employer does not give such a statement to the employee within the time limited by those sections, the employee may require a reference to be made to an industrial tribunal to determine what particulars ought to have been included or referred to in a statement given so as to comply with the requirements of the said section 4 or the said section 5, as the case may be.'

- c Section 8 (8) is set out at p 451 d, post.

reason of the unconscionable behaviour of the defendant. There were, however, no grounds for applying that doctrine in the instant case (see p 453 e to h, post).

Notes

For the obligation on an employer to give an employee a written statement of the terms of his employment, see Supplement to 25 Halsbury's Laws (3rd Edn) para 872A, 1-5; for the retrospective effect of statutes, see 36 Halsbury's Laws (3rd Edn) 423-428, paras 643, 644, 647, and for cases on statutes making alteration in judicial procedure, see 44 Digest (Repl) 290, 291, 1196-1218.

For the Contracts of Employment Act 1963, s 4, see 12 Halsbury's Statutes (3rd Edn) 206.

For the Contracts of Employment Act 1972, s 8, see 42 Halsbury's Statutes (3rd Edn) 318.

Cases referred to in judgment

Brueton v Woodward [1941] 1 All ER 470, [1941] 1 KB 680, 110 LJKB 645, 165 LT 348, 32 Digest (Repl) 461, 792.

Gibbs v Guild (1882) 9 QBD 59, 51 LJQB 313, 46 LT 248, CA, 32 Digest (Repl) 606, 1896.

Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd [1970] 2 All ER 871, [1971] AC 850, [1970] 3 WLR 287, 20 P & CR 74, HL, Digest (Cont Vol C) 616, 74172g.

Lynn v Bamber [1930] 2 KB 72, 99 LJKB 504, 143 LT 231, 32 Digest (Repl) 607, 1898.

Pegler v Railway Executive [1948] 1 All ER 559, [1948] AC 332, [1948] LJLR 939, HL; *affg* sub nom *Pegler v Great Western Railway Co* [1947] 1 All ER 355, CA, 38 Digest (Repl) 388, 551.

Cases also cited

Adams v Macaire Mould & Co Ltd (1966) 1 ITR 411, IT.

Fountain v Simmons (1968) 3 ITR 343, IT.

Gillies v Sidnor Engineering Ltd (1966) 1 ITR 418, IT.

Smith v Hoffman of London Ltd (1966) 1 ITR 413, IT.

Appeal

This was an appeal by Kenneth Walter Grimes against the decision of an industrial tribunal (chairman Edward Seeley Esq) sitting in London, dated 16th October 1972, dismissing the appellant's application made under s 8 (1) of the Contracts of Employment Act 1972 requiring the tribunal to determine the particulars of the change in the terms of the appellant's employment in 1968 with the respondents, the London Borough of Sutton. The facts are set out in the judgment of the court.

The appellant appeared in person.

John M Rankin QC and *Christopher S C S Clarke* for the respondents.

Cur adv vult

19th February 1973. **SIR HUGH GRIFFITHS** read the following judgment of the court. On 1st April 1965 the appellant commenced employment with the respondents as Assistant Borough Surveyor (Planning). His employment was terminated on 31st May 1971. The respondents refused to pay redundancy pay so the appellant applied to an industrial tribunal. The tribunal awarded the appellant a redundancy payment of £360.

During the course of the hearing of that application a question arose whether there had been a change in his position during the course of his employment or merely a change in the name of his position. The tribunal held that there had been a change in his position, not merely a change of name, the change occurring in 1968.

a So, on 27th July 1972, the appellant made a further application to the tribunal, contending that pursuant to s 4A (1)¹ of the Contracts of Employment Act 1963 (as amended by s 38 (2) of the Redundancy Payments Act 1965) he was entitled to require the tribunal to determine what particulars of the change in the terms of his employment ought to have been given to him by the respondents when the change occurred in 1968. It was common ground that the respondents had not given the

b appellant a statement pursuant to s 4 (4) of the Contracts of Employment Act 1963 at the time of the change.

Now it so happened that the appellant made this application on the very day that the Contracts of Employment Act 1972 came into force. This is a consolidating Act; it repeals the Contracts of Employment Act 1963 and those sections of the Redundancy Payments Act 1965 and the Industrial Relations Act 1971 by which that Act was

c amended.

The obligation on an employer to give written notice of the change of terms of employment and the right of an employee to refer the matter to a tribunal to determine the particulars that ought to have been included in the statement are contained in ss 5 (1) and 8 (1) of the 1972 Act. But s 8 (8) of the 1972 Act further provides:

d 'An industrial tribunal shall not entertain a reference under this section in a case where the employment to which the reference relates has ceased unless an application requiring the reference to be made was, in accordance with the regulations referred to in subsection (7) of this section, made before the end of the period of three months beginning with the date on which the employment ceased.'

This subsection is re-enacting an amendment to the 1963 Act introduced by the Industrial Relations Act 1971, s 21 and Sch 2, Part 1 (4).

e

The appellant's employment having ceased in May 1971, the period of three months had long since elapsed, and the tribunal concluded that in view of the mandatory terms in which the subsection is framed they had no jurisdiction to entertain the application and so they dismissed the application for lack of jurisdiction.

f The appellant submits that the tribunal are wrong on two grounds. First, he submits that s 8 (8) of the Contracts of Employment Act 1972 is not retrospective and does not apply to any dismissal prior to the date on which the Act came into force. Secondly and alternatively, he submits that even if it is retrospective it would be unjust that it should operate in this case, as he did not know of the change of his employment until his employers revealed the fact during the tribunal hearing in April 1972, some 11 months after his dismissal from their service.

g The respondents sought first to support the decision of the tribunal on the grounds that s 8 (8) goes to the jurisdiction of the tribunal and is not a procedural section introducing a period of limitation. In *Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd*² the House of Lords had to consider a similarly worded provision in the Landlord and Tenant Act 1954, s 29 (3), which provides:

h 'No application under subsection (1) of section twenty-four of this Act shall be entertained unless it is made not less than two nor more than four months after the giving of the landlord's notice under section twenty-five of this Act or, as the case may be, after the making of the tenant's request for a new tenancy.'

It was held that the subsection did not go to the jurisdiction of the court but was procedural constituting a period of limitation imposed for the benefit of the landlord, which he could waive if he wished.

j

Counsel for the respondents seeks to distinguish that decision by contrasting the language of s 29 (3) of the 1954 Act in which the words are 'No application . . . shall be

1 The provisions of s 4A (1) are now contained in s 8 (1) of the Contracts of Employment Act 1972

2 [1970] 2 All ER 871, [1971] AC 850

entertained' with s 8 (8) of the 1972 Act: 'An industrial tribunal shall not entertain a reference . . .' which he submits are in more mandatory terms. The answer to this submission is to be found in the speech of Lord Diplock, where he said¹:

'For my part I do not find any guide to the intention of Parliament in fine distinctions which can be drawn between the words "shall not be entertained" and the corresponding words of prohibition in other statutes of limitation. This would be to use the literal approach. But if it were right to adopt the literal approach the impossibility of finding an exception to the prohibition would not turn on verbal differences such as these. For the same reason I do not find any significance in the prohibition being expressed as a prohibition on the court itself rather than on the litigant invoking its process.'

Industrial tribunals are intended to give a swift remedy and it might cause great hardship to an employer if an employee long since dismissed might raise a question relating to a statement that he claimed he should have been given years before. We are satisfied that s 8 (8) of the 1972 Act is a procedural section introduced for the benefit of the employer, to protect him against the embarrassment of stale references and is properly to be regarded as a limitation section. Insofar, therefore, as the tribunal dismissed the application for want of jurisdiction they were in error. However, the tribunal also pointed out that assuming s 8 (8) was a limitation period the respondents were not prepared to waive it, and it is clear that the application would have been dismissed on this ground also. This then brings one to the question: is s 8 (8) retrospective in its operation?

In *Maxwell on the Interpretation of Statutes*² the general rule is stated thus: 'The general principle, however, seems to be that alterations in procedure are retrospective, unless there be some good reason against it.' Illustrative of this general principle are two decisions in which it was held that the provisions of the Limitation Act 1939 applied to defeat causes of action that arose before the Act came into force. In *Brueton v Woodward*³ Singleton J held that the limitation of 12 years on an action on a specialty imposed by s 2 (3) of the Act (in place of the previous limitation of 20 years under the Civil Procedure Act 1833) defeated a cause of action that accrued in June 1922. In *Pegler v Great Western Railway Co*⁴ the Court of Appeal approved that decision and held that where a cause of arbitration had arisen more than six years before the commencement of the Act it was statute-barred by s 2 (1) (d) of the Limitation Act 1939. In the House of Lords Lord Uthwatt (with whose speech all their Lordships concurred) said⁵:

'The questions which arise on the Limitation Act itself may be shortly disposed of. Before ATKINSON, J., and the Court of Appeal it was argued that the provisions of this Act subjecting statutory arbitrations to the rules as to limitation did not apply when the time limit had run out before the Act was passed. That point was not taken before your Lordships. There is, indeed, nothing in it.'

Is there then any sufficient reason why the limitation period imposed by the Contracts of Employment Act 1972 should not similarly be applied retrospectively? The appellant points to s 13 (2) which provides: 'Sections 1 and 2 of this Act shall apply in relation to any contract made before the commencement of this Act.' From this it is argued that as ss 1 and 2 are made specifically retrospective in their operation the contrary should be inferred in respect of all other provisions of the 1972 Act. Although

1 [1970] 2 All ER at 893, [1971] AC at 882

2 11th Edn (1962), p 217

3 [1941] 1 All ER 470, [1941] 1 KB 680

4 [1947] 1 All ER 355

5 [1948] 1 All ER 559 at 562, [1948] AC 332 at 338

a there is some force in this argument we do not regard it as sufficiently persuasive to displace the weight of authority in favour of the retrospective application of a procedural or limitation provision in an Act. Accordingly we conclude that s 8 (8) of the 1972 Act applies to the appellant's case despite the fact that he had been dismissed more than three months before the Act came into force. He is therefore out of time and the tribunal's refusal to proceed with the reference is to be supported on this ground.

b There remains the appellant's contention that it would be unjust—'contrary to natural justice' was the way he put it—to deny him relief because he could not have discovered his employers' breach of duty in time to pursue his remedy. He says:

'Unknown to me my employment was changed in 1968. I was dismissed in May 1971. Not until April 1972 did I know of the change. Therefore I never had the chance to refer to a tribunal until April 1972.'

c The Limitation Act 1939 makes statutory provision for the postponement of a limitation period in case of fraud or mistake. The relevant part of s 26 provides:

d 'Where, in the case of any action for which a period of limitation is prescribed by this Act, either—(a) the action is based upon the fraud of the defendant or his agent or of any person through whom he claims or his agent, or (b) the right of action is concealed by the fraud of any such person as aforesaid, or (c) the action is for relief from the consequences of a mistake, the period of limitation shall not begin to run until the plaintiff has discovered the fraud or the mistake, as the case may be, or could with reasonable diligence have discovered it . . .'

e There is no such corresponding provision in the Contracts of Employment Act 1972, but the doctrine that the running of time was postponed by fraud was originated by the courts of equity before the Limitation Act 1939 came into operation (see such decisions as *Gibbs v Guild*¹ and *Lynn v Bamber*²). In a suitable case it may well be that the courts will be prepared to develop this equitable doctrine and to apply it to postpone the operation of a time limit in a statute where otherwise a plaintiff might suffer a real injustice by reason of the unconscionable behaviour of the defendant. We are, however, satisfied that this is not a case in which it would be appropriate to take such a course. It is difficult to see what real advantage the appellant would gain if he did succeed in obtaining a statement of the terms on which he was employed in 1968, five years ago, and now, two years after his employment has ceased. It is even more difficult to see what hardship or injustice he will suffer if he does not obtain the statement; there are no proceedings he can take on it under the 1972 Act, and the fact that he does not obtain it in no way prevents him from bringing an action for breach of contract to obtain financial redress if he thinks that he has such a cause for action. Nor is there any material on which the tribunal or this court could properly conclude that a prima facie case existed of that type of unconscionable behaviour on the part of the respondents that would justify invoking the doctrine of equitable fraud.

h This appeal therefore fails on this further ground and must be dismissed.

Appeal dismissed.

Solicitors: *Town Clerk*, London Borough of Sutton (for the respondents).

Gordon H Scott Esq Barrister.

j
1 (1882) 9 QBD 59

2 [1930] 2 KB 72

Dunning v Board of Governors of the United Liverpool Hospitals

COURT OF APPEAL, CIVIL DIVISION

LORD DENNING MR, STAMP AND JAMES LJJ

19th, 20th FEBRUARY 1973

Discovery – Production of documents – Production before commencement of proceedings – Claim in respect of personal injuries – Production where claim likely to be made in subsequent proceedings – Likely to be made – Likelihood of claim depending on outcome of discovery – Claim likely to be made if documents on discovery indicating good cause of action – Whether court precluded from ordering production if only basis for saying claim not likely is absence of documents sought to be discovered – Administration of Justice Act 1970, s 31.

In 1963 the applicant, who had enjoyed good health all her life, developed a cough and was admitted to hospital for investigations. During the first three weeks after her admission she appeared to improve, but one day, when her family visited her, they found screens around her bed and were told by the ward doctor that she was very ill but would recover; the family found that her speech was impaired; her face was drawn up to one side and she appeared to be gravely ill. During the next few weeks her personality appeared to change. The doctors were uncertain of the diagnosis; at first they diagnosed undulant fever and prescribed streptomycin, the orthodox treatment for that disease; later they diagnosed another disease and prescribed other drugs. After 17 weeks the applicant left hospital but her walking and memory were still impaired and she had difficulty in doing her housework. Her condition got worse. Her family thought that the hospital were at fault in wrongly diagnosing undulant fever and that the streptomycin prescribed for that disease had caused the impairment of the applicant's health. In 1969 the applicant obtained legal aid to get a medical opinion. She was examined by a consultant physician and neurologist who asked to see the hospital's clinical notes. The hospital refused to disclose them unless they were assured that no action would be brought against them but such an assurance was refused by the applicant's advisers. On 11th May 1970 the consultant gave his report in which he said that assessment of the medical aspect of the case had been considerably hampered by the absence of the hospital notes and that he had had to rely on the recollection over six years of medically unqualified persons, i.e. the applicant and her family; he was however of the opinion that the hospital were not at fault in at first wrongly diagnosing undulant fever, and that it was only speculation that the streptomycin had caused the applicant's impairment of health; but he expressed the view that her suspicion that a mistake had occurred was heightened by the failure to release the hospital notes; that the notes should be released to determine whether they confirmed his own opinion; and that if they were made available, and their contents explained to the applicant and her family, their minds would be set at rest. On the basis of that report the applicant was granted legal aid to take proceedings against the hospital board for damages for negligence, but as more than six years had elapsed since the cause of action arose, it was necessary, under the Limitation Act 1963, to obtain leave to bring the proceedings. On application being made to the judge for leave under the 1963 Act, the judge adjourned the application on the ground that the consultant's report gave no basis for an action and that it was necessary to obtain the hospital notes. On 2nd August 1971, s 31^a of the Administration of Justice Act 1970, which empowered the court to order disclosure of documents before the commencement of proceedings, came into operation.

^a Section 31 is set out at p 457 a to c, post

a On 12th May 1972 the applicant applied for an order under s 31 for disclosure by the hospital board of the medical reports and case notes concerning her treatment. The judge ordered disclosure of those documents but limited the disclosure to the applicant's medical adviser. The board appealed.

b **Held** (Stamp LJ dissenting) – The applicant had fulfilled the conditions stipulated by s 31 of the 1971 Act since she and the board appeared 'likely to be' the parties in proceedings 'in which a claim in respect of personal injuries was likely to be made'. It was immaterial that the likelihood of the claim being made was dependent on the outcome of the discovery; the words 'likely to be made' in s 31 were to be construed as meaning 'may' or 'may well be made' if, on examination, the documents in question indicated that the applicant had a good cause of action. The court was not precluded from making an order if the only basis for saying that a claim was c not likely was the absence of the documents of which discovery was sought. Accordingly, since the applicant would no doubt get an extension of time under the 1963 Act if the documents disclosed by the board pointed to negligence, the order for discovery, limited to disclosure to her medical adviser, should stand and the appeal be dismissed (see p 457 f and g, p 458 c and p 460 d e and h, post).

d Notes

For discovery before commencement of proceedings, see Supplement to 12 Halsbury's Laws (3rd Edn) para 2A.

For the Administration of Justice Act 1970, s 31, see 40 Halsbury's Statutes (3rd Edn) 1101.

e Interlocutory appeal

f By an originating summons dated 12th May 1972 the applicant, Florence Madeline Dunning, applied for an order under s 31 of the Administration of Justice Act 1970, for the disclosure by the respondents, the Board of Governors of the United Liverpool Hospitals ('the board'), of the medical record and case notes of Mrs Dunning's treatment as an in-patient and out-patient at the Liverpool Royal Infirmary from April 1963 until about September 1963. On 20th October 1972 Mr District Registrar J Graeme Bryson refused to order disclosure of those documents. Mrs Dunning appealed and on 15th November 1972 Caulfield J, sitting in chambers, allowed the appeal, rescinded the registrar's order and ordered the board to produce the documents within 28 days to Mrs Dunning's medical adviser, Dr John Evans, or to such other medical g adviser as he might advise. Leave to appeal was given and the board appealed against the order of Caulfield J. The facts are set out in the judgment of Lord Denning MR.

C E F James for the board.

h Leo Clark QC and R B Martin for Mrs Dunning.

j **LORD DENNING MR.** This is the first case to come before this court under s 31 of the Administration of Justice Act 1970. It introduces a new procedure in personal injury cases. Even before an action is started, the prospective plaintiff can ask a prospective defendant to produce any documents that he has which are relevant in the case. The section came into operation on 2nd August 1971¹.

In 1963 Mrs Dunning was 56 years of age. She had enjoyed good health all her life. In April 1963 she developed a cough. She was admitted to the Royal Infirmary at

i See the Administration of Justice Act 1970 (Commencement No 4) Order 1971 (SI 1971 No 834)

Liverpool for further investigations. During the first two or three weeks after her admission she appeared to improve; but when the family visited her one day they found screens around her bed. They were taken on one side by a ward doctor. He explained that Mrs Dunning was very ill, but that she would recover. Her daughter went behind the screens to see her mother. She found her speech was impaired, her face was drawn up to one side, and she did indeed appear to be gravely ill. During the next few weeks there appeared to be a change in her personality. She was talking in a bizarre and inconsequential fashion about matters affecting other patients in the ward. She was also irritable and short tempered. The doctors were uncertain of the diagnosis. At first they thought it was undulant fever. Later they put it down as periarthritis nodosa. They treated her with various drugs: tetracyclin, streptomycin and prednisolone. After 17 weeks she left the hospital taking prednisolone 15 milligrammes a day. Her walking was impaired. Her memory was impaired. She had difficulty in doing her housework. She was a different woman altogether. a

The family thought that the doctors were at fault in wrongly diagnosing her illness as undulant fever; and that the streptomycin prescribed for that wrong diagnosis was the cause of all the trouble. But they did not take any action at the time, because Mrs Dunning's own doctor said that the ill effects would gradually wear off and that she would improve. Instead of improving, however, Mrs Dunning gradually got worse. In 1969 she got legal aid. It was limited to getting a medical opinion. She went to Dr John Evans, who is a consultant physician and neurologist in Manchester. He asked to see the clinical notes taken at the time of her illness. The hospital refused to disclose them to him unless they were assured that no action would be brought against them. Mrs Dunning's advisers declined to give that assurance. So Dr Evans did not get the case notes. On 11th May 1970 he gave his report as best he could, without them. He started off: b

'Assessment of the medical aspect of this matter has been considerably hampered by the absence of the clinical notes taken at the time of Mrs. Dunning's original illness.'

He finished by indicating that he thought the hospital was probably not at fault, but— c

'As an independent medical witness it is my opinion that this failure to reveal the hospital notes has unreasonably prolonged the litigation in this patient's case. I urge once again that steps are taken to secure the release of these hospital notes so that I can see them to determine whether or not they confirm the opinions expressed in this report. It is my opinion that once these notes have been made available and their contents explained in lay terms to the plaintiffs their minds will be set at rest.'

On receiving that report, the legal aid authorities thought it a proper case for proceedings to be instituted. In December 1970 they granted Mrs Dunning legal aid to take proceedings. Seeing that more than six years had passed, Mrs Dunning's advisers had to apply for leave under the Limitation Act 1963. On 1st July 1971 Rees J adjourned the application. It was no good starting proceedings then because Dr Evans's report gave no basis for an action unless the case notes were obtained; and the hospital had refused to disclose them to him. d

On 2nd August 1971 s 31 of the Administration of Justice Act 1970 came into operation. It took some time before the legal profession got to know of it. Eventually on 12th May 1972 Mrs Dunning's solicitor took out an originating summons under the new Act. By it, Mrs Dunning asked for an order that the hospital should disclose the medical reports and case notes which they had about her treatment. The registrar refused to make an order. But Caulfield J did order them to be produced; but he limited his order by saying that they were only to be produced 'to the plaintiff's medical adviser, Dr John Evans, or such other medical consultant as he may advise.' The hospital appeal to this court. e

a The case depends on the true construction of s 31, which reads:

'On the application, in accordance with rules of court, of a person who appears to the High Court to be likely to be a party to subsequent proceedings in that court in which a claim in respect of personal injuries to a person or in respect of a person's death is likely to be made, the High Court shall, in such circumstances as may be specified in the rules, have power to order a person who appears to the court to be likely to be a party to the proceedings and to be likely to have or to have had in his possession, custody or power any documents which are relevant to an issue arising or likely to arise out of that claim—(a) to disclose whether those documents are in his possession, custody or power; and (b) to produce to the applicant such of those documents as are in his possession, custody or power.'

c That section refers to the rules of court. They are contained in RSC Ord 24, r 7A and r 8, which prescribe the procedure, but do not help in the interpretation.

d Applying the section it seems to me reasonably plain (1) that Mrs Dunning is 'likely to be a party' if the proceedings were started; she is likely to be plaintiff; (2) that the hospital board are persons who are 'likely to be a party to the proceedings' if 'subsequent proceedings in which a claim in respect of personal injuries ... is likely to be made'. Much turns on the meaning of the words 'likely to be'. If a claim is 'likely to be made' the hospital board are 'likely to be' a party. They are likely to be defendants. (3) They have relevant documents in their possession.

e So the one question is this: is a claim in respect of personal injuries 'likely to be made' in subsequent proceedings? To that question the answer is: it all depends on what is contained in the medical reports and case notes. If they contain information pointing to negligence on behalf of the hospital board, then a claim is 'likely to be made'; but if not, then a claim is not likely. If the information does point to negligence, Mrs Dunning will, no doubt, get an extension of time under the 1963 Act, because she will not have known that she had a worthwhile cause of action until she got the medical reports and case notes.

f So the likelihood of a claim depends on the outcome of the discovery. It depends on what Dr Evans finds in the medical reports and case notes. How do you apply the section to this situation? It is difficult, but I think that we should construe 'likely to be made' as meaning 'may' or 'may well be made' dependent on the outcome of the discovery. One of the objects of the section is to enable a plaintiff to find out—before he starts proceedings—whether he has a good cause of action or not. This object would be defeated if he had to show—in advance—that he had already got a good cause of action before he saw the documents.

g In support of this view, I think it is permissible to look at the Report of the Committee on Personal Injuries Litigation in 1968¹ which was presided over by Winn LJ. It shows the mischief aimed at. It says²:

'Accordingly we regard it as essential that, whether or not any action has been commenced, provision should be made, if necessary by originating summons by either party, for ensuring the availability at the time of any medical examination of all such hospital records and all such entries in the summary of attendances by a general practitioner required to be kept by him under the National Health Act.'

j Counsel for the board very properly stressed the time that has elapsed since Mrs Dunning was in hospital in 1963 to the present day in 1973. It is ten years. But I

1 Cmnd 3691

2 Page 84, para 294

think the answer is this: the family were very distressed at the sudden collapse of their mother in hospital; but they had no reasonable cause for bringing an action for negligence unless they could get medical testimony in support of the case. No medical testimony was available to them so long as the hospital kept their medical records and case notes secret and would not disclose them. It was only when the new Act came into operation on 2nd August 1971 that it became possible to get discovery of the medical reports and case notes. It was only then that they could get effective legal aid to help them.

Furthermore it does seem to me that if a consultant of standing such as Dr John Evans asks to see the medical reports and case notes—so as to enable him properly to advise the patient and her family—then the hospital board ought to allow him to see them. They ought not to impose a condition such as ‘You shall not see them unless you promise not to bring an action’. Such conduct heightens suspicion. The best way to remove it is, as Dr Evans says, to disclose them.

In all the circumstances, I agree with the order made by the judge, especially as he has limited disclosure to the medical adviser.

I would therefore dismiss the appeal.

STAMP LJ. Section 31 of the Administration of Justice Act 1970 gives effect to something like what has been described in another context as a fishing expedition—here an expedition to fish for evidence which will support subsequent proceedings in respect of personal injuries; but at the time when the application for the discovery comes before the court, it must, as I read the section, appear to the court that the person against whom the order is sought is ‘likely to be a party to [such] proceedings . . . in which a claim in respect of personal injuries . . . is likely [I emphasise that word “likely”]’. Hope or suspicion is not enough to support the application. The section does not provide that the court may make the order if it appears possible that the discovery may provide material on which subsequent proceedings against the party may be founded; but in my judgment enables the order to be made when there are already grounds for thinking it *likely* that proceedings will be brought. The time at which it appears that the party is likely to be a party to the proceedings in which the claim is likely to be made can in my judgment only be the time at which the application comes before the court. The word ‘likely’ must in my view be read as connoting that the respondent to the application is likely to be a party to a worthwhile action by a litigant not acting irresponsibly. In a case where the applicant for the discovery has not already grounds for bringing proceedings, the fishing expedition is only to have the approval of the court if the court is persuaded on the facts before it that the fisherman is likely to find a worthwhile and catchable fish. On the facts before the court in this case there is, in my judgment, insufficient evidence to show that there is any likelihood of a worthwhile action being fished out as a result of the discovery. Dr Evans does not in his report suggest that it is at all likely that the hospital was negligent. I can well understand his feeling that he should have a sight of the papers in the possession of the hospital which might enable him to reassure Mrs Dunning that she was not negligently treated. But as I read his report, he does not find in the history related to him or from his examination of his patient any reason to suppose that she was negligently treated. The last two paragraphs of his report are in my judgment revealing. He says this:

‘During further talks with the family it seems that one of their chief concerns is the lack of certain knowledge about what happened while Mrs. Dunning was in hospital and their suspicions that some mistake might have occurred have been heightened by the failure of the Regional Board to release Mrs. Dunning’s clinical notes.

‘As an independent medical witness it is my opinion that this failure to reveal the hospital notes has unreasonably prolonged the litigation in this patient’s case.

a I urge once again that steps are taken to secure the release of these hospital notes so that I can see them to determine whether or not they confirm the opinions expressed in this report. It is my opinion that once these notes have been made available and their contents explained in lay terms to the plaintiffs their minds will be set at rest.'

b This I think is Dr Evans's reason for wanting to see the notes, and not because he thinks they are in the least likely to reveal that there was negligence by the hospital. In the face of that report I find it impossible to say that on the facts before this court they are likely to lead to proceedings in which a claim in respect of personal injuries is likely to be made. On the facts before the court, this appears to me to be most unlikely.

c In this case there is a particular difficulty in the way of showing that it is likely that the hospital will be a party to such proceedings. Any such proceedings are statute-barred and can only be brought with the sanction of the court under s 2 (2) of the Limitation Act 1963 if, inter alia, there is a prima facie case. On the evidence as it stands I think Mrs Dunning has no prima facie case. Unless therefore there be grounds for thinking, as in my judgment there are not, that the discovery sought is likely to disclose that Mrs Dunning has a prima facie case, how can it be said that, on the evidence as it stands, the hospital is likely to be party to such proceedings? The likelihood in my judgment is otherwise.

d I only add this: if I thought that the recommendations of the committee¹ of which Lord Denning MR has spoken were admissible for the purpose of ascertaining the true construction of the Act of Parliament, I would draw attention to the fundamental difference in language between the terms of the recommendation and the terms of s 31.

e I would allow the appeal.

f **JAMES LJ.** The facts of Mrs Dunning's illness and the history which brings the matter before this court have been sufficiently stated in the judgments of Lord Denning MR and Stamp LJ. On the facts I would only add this, that in the report of Dr Evans there is the expression of the clear view that, subject to seeing the hospital notes, there is no indication of incompetence or negligence on the part of the doctors who treated Mrs Dunning and that Dr Evans's own clinical findings do not support the suggestion that treatment by streptomycin was the cause. But in that same report he said his opinion was based at least in part on the long-term recollection of persons not medically qualified. And Dr Evans writes: 'Assessment of the medical aspect of this matter has been considerably hampered by the absence of the clinical notes taken at the time of Mrs. Dunning's original illness.' And 'the clinical notes taken by medical practitioners at the time of the illness would make the whole matter immediately clear'.

g I agree that this appeal falls to be determined by the construction to be placed on s 31 of the Administration of Justice Act 1970. Emphasis in the argument has been placed on the words 'On the application . . . of a person who appears . . . to be likely to be a party to subsequent proceedings . . .' The word 'likely' appears in a number of places in the section. It refers to the applicant, to the person against whom the order is sought, to the bringing of proceedings, to the possession of documents and to the issues likely to be raised. On the facts of the present matter it is to my mind quite certain that the applicant, Mrs Dunning, and the board against whom the order is sought will be parties if any proceedings are subsequently brought; and the question in this case is: is a claim for personal injuries likely to be made in subsequent proceedings?

1 Report of the Committee on Personal Injuries Litigation, 1968 (Cmnd 3691)

Counsel for the board argues that there is no likelihood of that because Dr Evans's report reveals that there is no foundation for making a claim and that disclosure of documents is sought not for the purpose of providing evidence on which a claim can be based but for the purpose of allaying the anxieties of Mrs Dunning and her family. Counsel further argues that the delay of six years before consulting solicitors and the repeated delays between steps taken on Mrs Dunning's behalf since then are such that the court should not order discovery of documents pursuant to this application at this time.

The words of the section 'shall have power to order' provide a discretion whether the power should be exercised in any particular case.

Counsel for Mrs Dunning formulates for the court's decision the question: is s 31 available to a person who may have a cause of action, but who, until discovery of documents has been made by the person intended to be sued, does not know whether he has one or not? In my judgment there is no simple unequivocal answer to the question. Section 31 is, by its terms, expressed to provide a way of obtaining disclosure of documents, in certain circumstances and subject to certain safeguards, before the commencement of proceedings. It covers both the situation in which without sight of the documents in question the intending plaintiff may have ample evidence on which to found a claim, and also the situation in which the documents are the evidence essential to the claim or are evidence without which the claim is not so strong. I cannot conceive that the power of the court under s 31 is so restricted that it will not order discovery of documents, to a person likely to be a party against a person who is likely to be a party, on the ground that it is not likely that a claim will be made if the only basis for saying that a claim is not likely is the absence of the documents which are sought to be discovered and which will be of assistance in determining whether there exists a genuine basis for making the claim.

In order to take advantage of the section the applicant for relief must disclose the nature of the claim he intends to make and show not only the intention of making it but also that there is reasonable basis for making it. Ill-founded, irresponsible and speculative allegations or allegations based merely on hope would not provide a reasonable basis for an intended claim in subsequent proceedings. In this matter there is evidence of the sudden dramatic change in Mrs Dunning's health referred to in the judgment of Lord Denning MR. There is also the impact on the family of that and her subsequent medical history. Does the opinion of Dr Evans override that evidence so that it no longer provides a reasonable basis for making a claim? I do not think so. It would have done so, in my judgment, had not the report been qualified by Dr Evans's urgent desire to study the clinical notes without which he says the medical assessment was made more difficult. As it stands, it leaves open the possibility that the notes, if available, may add to the existing evidence to support Mrs Dunning's allegations. If the notes do not confirm Dr Evans's professional view, a claim is more than likely. I would construe 'likely' there as meaning a 'reasonable prospect'.

In my judgment Mrs Dunning has brought herself within the terms of the section. Subject to the question of delay the judge's order, in my judgment, should stand and the appeal be dismissed. I agree with what has been said by Lord Denning MR on the subject of delay.

I would dismiss the appeal.

Appeal dismissed. Leave to appeal to the House of Lords refused.

Solicitors: *Alsop, Stevens, Batesons & Co*, Liverpool (for the board); *Southern, Ritchie & Clegg*, Liverpool (for Mrs Dunning).

Wendy Shockett Barrister.

R v Greater Birmingham Appeal Tribunal, ex parte Simper

QUEEN'S BENCH DIVISION

LORD WIDGERY CJ, CUSACK AND CROOM-JOHNSON JJ

21ST FEBRUARY 1973

National insurance – Non-contributory benefit – Supplementary allowance – Calculation – Adjustment for exceptional circumstances – Award of amount exceeding basic allowance – Regard to be had to provisions for additional requirements – Additional requirements – Entitlement of recipient of allowance to further sum after two years – Sum awarded for additional requirements exceeding sum awarded for exceptional circumstances – Whether sum awarded for additional requirements to be reduced by amount of sum paid for exceptional circumstances – Ministry of Social Security Act 1966, Sch 2, paras 4, 12.

In 1969 the applicant's husband left her. The applicant was then without financial means and the Supplementary Benefits Commission held (i) that she was entitled to receive and would be given a supplementary allowance under the Ministry of Social Security Act 1966, and (ii) that the circumstances were exceptional and that she should be awarded, under para 4 (1) (a)^a of Sch 2 to that Act, an extra 35p per week over and above her basic allowance. In 1971 she qualified, under para 12^b of Sch 2, for the additional requirement of 50p per week. She was, however, only paid an additional 15p per week. The commission held that they were bound by the stipulation in para 4 (2) (a) of Sch 2, that in determining whether to award benefit in accordance with para 4 (1) (a) 'regard shall be had' to the provisions made by Sch 2 for additional requirements, to deduct the 35p awarded to the applicant for exceptional circumstances from the 50p for which she qualified under para 12, and that accordingly only the balance could be paid to her. Their decision was upheld by an appeal tribunal. The applicant thereupon sought an order of certiorari to quash the appeal tribunal's decision.

Held – On the true construction of para 4 (2) the person making the determination of the amount due was not bound where two sums were involved, one under para 4 and another under para 12, to make a deduction; para 4 (2) only required him to exercise his discretion to ensure that there was no duplication; as the commission had proceeded on the wrong basis in automatically making the deduction, the order of certiorari would go to quash the appeal tribunal's decision (see p 463 g and p 464 b to d, post).

Notes

For calculating social security benefits, see Supplement to 27 Halsbury's Laws (3rd Edn) para 947A.

For the Ministry of Social Security Act 1966, Sch 2, paras 4 and 12, see 23 Halsbury's Statutes (3rd Edn) 721, 723.

Cases cited

McDermott v Owners of Steamship Tintoretto [1911] AC 35, HL.

Newport Borough Council v Monmouthshire County Council [1947] 1 All ER 900, [1947] AC 520, HL.

Motion for certiorari

This was an application by way of motion on behalf of Julie Doreen Simper for an order of certiorari to bring up and quash a decision of the Greater Birmingham Appeal

^a Paragraph 4 is set out at p 463 c and d, post

^b Paragraph 12, so far as material, is set out at p 462 g, post

Tribunal, given under the Ministry of Social Security Act 1966, following the hearing of the appeal on 18th October 1971 whereby they held that the applicant was not entitled on 11th October 1971 to receive the full amount of the sum for additional requirements awarded under para 12 of Sch 2 to the Ministry of Social Security Act 1966, but was only entitled to the difference between the sum she was receiving in respect of extra heating cost awarded to her on 10th November 1969 under para 4 of Sch 2. The facts are set out in the judgment of Cusack J.

Michel Kallipetis for the applicant.

Gordon Slynn for the appeal tribunal.

CUSACK J delivered the first judgment at the request of Lord Widgery CJ. This is an application made pursuant to leave of this court for an order of certiorari to quash a decision dated 18th October 1971 of the Greater Birmingham Appeal Tribunal. That tribunal is established under the Ministry of Social Security Act 1966. The applicant is Mrs Julie Doreen Simper. The point at issue, put briefly, and it will be necessary to elaborate it later, is the interpretation of certain of the provisions for determining the right to and the amount of social security benefit payable under that Act. The applicant is a married woman with a child who was at the material time living with her. According to her affidavit, her husband left her in September 1969 and she had not lived with him since. That affidavit was sworn on 14th April 1972. As she had no means in that situation, she received supplementary allowance from the date her husband left her. The amount of supplementary allowance was determined by the Supplementary Benefits Commission under the provisions of Sch 2 to the 1966 Act. Broadly speaking, that means this: in addition to what I may call the basic allowance for normal requirements, which has to be calculated according to a certain scale, provision is made under para 4 of Sch 2 for adjustments in exceptional circumstances. The effect of that is that in exceptional circumstances benefit may be awarded at an amount exceeding the basic allowance. In November 1969 the applicant was awarded an extra sum of 35p per week for heating; that was an adjustment for exceptional circumstances made under para 4.

Next it is necessary to turn to para 12; the relevant part of that paragraph, which is headed 'Persons in receipt of supplementary allowance for 2 years or more', provides that where a person has had a supplementary allowance for not less than two years, a sum of money is awarded for additional requirements. Paragraph 11 makes similar provision for persons eligible for a supplementary pension; that is in effect old age pensioners. It is necessary to look at the wording of para 12; it reads as follows:

'Additional requirements of person in receipt of supplementary allowance where—(a) he has been in receipt thereof for a continuous period of not less than 2 years; and (b) his right to the allowance is not, and was not at any time during the last 2 years of that period, subject to the condition of section 11 of this Act . . .'

then it states the actual sum of money. On 11th October 1971, having been in receipt of benefit for two years, the applicant qualified under para 12 for the sum of money mentioned therein; at that time it was 50p per week. The Supplementary Benefits Commission, who were at that time paying her the 35p under para 4, made a deduction, and the manner in which that was done is best shown by referring to the observations made to the appeal tribunal by an officer of the commission. I should state here that it is agreed that as the appeal tribunal expressly affirmed the officer in very short and concise terms, that his observations were incorporated in their adjudication, and this matter has proceeded on that basis.

The relevant part of what he said is this:

'From 11th October 1971 [the applicant] qualifies for the additional requirement of 50p per week under para 12 of Sch 2 to the Ministry of Social Security

a Act 1966. However, Sch 2, para 4 (2) (a) says "In determining whether to award benefit in accordance with sub-para 1 (a) of this paragraph (a) regard shall be had to the provisions made by this Schedule for additional requirements..." This means that where the additional requirements (50p) exceed additions already awarded for exceptional circumstances (in this case 35p) only the balance up to 50p may be paid. Hence the allowance from 11th October 1971 is increased by 15p only.'

b Now the reasons for the deduction, as will appear from what I have read, are to be found, so it is said, in para 4 of Sch 2. Paragraph 4 (1) reads in this way:

c 'Where there are exceptional circumstances—(a) benefit may be awarded at an amount exceeding that (if any) calculated in accordance with the preceding paragraphs; (b) a supplementary allowance may be reduced below the amount so calculated or may be withheld...'

Paragraph 4 (1) (b) is not relevant to the present case but the paragraph goes on to say 'as may be appropriate to take account of those circumstances'. Then para 4 (2) reads:

d 'In determining whether to award benefit in accordance with sub-paragraph (1) (a) of this paragraph—(a) regard shall be had to the provisions made by this Schedule for additional requirements; and (b) regard may be had to any resources which would otherwise fall to be disregarded under paragraphs 23 to 26 of this Schedule.'

e Counsel for the appeal tribunal, in argument to which I shall refer later, has drawn attention to the fact that para 4 (2) (a) says regard 'shall' be had, whereas para 4 (2) (b) says regard 'may' be had. Paragraph 4 (2) (a) is the one which says that, in determining whether to award benefit under para 4 (1) (a), regard shall be had to the provision made by the schedule for additional requirements, that is to say for the purposes of this case regard shall be had to awards made under para 12.

f As I say, the appeal tribunal affirmed the decision of the commission, and the applicant applies to this court to quash the findings of the tribunal. Counsel who has appeared for her has argued that what in effect has happened is that in interpreting para 4 (2) (a) the commission, affirmed by the tribunal, has laid down a hard and fast rule meaning that where two sums are involved, one under para 4 and one under para 12, there must always be a deduction. His submission is that that is not the correct interpretation of para 4 (2) (a) which leaves the matter, according to him, at discretion. g He says that the provisions of para 4 (2) (a) are intended to avoid duplication, that regard may be had to various sums of money, in particular the two sums of money to which I have referred, but that does not mean that there must always in every case, without the exercise of any discretion, be an arithmetical deduction of the one sum from the other, as has occurred in this case.

h Counsel for the appeal tribunal not only has drawn attention to the difference in wording between para 4 (2) (a) and para 4 (2) (b), but has suggested that the correct interpretation is that para 4 (2) (a) is mandatory, not simply in the sense that the commission must pay attention to it, but in the sense that a deduction must be made. With regard to para 4 (2) (b) he says that is in effect discretionary, and that regard may be had in those circumstances, but there need be no hard and fast deduction. He i urges that the two provisions of para 4 (2) (a) and (b) must be considered in conjunction with each other. He also submits that as the Act provides that certain sums of money must be disregarded, meaning that they must not be deducted, the use of the expression 'regard shall be had' in this particular sub-paragraph means that they must be deducted.

The court has considered the matter very carefully, and it seems to me, speaking on my own behalf, that the argument advanced by counsel for the applicant has very

great force indeed. Unless he is correct, illogical results would follow in that a person might receive as a matter of right under para 12 the flat rate awarded after two years, who had not hitherto had any adjustment for exceptional circumstances, but that another person who was entitled after two years to the flat rate under para 12 who had previously received the adjustment for exceptional circumstances would be at a considerable disadvantage, on account of the deduction of one sum from the other. For my part I take the view that counsel for the applicant's argument is correct, and that the argument advanced by counsel for the appeal tribunal, ingenious and persuasive though it is, cannot be sustained.

My interpretation of these regulations is that para 4 (2) (a) means that a discretion is to be exercised; that is to say, it is intended that the person making a determination of the sum of money due should exercise a broad judgment to ensure that in fact there is no overlapping, but that he ought not to proceed simply on a rule of thumb that exact deductions should be made. In these circumstances I would accede to this application and I would take the view that the order of certiorari should go to quash the decision.

CROOM-JOHNSON J. I agree and have nothing to add.

LORD WIDGERY CJ. I also agree.

Certiorari granted.

Solicitors: *H E G Hodge* (for the applicant); *Solicitor, Department of Health and Social Security* (for the respondent).

N P Metcalfe Esq Barrister.

Practice Direction

SUPREME COURT TAXING OFFICE

Costs – Taxation – Value added tax – Procedure where government department involved – Finance Act 1972, s 19 (2).

Attention is drawn to s 19 (2) of the Finance Act 1972, the effect of which is that the supply of goods or services by a government department, e.g. legal costs, does not amount to carrying on a business unless and until the Treasury so directs.

In fact each government department has been given a registered number but no accountability for VAT arises until any such direction is issued. Therefore:

1. It is *incorrect* to ask government departments to insert their registered number on their bills of costs.

2. On a taxation inter partes where costs are being paid to a government department it is incorrect to add VAT on the indemnity principle since there is no accountability and to do so would result in the department concerned making a profit.

GRAHAM GRAHAM-GREEN

4th May 1973 Chief Master

Epps and another v Esso Petroleum Co Ltd

CHANCERY DIVISION

TEMPLEMAN J

7th, 8th, 9th, 26th FEBRUARY 1973

Land registration – Rectification of register – Overriding interest – Rectification to give effect to overriding interest – Actual occupation – Use of land to park car – Strip of disputed land between adjoining properties – Strip conveyed to plaintiffs' predecessor with one property – Strip used for purpose of parking car – Strip mistakenly included in conveyance of adjoining property to defendants' predecessor – Defendants' predecessor registering title – Filed plan including strip – Whether plaintiffs' predecessor having overriding interest – Whether use of strip for parking car amounting to actual occupation – Land Registration Act 1925, ss 70 (1) (g), 82 (3).

Land registration – Rectification of register – Circumstances justifying rectification – Unjust not to rectify register against proprietor in occupation – Circumstances making it unjust not to order rectification – Indemnity – Entitlement of proprietor to indemnity on rectification – Applicants not entitled to indemnity on refusal of rectification – Land Registration Act 1925, s 82 (3) (c).

In 1935 C built a house, 4 Darland Avenue, on a site which he owned. The site had an eastern frontage to Darland Avenue of 28 feet. The northern boundary ran four feet from the side wall of the house, and a brick wall was erected on that boundary which separated the site from the adjoining property, Darland Garage, which was also owned by C. In 1935 C let both properties to J. C died in 1943 and in July 1955 his personal representatives conveyed 4 Darland Avenue to J's wife, the conveyance including not only the original site, but also a strip of land ('the disputed strip') which ran parallel to, and on the north side of the brick wall, having a frontage of 11 feet to Darland Avenue. The addition was effected because J's wife wished to build a private garage on the northern flank of the house. From 1935 onwards J had parked his car at night and sometimes during the day on the disputed strip. J's wife covenanted to erect and maintain a wall along the northern boundary separating the disputed strip from Darland Garage, there being nothing to indicate where the boundary lay. In fact, neither garage nor wall was ever erected. In 1956 C's personal representatives leased Darland Garage to J for a term expiring in December 1962. By mistake, the lease purported to include in the demised premises not only the site of Darland Garage but also the disputed strip. The mistake was not readily apparent from the plan annexed to the lease. In 1959 C's personal representatives conveyed Darland Garage to B in fee simple, subject to J's lease, and the conveyance repeated the mistake in the lease. A survey plan was prepared by the Land Registry identifying the land intended to be conveyed which repeated the original mistake by including the disputed strip. B was registered as the first registered proprietor of Darland Garage including the disputed strip. At that time there was no fence separating the strip from Darland Garage and no indication of the existence of the disputed strip, but the original brick wall, which appeared to be the boundary between the two properties, remained. There was nothing to lead B or the Land Registry to call for an inspection of the 1955 conveyance which would have revealed the mistaken double conveyance made by C's personal representatives. J's wife died intestate in February 1964. J's lease of Darland Garage having expired, he held over until about the end of 1964. In December 1964 Darland Garage, including the disputed strip, was transferred to the defendants with vacant possession in fee simple and they became the registered proprietors thereof. In July 1968 J, in whom 4 Darland Avenue had vested, conveyed the property to the plaintiffs in fee simple by a description which followed and

referred to the 1955 conveyance and was therefore apt to include the disputed strip. In August 1968 the plaintiffs became the first registered proprietors of 4 Darland Avenue. The filed plan excluded the disputed strip which was already included in the filed plan relating to Darland Garage. A dispute arose between the plaintiffs and the defendants about the northern boundary of 4 Darland Avenue and in consequence the parties discovered the facts about the double conveyance. The plaintiffs claimed that they were entitled to rectification of the register under s 82^a of the Land Registration Act 1925 on the following grounds: (i) rectification was necessary to give effect to an overriding interest to which the disputed strip was subject, by virtue of s 70 (1) (g)^b of the 1925 Act, in consequence of the fact that, when the defendants completed their purchase in 1964, J was in actual occupation of the disputed strip and when the plaintiffs completed their purchase in 1968 the defendants were not in actual occupation; (ii) in any event rectification should be ordered under s 82 (3) (c) because in all the circumstances it would be unjust not to rectify the register against the defendants, in particular in view of the fact that on rectification the defendants would be entitled to an indemnity under s 83 at current values whereas, on a refusal of rectification, the plaintiffs would not be entitled to be indemnified.

Held – The claim to rectification would be refused for the following reasons—

(i) J was not in actual occupation of the disputed strip at the time when the defendants completed their purchase. Even if J had regularly parked his car on the disputed strip, a parked car did not actually occupy a substantial or defined part of the disputed strip for any defined period of time and, in any event, the parking of a car on an unidentified piece of land, apparently comprised in garage premises, was not an assertion of actual occupation of anything. On the contrary the circumstances showed that at all material times the defendants were in actual occupation (see p 473 b to d and g to j, post).

(ii) It could not be considered unjust not to order rectification for, in the circumstances, justice lay wholly with the defendants and not the plaintiffs. When they became registered proprietors of the disputed strip there was nothing to put the defendants on enquiry and in any event no reasonable requisition by the defendants from their vendor would have disclosed the existence of, let alone any claim to, the disputed strip. It was the plaintiffs who had taken a gamble in consequence of the failure of their predecessors to assert ownership and their own failure to make proper enquiries before completion even though they must have realised that there might be some difficulty over the boundary between the two properties. Furthermore, the fact that the defendants would be entitled to an indemnity on rectification was not sufficient to make it unjust not to order rectification; the defendants had bought the land to exploit for commercial purposes and an indemnity, although assessed at current values, would not be adequate compensation (see p 473 j to p 474 b d to f and p 475 j to p 476 b, post).

Notes

For rectification of the land register, see 23 Halsbury's Laws (3rd Edn) 203-206, paras 425-431, and for cases on the subject, see 38 Digest (Repl) 899, 900, 944-950.

For the Land Registration Act 1925, ss 70, 82, see 27 Halsbury's Statutes (3rd Edn) 843, 856.

^a Section 82, so far as material, is set out at p 470 h and p 471 a, post

^b Section 70 (1), so far as material, provides: 'All registered land shall . . . be deemed to be subject to such of the following overriding interests as may be for the time being subsisting in reference thereto . . . (g) The rights of every person in actual occupation of the land . . . save where enquiry is made of such person and the rights are not disclosed . . .'

Cases referred to in judgment

- a** *Bridges v Mees* [1957] 2 All ER 577, [1957] Ch 475, [1957] 3 WLR 215, 38 Digest (Repl) 891, 932.
- Chowood Ltd v Lyall* (No 2) [1930] 2 Ch 156, [1930] All ER Rep 402, 99 LJCh 405, 143 LT 546, CA, 38 Digest (Repl) 900, 948.
- High Street* (139), *Deptford*, Re [1951] 1 All ER 950, [1951] Ch 884, 38 Digest (Repl) 900, 950.
- b** *Hodgson v Marks* [1971] 2 All ER 684, [1971] Ch 892, [1971] 2 WLR 1263, CA.
- Leighton's Conveyance*, Re [1936] 1 All ER 667; *on appeal* [1936] 3 All ER 1033, [1937] Ch 149, 106 LJCh 161, 156 LT 93, CA, 38 Digest (Repl) 900, 949.
- Sea View Gardens*, Re, *Claridge v Tingey* [1966] 3 All ER 935, [1967] 1 WLR 134, Digest (Cont Vol B) 620, 950b.

Cases also cited

- Long (Fred) & Sons Ltd v Burgess* [1949] 2 All ER 484, [1950] 1 KB 115, CA.
- Williams Brothers Direct Supply Stores Ltd v Raftery* [1957] 3 All ER 593, [1958] 1 QB 159, CA.

Adjourned summons

- d** This was an application, under s 82 of the Land Registration Act 1925, by originating summons dated 14th May 1971 by the plaintiffs, Albert Grant Epps and Lorna Dorothy Epps, his wife, against the defendants, Esso Petroleum Co Ltd whereby the plaintiffs, the proprietors of freehold land, 4 Darland Avenue, Gillingham, comprised in title no K 311242, sought against the defendants, the proprietors of a piece of freehold land fronting Darland Avenue, Gillingham, included in title No K 71926, an order that
- e** the register of title no K 71926 be rectified by excluding therefrom and from the filed plan thereof a strip of land approximately 11 feet in width and extending along the whole of the southern boundary thereof as shown on the filed plan and including such strip in the adjoining property, 4 Darland Avenue, so that the frontage of the adjoining property to Darland Avenue measured 39 feet, and, an order that the register of
- f** title no K 311242 and filed plan thereof be rectified accordingly by including the strip therein. The facts are set out in the judgment.

T L G Cullen for the plaintiffs.

C A Brodie for the defendants.

Cur adv vult

- g** 26th February. **TEMPLEMAN J** read the following judgment. This is an application under the Land Registration Act 1925 for rectification by removing a strip of land 11 feet wide and 80 feet long from the register of the land and premises of the defendants, Esso, known as Darland Garage, Gillingham, Kent, and by adding that strip of land to the register of the adjoining land and premises of the plaintiffs, Mr and Mrs Epps, known as 4 Darland Avenue. The house, 4 Darland Avenue, was built in 1935 by
- h** Alfred Edmund Clifford on land with an eastern frontage to Darland Avenue of 28 feet. The northern boundary of that land ran four feet from the side wall of the house, and on that northern boundary there was erected a brick wall which ran for 80 feet, and separated the land and premises of 4 Darland Avenue from the adjoining land and premises, Darland Garage, on the north. Darland Garage itself occupied a corner site, with a main frontage facing north, on to the thoroughfare, Watling Street, and a return eastern frontage to Darland Avenue. Mr Clifford was the estate owner
- i** in fee simple of both properties, 4 Darland Avenue, and Darland Garage, and he let those premises to Mr William Stephen Jones. Mr Clifford died on 27th August 1943. His will was proved by three members of his family, and by a conveyance dated 1st July 1955 his personal representatives conveyed to Mrs Edna Lilliston Jones, the wife of Mr Jones, land having a frontage of 39 feet to Darland Avenue and the house,

4 Darland Avenue, situate on part of that land. This conveyance included not only the 28 feet frontage of 4 Darland Avenue, bounded on the north by the brick wall which I have mentioned, but also the strip of land now in dispute, having a frontage of 11 feet to Darland Avenue, and a depth of 80 feet. This disputed strip ran parallel to, and on the north side of, the brick wall which originally divided 4 Darland Avenue, from Darland Garage. Thus the disputed strip was on paper carved out of the Darland Garage land and added to the 4 Darland Avenue land, although this is by no means clear from the plan annexed to the conveyance. The addition of the disputed strip to 4 Darland Avenue was effected by the 1955 conveyance which I have mentioned, because Mrs Jones wished to build a private garage for her car on the northern flank of the house. In the 1955 conveyance Mrs Jones covenanted to erect and maintain a good and sufficient nine inch wall, at least five feet nine inches in height, along the northern boundary separating the disputed strip from Darland Garage, because, as Mr Jones asserted and admitted, there was nothing to show where the 11 foot strip ended. Thus the obligation to carve out the disputed strip on the ground, so as to correspond to the carving out effected on paper, was imposed on Mrs Jones and on her successors in title. All would have been well if Mrs Jones had erected the private garage, as she contemplated, or the boundary wall, as she covenanted, but neither step was taken.

Mr Jones gave evidence that a post and wire fence was erected along the boundary of the 11 foot strip between 4 Darland Avenue and Darland Garage, and that the fence was eventually destroyed by children playing on the disputed strip. Mr Jones also gave evidence that from 1935 onwards he parked his car at night on the disputed strip, and sometimes during the day. There was endorsed on the probate of the will of Mr Clifford a memorandum to the effect that by a conveyance dated 1st July 1955 the freehold land and premises, 4 Darland Avenue, were conveyed to Mrs Jones in fee simple. This memorandum is uninformative and in retrospect misleading so far as the disputed strip of land is concerned, but gave notice of a 1955 conveyance of land which plainly adjoined Darland Garage. By a lease dated 31st July 1956 Mr Clifford's personal representatives leased Darland Garage to Mr Jones for a term expiring 25th December 1962 and by mistake the lease purported to include in the demised premises, not only the site of Darland Garage, but also the disputed strip and a part of the original site of 4 Darland Avenue. This mistake is not readily apparent from the plan annexed to the lease. By a conveyance dated 18th February 1959 Mr Clifford's personal representatives conveyed Darland Garage to a Mr Julian Iver Ball in fee simple, subject to the lease dated 31st July 1956 which was vested in Mr Jones. The 1959 conveyance repeated the mistake made in the 1956 lease, and purported to include the disputed strip and part of the original site of 4 Darland Avenue. The plan on the 1959 conveyance is identical with the plan on the 1956 lease. The mistake made in the 1959 conveyance was not wholly perpetuated because a survey plan was prepared by the Land Registry and signed by Mr Clifford's personal representatives and by Mr Ball, identifying the land which they intended should be conveyed by the 1959 conveyance, and they requested the Land Registry to complete registration accordingly. This survey plan excluded any part of the original site of 4 Darland Avenue, but repeated the original mistake of including the disputed strip. That was wholly included in the survey plan, and on 2nd March 1959 Mr Ball was registered in the Land Registry as the first registered proprietor with title absolute, under title no K 71926, of Darland Garage including the disputed strip.

By s 5 of the Land Registration Act 1925 this registration deprived Mrs Jones of the legal estate in fee simple in the disputed strip and vested that estate in Mr Ball, subject to such overriding interests, if any, as affected the disputed strip. Mr Clifford's personal representatives had thus innocently perpetrated a double conveyance of the disputed strip, first to Mrs Jones, subsequently to Mr Ball, and the Land Registry had thus innocently registered as the proprietor of the disputed strip Mr Ball who was not entitled to be so registered.

a I infer and find that when the disputed strip was conveyed to Mr Ball and then surveyed and registered in his name there was no fence separating the disputed strip from Darland Garage, and no indication of the existence of the disputed strip, but there was on the ground the original brick wall, which appeared to be the boundary between 4 Darland Avenue and Darland Garage. The position on the ground, the similarity between the 1956 lease and the 1959 conveyance and the terms of the memorandum endorsed on the probate of the will of Mr Clifford would not lead Mr b Ball or the Land Registry to ask any requisition or to call for the inspection of the 1955 conveyance to Mrs Jones, which would or might have revealed the mistaken double conveyance made by Mr Clifford's personal representatives.

c On 28th February 1964 Mrs Jones died intestate and her property vested in the probate judge. Mr Jones's lease of Darland Garage expired on 25th December 1962. He held over, he thinks, only for a few months, but the defendants submit, and I find, that he held over until the end of 1964, probably until December 1964. I base this finding on a report prepared by the defendants before they contracted to purchase Darland Garage, and on the terms of the contract into which the defendants entered for the purchase of Darland Garage. The defendants were on the scene not later than August 1964 when, in accordance with their usual practice, they took and retained d photographs of Darland Garage, which they were negotiating to purchase. Those photographs were not, of course, taken with a view to illuminating the position concerning the disputed strip, but it appears from those photographs that on the ground the apparent and obvious boundary between 4 Darland Avenue and Darland Garage remained the original brick wall erected four feet from the flank wall of the house, 4 Darland Avenue. There is nothing to indicate the existence of the disputed strip.

e By an agreement dated 13th October 1964, the defendants contracted to purchase Darland Garage with vacant possession on completion, and the description of Darland Garage included the disputed strip. By s 110 of the Land Registration Act 1925 the defendants were precluded from investigating title prior to first registration, and therefore had no opportunity of discovering the existence of the 1955 conveyance to Mrs Jones.

f On 14th December 1964 Darland Garage, including the disputed strip, was transferred to the defendants, and on 17th December 1964 they became, as they are now, the registered proprietors, and, by s 20 of the Land Registration Act 1925, became the legal estate owners in fee simple, subject to the overriding interests, if any, affecting the estate transferred. The defendants, no doubt, thought that they had obtained vacant possession of all that they had contracted to purchase with vacant possession.

g On 22nd September 1965 letters of administration to the estate of Mrs Jones were granted to Mr Jones, and by an assent dated 11th January 1966 he assented to 4 Darland Avenue, vesting in his own favour. By a conveyance dated 24th July 1968 Mr Jones conveyed to the plaintiffs, Mr and Mrs Epps, in fee simple 4 Darland Avenue, by a description which followed and referred to the original conveyance of 1st July 1955 and was therefore apt to include the disputed strip.

h On 1st August 1968 the plaintiffs became the first registered proprietors of 4 Darland Avenue, with title absolute, under title no K 311242. The filed plan prepared by the Land Registry, and accepted without demur by the plaintiffs or by their solicitors, excluded the disputed strip, which was, of course, already included in the filed plan relating to Darland Garage, and was vested in the defendants. The plaintiffs realised that the conveyance to them of 4 Darland Avenue included the disputed strip, but j that the position on the ground required clarification, because by a letter dated 31st July 1968 the plaintiff, Mr Epps, wrote to the defendants informing them that he had purchased 4 Darland Avenue and saying:

'... as this is next to your Darland Filling Station, would it be possible, for your representative, to meet my builder at the site, to agree on the building Line, before I commence building.'

It is plain from subsequent correspondence that the building line he had in mind was the boundary between the disputed strip and Darland Garage and the building he contemplated was a private garage. A meeting took place on the site, but the defendants' representative had no filed plans, and by a letter dated 15th August 1968 the defendants wrote to Mr Epps confirming their meeting and stating that they had measured the land. It was agreed, they said, that—

[we] should write to your solicitors when the plans attached to the Deeds of your property could be compared with ours, as soon as yours had been obtained from the Land Registry. [They asked for the name of the plaintiffs' solicitors and said:] As soon as the area of land is agreed, after scrutiny of the plans, a representative of this Company will call on you again to determine the precise boundary line between our respective properties, after which there will be no objection to your commencing construction of the building which you propose to erect adjoining your house. It is understood, in the light of our measurements, that your property extends from the existing wall at the side of your house to the boundary of this Company's property, which is approximately a distance of 12 feet, but this measurement is subject to detailed verification on comparison of plans.'

Of course, on the perfectly proper statement by Mr Epps that his property had a frontage of 39 feet, that was correct, but the plans, when ultimately seen, showed an entirely different position. The matter of the boundary was overlooked by the defendants' representatives until 1970, when they were proceeding with plans to develop Darland Garage; they wrote to Mr Epps on 1st May 1970, having forgotten or overlooked the previous correspondence and meeting, asking Mr Epps to remove a fence which he had in the meantime—I think some time in 1968—erected on the boundary between the disputed strip and Darland Garage. This letter asked Mr Epps to remove the fence forthwith and to cease using the disputed strip, and threatened proceedings if that request were not complied with. The defendants then found out that the matter had been overlooked and sent an apology for that to Mr Epps, and there was then an inspection of the plans by either side. Of course, from inspection of the plans it appeared that the disputed strip belonged to the defendants so far as registered title was concerned. There was then some more misunderstanding, not unnaturally, in view of the mistakes which had been made, and for which neither of them were responsible, but by the end of 1970 it was clear on both sides that this was a case of double conveyancing, that the legal title was vested in the defendants, and that the plaintiffs could only continue to claim the disputed strip if they were successful in obtaining rectification of the register. Hence these proceedings.

Section 82 (1) of the Land Registration Act 1925 provides that the register may be rectified where, inter alia, as in the present case, a legal estate has been registered in the name of a person who, if the land had not been registered, would not have been the estate owner. That describes the defendants. Section 82 (3) limits the exercise of the power of rectification conferred by s 82 (1). The limitation is in these terms:

'The register shall not be rectified, except for the purpose of giving effect to an overriding interest, so as to affect the title of the proprietor who is in possession ... unless ...'

and then it specifies three conditions, one of which must be satisfied, if rectification is to be granted. Condition (a), which does not apply in the present case, authorises rectification against a party who has caused or substantially contributed to the mistake which has been made on the register. Condition (b), which also does not apply, authorises rectification where the immediate disposition to the registered proprietor is void, or the disposition to any person through whom he claims otherwise than for valuable consideration was void. Condition (c) provides for rectification if—

a 'for any other reason, in any particular case, it is considered that it would be unjust not to rectify the register against [the registered proprietor].'

Counsel for the plaintiffs submitted that when Mrs Jones was deprived of her legal estate in fee simple by the mistaken registration of Mr Ball, as proprietor, Mrs Jones retained or acquired, and her successors in title, down to and including the plaintiffs, acquired an equitable interest in fee simple. The registered proprietor, first Mr Ball, and now the defendants, acquired the legal estate, subject to the equitable interest of Mrs Jones and her successors. Effect should be given to that equitable interest by rectification. The limitation on the exercise of the power of rectification, which is to be found in s 82 (3), does not apply where rectification is required to give effect to an overriding interest. The equitable interest of Mrs Jones and her successors in title is an overriding interest. By s 70 (1) (g) overriding interests include the rights of every person in actual occupation of the land or in receipt of the rents and profits thereof, save where enquiry is made of such person and the rights are not disclosed. Mrs Jones and her successors in title were in actual occupation, because Mr Jones, and later the plaintiffs, parked a car on the disputed strip. Mr Ball and the defendants acquired the disputed strip subject to the overriding interests of Mrs Jones and her successors constituted by an equitable interest protected by actual occupation. The defendants never were in possession or, at any rate, ceased to be in possession when the plaintiffs erected their fence in 1968. Thus far counsel for the plaintiffs.

In considering this case I propose to ignore the fence erected by the plaintiffs in 1968 after they had entered into amicable discussions with the defendants. Even if s 82 (3) referred to de facto possession as at the date of the trial of these proceedings, I would have restored the position by ignoring the fence, when considering the exercise of the general discretion conferred by s 82 (1). It does not seem to me that in order to secure the protection given by the Act the defendants were bound forcibly to re-enter and tear down the fence or to get an injunction pending trial.

The claim put forward by counsel for the plaintiffs to an overriding interest depends on whether Mr Jones was in actual occupation of the disputed strip when the defendants became the registered proprietors of the disputed strip in 1964. The contention put forward by counsel for the plaintiffs that the defendants were not in possession depends on whether the defendants went into possession of the disputed strip when they became the registered proprietors and remained in possession until after the plaintiffs completed their purchase in 1968.

Counsel for the defendants took up a position at the opposite pole. He submitted that even if Mr Jones was in actual occupation he occupied in his capacity as tenant of Mr Ball. Alternatively, the occupation of Mr Jones could not protect any equitable interest vested in the probate judge at the date when the defendants became the registered proprietors of the disputed strip in 1964.

I reject these submissions of counsel for the defendants. If Mr Jones was in actual occupation when the defendants completed their purchase of the disputed strip then his occupation in the present circumstances sufficed to assert and protect any equitable interest of Mrs Jones and her estate so as to constitute an overriding interest, and sufficed also to defeat the claim by the defendants to be in possession.

Counsel for the defendants also submitted that where rectification is sought, not against the first registered proprietor, in this case Mr Ball, but against a subsequent transferee for value, in this case the defendants, that subsequent transferee must be treated as a bona fide purchaser for value without notice, and will not be compelled to suffer rectification save in exceptional circumstances. For this proposition he cited *Re Leighton's Conveyance*¹: where a transfer was procured from a registered proprietor by fraud, and the original registered proprietor was held to be bound by a charge executed by the fraudulent transferee in favour of an innocent mortgagee.

1 [1936] 1 All ER 667, on appeal [1936] 3 All ER 1033, [1937] Ch 149

That case is, however, only an illustration of an estoppel operating in certain circumstances against a person who executes a document relied on by an innocent third party, and does not assist me in the present case. a

In my judgment, the fact that the defendants were not the original proprietors, but subsequent transferees, is only one element to be considered in the exercise of the discretion conferred by s 82 (1) and (3) (c) of the 1925 Act. In the confrontation envisaged by s 82 (1), and in particular by s 82 (1) (g), between, on the one hand, the registered proprietor, who is a victim of double conveyancing, and the first purchaser or his successors, deprived of the legal estate by registration, the court must first determine whether the registered proprietor is in possession. If the registered proprietor is not in possession then s 82 (3) does not apply, and the court will normally grant rectification: see *Chowood Ltd v Lyall* (No 2)¹. A fortiori if the registered proprietor is not in possession but the applicant has an overriding interest constituted by an equitable interest protected by actual occupation, the court will grant rectification: see *Bridges v Mees*². However, the power of rectification given by s 82 (1) never ceases to be discretionary, so that where s 82 (3) does not apply there may still be circumstances which defeat the claim for rectification. b

If the registered proprietor is in possession, the applicant for rectification will not normally be in actual occupation, and one of the conditions specified in s 82 (3) must be satisfied if rectification is to be granted. If the registered proprietor is the first registered proprietor and has caused or contributed to the mistake in registration then s 82 (3), condition (a) applies, and rectification will normally be granted: see *Re 139 High Street, Deptford*³. But where the applicant has, for example, allowed the registered proprietor to build on the land, then, even though the conditions in s 82 (3) (a) have been satisfied, the court, taking the hint from s 82 (3) (c) and exercising the discretion conferred by s 82 (1), may refuse to rectify: see *Re Sea View Gardens, Claridge v Tingey*⁴. c

If the proprietor is not the first registered proprietor but is a subsequent transferee he will not normally be responsible for the mistake in registration in any way at all, so that the conditions specified in s 82 (3) (a) will not be satisfied; to this limited extent a subsequent transferee is in a better position than the first registered proprietor. But whether the proprietor be the first registered proprietor or a subsequent transferee rectifications will still be granted under s 82 (3) (c) if for any reason in any particular case it is considered that it would be unjust not to rectify the register against the registered proprietor. d

It follows that the crucial questions in the present case are, first, whether Mr Jones was in actual occupation of the disputed strip when the defendants completed their purchase in 1964; secondly, whether the defendants were in possession at the date when the plaintiffs completed their purchase of 4 Darland Avenue in 1968; and if those questions are decided in favour of the defendants, thirdly, whether it would be unjust not to rectify against them. e

In *Hodgson v Marks*⁵ Russell LJ had this to say about actual occupation as an ingredient of an overriding interest: he said he was prepared for the purpose of that case to assume, without necessarily accepting, that s 70 (1) (g) of the 1925 Act was designed only to apply to a case in which the occupation was such in point of fact as would in the case of unregistered land affect a purchaser with constructive notice of the rights of the occupier. Then he said⁶: f

'I do not think it desirable to attempt to lay down a code or catalogue of g

1 [1930] 2 Ch 156, [1930] All ER Rep 402

2 [1957] 2 All ER 577 at 581, 582, [1957] Ch 475 at 486

3 [1951] 1 All ER 950, [1951] Ch 884

4 [1966] 3 All ER 935, [1967] 1 WLR 134

5 [1971] 2 All ER 684 at 688, [1971] Ch 892 at 931

6 [1971] 2 All ER at 688, [1971] Ch at 932 h

a situations in which a person other than the vendor should be held to be in occupation of unregistered land for the purpose of constructive notice of his rights, or in actual occupation of registered land for the purposes of s 70 (1) (g). It must depend on the circumstances, and a wise purchaser or lender will take no risks. Indeed, however wise he may be he may have no ready opportunity of finding out; but, nevertheless, the law will protect the occupier.'

b In my judgment Mr Jones was not in actual occupation of the disputed strip when the defendants completed their purchase of Darland Garage, and was not thereafter in actual occupation. Mr Jones gave evidence that every night he parked his car on the disputed strip, and sometimes the car was there during the day. Mr Jones's recollection, not unnaturally, was not very reliable, and I find that he sometimes parked his car on the disputed strip, but how often and when no one can now determine with any certainty. But even if Mr Jones regularly parked his car on the disputed strip I do not consider that this constituted actual occupation of the disputed strip in the circumstances of the present case.

c I reach this conclusion for the following reasons. First, the parking of a car on a strip 11 feet wide by 80 feet long does not actually occupy the whole, or a substantial, or any defined part of that disputed strip for the whole or any defined time. Secondly, the parking of a car on an unidentified piece of land, apparently comprised in garage premises, is not an assertion of actual occupation of anything.

d In addition to these two reasons there are circumstances which show that, not only was Mr Jones not in actual occupation, but on the contrary the defendants were. First, there is no evidence that Mr Ball or the defendants were ever aware that Mr Jones parked his car on the disputed strip. The fact that the defendants completed their purchase after stipulating for vacant possession is an indication that both Mr Ball and the defendants considered that vacant possession was in fact given and taken on completion. Secondly, the brick wall four feet from the house, 4 Darland Avenue, was an assertion that the occupier of Darland Garage occupied land up to that wall, and was just as much in possession of the disputed strip as of any other part of the apparent Darland Garage premises. Thirdly, as appears from the defendants' photographs, there was no method of driving on to the strip from Darland Avenue without trespassing on to the garage premises unless the car in question was bounced up the kerb and steered between a stop-sign and a tree. These difficulties could, no doubt, be overcome, but they added force to the apparent assertion by all the indications on the ground that the disputed strip was part and parcel of Darland Garage and was occupied and possessed therewith, and that the claim and title of 4 Darland Avenue ceased where the brick wall ceased. In the result Mr Jones and the plaintiffs were, in my judgment, never at any material time in actual occupation of the disputed strip, and the defendants were at all material times in possession of the the disputed strip. The defendants claimed that they occupied the disputed strip by depositing waste materials on the strip as part of the garage land. Precise evidence of this was, not unnaturally, impossible to obtain. I accept, however, that they did treat the disputed strip just in the same way that they treated any other part of the garage land and premises.

g In my judgment, therefore, s 82 (3) does apply because Mr and Mrs Jones and the plaintiffs had no overriding interest protected by actual occupation and because the defendants were in possession. There remains the question, under s 82 (2) (c), whether it would be unjust not to rectify against the defendants.

j In my judgment, justice in the present case lies wholly with the defendants and not with the plaintiffs. There was nothing on the register or on the ground on or before the date when the defendants became the registered proprietors of the disputed strip which put them on enquiry. On the contrary, both the register and the appearance on the ground proclaimed that title to and possession of the disputed strip and the garage premises were one and indivisible. No reasonable requisition by

the defendants from their vendor, Mr Ball, would in the circumstances have disclosed the existence of, let alone any claim to, the disputed strip. The absence of any indication on the ground was due to the default of the plaintiffs' predecessor in title in not complying with her covenant to build a boundary wall which would mark out the disputed strip. On the other hand, the plaintiffs, even without hindsight, were taking a gamble. The title disclosed to them showed the obligations of Mrs Jones to build a boundary wall. Inspection of the site disclosed that the only wall in existence was the original wall four feet from the side of the house. It was possible that the frontage of 39 feet mentioned in the 1955 conveyance was a mistake; whether it was a mistake or not it was possible that the true 1955 boundary between 4 Darland Avenue and Darland Garage was the line of the original wall. If the true 1955 boundary was not the existing wall but a new wall to be constructed on the northern boundary of the disputed strip it was possible that because of the failure to build the wall or to mark out the disputed strip, title to the disputed strip had been lost by adverse possession, or, as in fact happened, by a natural mistake on registration.

The plaintiffs must have realised that there might be some difficulty over the boundary between 4 Darland Avenue and Darland Garage; hence Mr Epps's letter dated 31st July 1968. The enquiries made in that letter after completion could have been made, and ought to have been made, before completion. The plaintiffs or their legal advisers, if properly instructed, ought to have required their vendor, Mr Jones, to prove that the boundary between 4 Darland Avenue and Darland Garage was 11 feet from the brick wall, and was known to and acknowledged by the owner of Darland Garage to be that unmarked boundary and not the apparent boundary constituted by the brick wall four feet from the side wall of the house. The plaintiffs or their legal advisers, if properly instructed, ought to have realised that, without further enquiries to their vendor, and enquiries by their vendor to the defendants, it had not been established that the vendor was in a position to give a good title or in a position to give possession of the disputed strip to the plaintiffs.

In my judgment, whereas the defendants bought the disputed strip, the plaintiffs bought a law suit, thanks to the default of their vendor in not taking steps to assert ownership and possession of the disputed strip, and thanks to the failure of the plaintiffs to make before completion the enquiries which they made immediately after completion.

Counsel for the plaintiffs put forward one additional circumstance which he argued, with some force, tilted the balance of justice in favour of rectification. That circumstance, he submitted, was that if the register is rectified the defendants can recover compensation based on the 1973 value of the disputed strip, but if the register is not rectified the plaintiffs cannot recover compensation. This argument is founded on s 83 of the 1925 Act which deals with compensation. Section 83 (1) provides that, subject to the provisions of the Act to the contrary, any person suffering loss by reason of any rectification of the register under the Act shall be entitled to be indemnified. That will be the position of the defendants if I rectify. Section 83 (2) provides that where an error or omission has occurred in the register, but the register is not rectified, any person suffering loss by reason of such error or omission shall, subject to the provisions of the Act, be entitled to be indemnified. That is the position of the plaintiffs if I do not rectify.

By s 83 (6) where indemnity is paid in respect of the loss of an estate or interest in or charge on land the amount so paid shall not exceed, where the register is not rectified, the value of the estate, interest or charge at the time when the error or omission which caused the loss was made. In other words, if I do not rectify then the plaintiffs' indemnity is reduced to the value of the disputed strip as at 1959 when the error was made. Section 83 (6), on the other hand, says that where the register is rectified the indemnity is not to exceed the value if there had been no rectification of the estate, interest or charge immediately before the time of rectification. This would apply to the defendants. So that the legislature provides 1959 values for the plaintiffs

a and 1973 values for the defendants. The matter does not end there, however, because by s 83 (11) there is a further limitation on indemnity. Section 83 (11) provides that a liability to pay indemnity under the Act shall be deemed a simple contract debt; and for the purposes of the Limitation Act 1963 the cause of action shall be deemed to arise at the time when the claimant knows or, but for his own default, might have known, of the existence of his claim. Whether or not that applies to the plaintiffs, b it clearly does not affect the defendants; first, because they are not claimants; and secondly, because they must have been in complete innocence of anything wrong until the plaintiffs came on the scene and raised the question of where the true boundary lay. Then there is a proviso:

c 'Provided that, when a claim to indemnity arises in consequence of the registration of an estate in land with an absolute or good leasehold title, the claim shall be enforceable only if made within six years from the date of such registration, except in the following cases . . .'

and then it sets out cases involving infants or settled land, which plainly do not apply. Clearly, that proviso operates to deprive the plaintiffs of compensation, because their claim to indemnity is made more than six years from the date of the 1959 registration. d Counsel for the plaintiffs submits that it does not apply to the defendants. First, he says that the proviso only applies to s 83 (2); and, secondly, he says that the claim to indemnity will only arise so far as the defendants are concerned in consequence of the registration which will follow on any order for rectification.

e Counsel for the defendants, on the other hand, submits that the proviso applies to the defendants and that if it does not, the matter is obscure, and any decision I make on it will not be binding, and the defendants should not be left in the uncertainty of knowing whether that decision is right.

f I can only peer through my own spectacles, and, in my judgment, the proviso does not apply to the defendants. It is intended only to apply to a claimant who has the means and opportunity of finding out and asserting his claim, and therefore there is no reason why the six year period should not operate. In the case of the defendants, however, who are in possession and who have got the title I do not consider that the proviso applies; they will not suffer and their claim to indemnity will not arise unless and until an order for rectification is made.

g Accordingly, the foundation for counsel for the plaintiffs' submission is established. This is a case, in my judgment, in which if an order for rectification is made the defendants will be entitled to indemnity on 1973 values, and if the claim for rectification is refused then they will keep the land, but the plaintiffs will not get compensation.

h The question I have to determine is whether that is sufficient to upset the justice of the defendants' claim that there should not be rectification in the present instance. Is it sufficient—and this is the test—to make it unjust not to rectify the register against the defendants? Counsel for the plaintiffs pointed out that as far as the defendants are concerned the disputed strip formed, he calculated, four per cent of the garage premises. He said it could not make a lot of difference to the defendants' garage; on the other hand, it was of importance to 4 Darland Avenue, because it provided a private garage, an asset which is important in commuter territory.

i In my judgment, however, this cannot be solved merely on the question of money. The defendants bought the land; they bought it to exploit for their commercial purposes; they did not buy it in order to sell a strip for a 1973 value, which in real terms will not, in my judgment, adequately indemnify them. Although the strip is at the back of the garage, in the same way as it could be used as a private garage for 4 Darland Avenue, so it could be used by the defendants for commercial purposes, and in fact they say now they intend to use it in connection with a car wash; if they are deprived of it they will be in considerable difficulty, and will not have all the facilities which a modern garage requires. I think that may be putting it a bit high, but the

fact of the matter is that this strip is worth more to the defendants than the pounds, shillings and pence which they will receive by indemnity, even on a 1973 basis. a

Accordingly, in my judgment, that argument is not sufficient to overturn all the other arguments in favour of the defendants, and I decline to order rectification of the register.

Summons dismissed.

Solicitors: *Vigards* (for the plaintiffs); *Piesse & Sons* (for the defendants). b

Jacqueline Metcalfe Barrister.

Holwell Securities Ltd v Hughes c

CHANCERY DIVISION

TEMPLEMAN J

1st, 2nd MARCH 1973

Contract – Offer and acceptance – Acceptance by post – Mode of acceptance prescribed – Notice in writing to offeror – Option – Option to purchase freehold property – Notice – Option ‘exercisable by notice in writing to’ vendor within prescribed period – Purchaser writing letter to vendor giving notice of exercise of option – Letter sent by ordinary post – Letter never delivered to vendor – Whether option validly exercised – Law of Property Act 1925, s 196. d

By cl 1 of an agreement dated 19th October 1971 made between the defendant of the one part and the plaintiffs of the other, the plaintiffs were granted an option to purchase certain freehold property from the defendant. Clause 2 of the agreement provided: ‘The said option shall be exercisable by notice in writing to the [defendant] at any time within six months from the date hereof.’ On 14th April 1972 the plaintiffs’ solicitors wrote a letter to the defendant giving notice of the exercise of the option. The letter was posted, properly addressed and prepaid, on 14th April, but it was never in fact delivered to the defendant or to his address. In an action against the defendant seeking specific performance of the option agreement, the plaintiffs contended that, since a contractual offer could be accepted by posting a letter of acceptance, the time of acceptance being the moment of posting, the option had been validly exercised when their letter of 14th April was posted. e

Held – Since the agreement prescribed the mode in which it was to be exercised, it followed that it could only be exercised in the prescribed way, i.e. by serving notice on the defendant, either by delivering it to him by hand or in one of the ways authorised by s 196^a of the Law of Property Act 1925. The mere posting of the notice could f

g
^a Section 196, so far as material, provides:

‘(3) Any notice required or authorised by this Act to be served shall be sufficiently served if it is left at the last-known place of abode or business in the United Kingdom of the . . . person to be served . . .’

‘(4) Any notice required or authorised by this Act to be served shall also be sufficiently served, if it is sent by post in a registered letter addressed to the . . . person to be served, by name, at the aforesaid place of abode or business . . . and if that letter is not returned through the post-office undelivered; and that service shall be deemed to be made at the time at which the registered letter would in the ordinary course be delivered. h

‘(5) The provisions of this section shall extend to notices required to be served by any instrument affecting property executed or coming into operation after the commencement of this Act unless a contrary intention appears . . .’ i

a not constitute a valid exercise of the option (see p 480 c, p 481 a, p 482 c, p 484 c to f and p 485 b, post).

Henthorn v Fraser [1891-94] All ER Rep 908, *Bruner v Moore* [1904] 1 Ch 305, *Household Fire and Carriage Accident Insurance Co Ltd v Grant* (1879) 4 Ex D 216 and *Re Imperial Land Co of Marseilles* (1872) 7 Ch App 587 distinguished.

b Notes

For contracts made through the post, see 8 Halsbury's Laws (3rd Edn) 78-80, paras 134-139, and for cases on the subject, see 12 Digest (Repl) 96-100, 484-525.

For the Law of Property Act 1925, s 196, see 27 Halsbury's Statutes (3rd Edn) 617.

Cases referred to in judgment

c *Berkeley Road* (88), London NW9, *Re, Rickwood v Turnsek* [1971] 1 All ER 254, [1971] Ch 648, [1971] 2 WLR 307.

Bruner v Moore [1904] 1 Ch 305, 73 LJCh 377, 89 LT 738, 12 Digest (Reissue) 99, 516.

Hare v Nicoll [1966] 1 All ER 285, [1966] 2 QB 130, [1966] 2 WLR 441, CA, Digest (Cont Vol B) 665, 300a.

Henthorn v Fraser [1892] 2 Ch 27, [1891-94] All ER Rep 908, 61 LJCh 373, 66 LT 439, CA, 12 Digest (Reissue) 74, 383.

d *Holt v Heatherfield Trust Ltd* [1942] 1 All ER 404, [1942] 2 KB 1, 111 LJBK 465, 166 LT 251, 8 Digest (Repl) 597, 406.

Household Fire and Carriage Accident Insurance Co Ltd v Grant (1879) 4 Ex D 216, 48 LJQB 577, 41 LT 298, 44 JP 152, CA, 12 Digest (Reissue) 81, 420.

Imperial Land Co of Marseilles, Re, Harris' Case (1872) 7 Ch App 587, 41 LJCh 621, 26 LT 781, 12 Digest (Reissue) 97, 490.

e *Stevenson, Jacques & Co v McLean* (1880) 5 QBD 346, 49 LJQB 701, 42 LT 897, 12 Digest (Reissue) 71, 363.

Case also cited

Entores Ltd v Miles Far East Corpn [1955] 2 All ER 493, [1955] 2 QB 327, CA.

f Action

This was an action commenced by writ issued on 4th July 1972 by the plaintiffs, Holwell Securities Ltd, against the defendant, Thomas Hilaire Hughes, seeking specific performance of an agreement for the sale by the defendant to the plaintiffs of property known as 571 High Road, Wembley, and registered at H M Land Registry with absolute freehold title under title no NGL 10503 at the price of £45,000 such agreement being constituted by an option agreement made in writing and for value on 19th October 1971 between the plaintiffs and the defendant and exercise of the option by notice in writing to the defendant dated 14th April 1972. Further or alternatively, the plaintiffs claimed damages for breach of contract. The defendant denied that the option had been validly exercised. The facts are set out in the judgment.

h W A Macpherson QC and Hubert Picarda for the plaintiffs.
Frank Whitworth QC and Roger Ellis for the defendant.

TEMPLEMAN J. This is a purchaser's specific performance action based on a written option agreement. The defence is that in the circumstances which I shall narrate the option was not validly exercised.

i The option agreement was dated 19th October 1971 and made between the defendant, Dr Hughes (called 'the intending vendor'), of the one part, and the plaintiffs, Holwell Securities Ltd (called 'the intending purchaser'), of the other part. Clause 1 granted the option to purchase the property known as 571 High Road, Wembley, which was registered at the Land Registry with absolute title. Those premises, 571 High Road, Wembley, were the residence of the defendant and also the place where he

carried on his practice as a general medical practitioner. Clause 2 dealt with the exercise of the option and was in these terms: 'THE said option shall be exercisable by notice in writing to the Intending Vendor at any time within six months from the date hereof . . .'

By a letter dated 14th April 1972, getting near the expiry date for the option, the plaintiffs' solicitors wrote to the defendant's solicitors. The letter read:

'Re Dr. T. H. Hughes and Holwell Securities Limited, 571 High Road, Wembley. We refer to our earlier correspondence regarding our clients' option to purchase the above property. Our clients wish to exercise their option and we shall be obliged if you would accept this letter as notice of the exercise of the option. Kindly acknowledge receipt. We enclose our clients' cheque in your favour for the sum of £4,500, being the 10 per cent. deposit payable on the exercise of the option to be held by you as stakeholders. [Finally:] We are sending a copy of this letter to your client.'

Although cl 2 of the option agreement provided for notice in writing to the intending vendor, a different arrangement was made with regard to the deposit. Clause 3 of the agreement provided that on the exercise of the option the intending purchaser 'shall pay to the Intending Vendor's Solicitors as Stakeholders by way of deposit the sum of . . . £4,500'. So notice exercising the option was to go to the vendor, and the deposit was to go to the vendor's solicitors, and in this letter dated 14th April 1972 the plaintiffs' solicitors purported both to exercise the option and to send the deposit (which they did) by the letter addressed to the defendant's solicitors. That letter was delivered by hand to the defendant's solicitors in the afternoon of 14th April. There is no dispute about that. But equally the plaintiffs do not contend that this solicitors' letter was effective by itself to exercise the option. It is not contended that service on the defendant's solicitors could be sufficient. On the same day, that is to say 14th April, and about the same time, the plaintiffs' solicitors prepared another letter. It was dated 14th April and it was addressed, on the letter, to:

'Dr. T. H. Hughes, 571 High Road, Wembley, Middlesex. Dear Sir, Re [and then on the carbon, which is the only copy we have got, it is left rather vague as to whether they got the number right] High Road, Wembley, Holwell Securities Limited. We enclose for your information a copy of a letter today sent to your solicitors.'

So they did what they told the other solicitors they were going to do, namely, send a copy of the letter to the defendant.

That letter, the one intended for the defendant, and a copy of the letter which had been sent by hand to the solicitors were, between about 1.30 p.m. and 2 p.m. on 14th April, placed in an envelope addressed it is said to the defendant and that envelope and its contents (to which I shall refer as 'the disputed notice') were immediately placed in a post basket on the third floor of the principal offices of the plaintiffs' solicitors. There is no direct evidence that it was ever seen again. What should have happened to the disputed notice, and what I am invited to infer in fact happened, was this: about 15 minutes after the disputed notice had been placed in the post basket, the disputed notice and any other letters were collected by a messenger from the post-room. They were taken to the post-room, a room set aside for that purpose in the plaintiffs' solicitors' principal offices, and in the post-room the disputed notice was franked with first-class mail postage, and the franking incorporated a print of the name of the plaintiffs' solicitors together with a direction to deliver the envelope back to the address thus given in the event of it not being delivered to the addressee. When that franking was completed, the disputed notice and the contents of other baskets with more letters delivered from other offices belonging to the plaintiffs' solicitors, were divided into two categories, one providing for delivery to postal addresses in the London area and the other for delivery outside London. Bundles of about 30 letters

a were secured by a rubber band and each bundle was dropped into a Post Office mail bag. There were separate mail bags for the letters intended for the London area and for those intended for other areas. At the end of the afternoon each mail bag was fastened by string at the neck in the usual way and was taken to the street entrance to the offices, and at about 6 p.m. the mail bags were handed over to an employee of the Post Office, who accepted them and put them on to a Post Office van, and off they went.

b I heard evidence from the supervisor of the postal department of the plaintiffs' solicitors, and the chance that the disputed notice was lost on the premises of the plaintiffs' solicitors, or that there was some failure of the system so that the disputed notice was not in fact handed over to the Post Office representative on the evening of 14th April, is negligible and remote.

c The same day the defendant's solicitor, who had received his letter by hand, spoke by telephone to the defendant, and in his evidence the defendant said that he was told that the solicitor had received a letter which purported to exercise the option, but that the solicitor did not think it was a valid exercise of the option, and the defendant was told, or at least led to believe, that he could expect to receive a copy, or a similar letter—I am not giving the exact words but it is quite clear that was the general sense of what he was told. The defendant then gave evidence that he d told his solicitor that he had already planned to go to Ireland because of illness in his family, and asked whether he could go. He was advised that he was under no obligation to stay at home and wait for whatever came through the post or whatever might be delivered otherwise than through the post. So the defendant then left for Ireland that evening and did not return to Wembley until the morning of 20th April, by which time of course the six months limited by the option agreement for the exercise e of the option had expired.

In the meantime, while the defendant was away, the disputed notice having been taken and accepted by the Post Office should have been taken by van to a London sorting office at Rathbone Place, and having then been sorted for Wembley it should have been taken to the Wembley sorting office by van, and then by van and man it f should have gone from the Wembley sorting office to the defendant's address, arriving there on Saturday 15th April providing it was correctly addressed and providing that no mistake or delay intervened.

As I have said, the defendant is a medical practitioner who lives and practises at 571 High Road, Wembley. He is in partnership with another doctor, a Dr Blankert, and whenever Dr Blankert is on duty and the defendant is away Dr Blankert occupies a flat on the top floor of the premises.

g [His Lordship considered the layout of the defendant's house, the arrangements for receipt of mail, the evidence of the defendant and Dr Blankert and continued:] Dr Blankert was quite clear in her evidence, and the chances that the disputed notice was in fact delivered to the defendant's address between 14th and 20th April without her knowledge are negligible. It follows that, unless Dr Blankert is telling a pack of h lies, the disputed notice was not delivered, and in this state of the evidence I infer, and find, first, that the disputed notice was posted on 14th April, that is to say before the option expired, and posted in the sense that it was handed over to the Post Office, to some postman duly authorised to receive it and to transmit it to the defendant, and that it was properly addressed and properly posted. Secondly, I find that the disputed notice was never in fact delivered to the defendant or to his address.

i Counsel who appeared for the defendant submitted that even if the disputed notice had been delivered it would not have been sufficient to exercise the option because it did not, in addressing the defendant, say 'Dear Dr Hughes, We are exercising the option'; it merely enclosed for his information a copy of a letter sent to his solicitors. But when one looks at that copy and finds it says, 'Our clients wish to exercise their option and we shall be obliged if you would accept this letter as notice of the exercise of the option', it seems to me that if the defendant had got that letter he

would have got what the option agreement says he was to get, notice in writing exercising the option. a

The argument in this case then revolves round one point. Counsel for the plaintiffs submits that the option was exercised when the letter was posted, while counsel for the defendant submits that the option could only be exercised by delivery. It never was delivered, and thus the option was never exercised at all.

I begin by disembarassing myself as far as possible from authority and looking at the agreement. The agreement says the option shall be exercisable 'by notice in writing to the Intended Vendor at any time within six months from the date hereof'. As a matter of construction I think that meant the notice in writing had to be given to the intending vendor, and given to him in the sense that he had got to receive it. I leave out of account for the moment what would have happened if he tried to evade service or if it was delivered to his house where he lived. Leaving that out of account for a moment, as a matter of construction it seems to me this option agreement is providing that the notice shall be delivered to the vendor, and if it is not then the option is not properly exercised. b

I turn now to see what authority has to say on the matter, and the first hint to which I refer is s 196 of the Law of Property Act 1925. That deals, in sub-s (1), with 'Any notice required or authorised to be served or given by this Act', and by sub-s (5) the provisions of the section— c

'shall extend to notices required to be served by any instrument affecting property executed or coming into operation after the commencement of this Act unless a contrary intention appears.' d

In *Re 88 Berkeley Road, London NW9, Rickwood v Turnsek*¹ Plowman J decided that for the purposes of s 196 (4) there was no difference between serving a notice and giving a notice, and it seems to me that, apart altogether from sub-s (1) which talks about notices being served or given, the same principle must apply to sub-s (5) and to the option agreement. Counsel for the plaintiffs did not argue that there was any difference between an agreement which required notice in writing to the vendor and an agreement which required notice in writing to be given to the vendor. His argument was that notice was given when the disputed notice was posted. Section 196 contains various directions as to how notice may be given. Subsection (3) provides: e

'Any notice required or authorised by this Act to be served shall be sufficiently served if it is left at the last-known place of abode or business in the United Kingdom of the lessee, lessor, mortgagee, mortgagor, or other person to be served, or, in case of a notice required or authorised to be served on a lessee or mortgagor, is affixed or left for him on the land or any house or building comprised in the lease or mortgage [and so on].' f

That gets round the difficulty which might arise, as in the present case, if the defendant were away in Ireland. You could leave the notice at his last known place of abode or business, which in the present case were one and the same thing. Then sub-s (4) provides: g

'Any notice required or authorised by this Act to be served shall also be sufficiently served, if it is sent by post in a registered letter addressed to the lessee, lessor, mortgagee, mortgagor, or other person to be served, by name, at the aforesaid place of abode or business, office, or counting-house, and if that letter is not returned through the post-office undelivered; and that service shall be deemed to be made at the time at which the registered letter would in the ordinary course be delivered.' h

I leave out the complication that we now have 'Recorded delivery' with another statute which provides similar machinery, but the significance of s 196 is this: it i

¹ [1971] 1 All ER 254, [1971] Ch 648

a assumes that when a notice is required to be served or given it must actually reach the person for whom it is intended, and there are statutory exceptions which discharge the sender of the notice from proving that it reached the person in question in certain limited circumstances: first of all, if he can show that the notice was left at his house or office, and, secondly, if sent by post in a registered letter properly addressed. In that case if the registered letter is not returned undelivered then it is to be deemed to be sufficiently served, and the Act specifies that the time at which the service is deemed to be carried out is not the time of posting but the time of normal delivery. That seems to me to be consistent only with the underlying assumption that notices which require to be served have got to reach people, and this is a convenient method of proving or deeming that service has in fact been carried out and that they have been reached. True, as counsel for the plaintiffs says, you are not obliged to use the Act. You can hand the notice to the addressee personally or serve it in another form altogether. But in that case, of course, you may not need and do not get the protection afforded by the Act.

c Counsel for the plaintiffs says that s 196 is irrelevant, it is only an extra precaution which could be used. But if he is right it is an unnecessary section. All you have got to do to serve a notice, he says, is to pop it in a pillar box. According to him if you have got to serve a notice by midnight on Friday on a gentleman living in Blackpool all you have got to do is, one minute before midnight in Brighton, to pop it in a pillar box, presumably even with a 2½p stamp, and, although it may not get there for another week afterwards, or may never get there, that is good service and is effective as at the date when it is popped into the pillar box. In my judgment, s 196 is entirely inconsistent with that argument. It must be remembered that s 196 is only statutory shorthand for precedents which were commonly in use and which also therefore assumed that a notice had to be proved to be delivered at or before the required date. Counsel for the plaintiffs seeks to say there are two sorts of notices: one which he calls an initiation notice and one such as the present which he calls a completion notice. An initiation notice he describes, for example, as a notice of intention to prosecute, or something of that sort, and he also said that notice pursuant to a clause in a lease for breaking the term of the lease was an initiation notice. His submission was that if you found a lease-break clause, then—I am not quite sure whether he said it certainly was or could well be—notice in writing required in that case had to be actually received subject to the provisions of s 196, whereas if, as in the present case, there was an option to purchase, then he says posting is good enough, and he was driven to concede that you might in one and the same lease have three clauses, a lease-break clause, a renewal clause and an option to purchase the freehold. Each clause might require notice in writing, but some of those notices could be well served by, and at the time of, popping in the pillar box; other notices would have to be served by delivery and would be served at the time when the notice was in fact received. That argument seems to me to produce a result which I should, if possible, strive to avoid. It is not entirely without significance that the plaintiffs' solicitors, in carrying out what they obviously regarded as the only requirement of the option agreement, namely, service on the solicitors, were careful to see that the solicitors' letter was delivered by hand well before the date when the option expired.

h I was also referred to *Holt v Heatherfield Trust Ltd*¹. That was a case of an assignment of a debt and under s 136 of the Law of Property Act 1925 the assignment takes effect if express notice in writing has been given to the debtor and the assignment is effectual as from the date of the notice. Atkinson J said²:

j "The date of [such] notice is the date of a notice which has been given to the debtor, and refers back to the express notice in writing mentioned earlier in

1 [1942] 1 All ER 404, [1942] 2 KB 1

2 [1942] 1 All ER at 408, [1942] 2 KB at 6

the section. It is express notice in writing given to the debtor, and, in my judgment, the date of such notice is the date on which it is received by or on behalf of the debtor. If the notice arrives at his place of business, and he happens to be away and does not see it personally for another day or two, I think that would be immaterial; it would be received on his behalf. It cannot be the date of the notice, because a notice might be written and dated a week before it was posted, and it would be absurd to suppose that that would be effective.'

Of course, there was a reference to the effective date being the date of the notice and the learned judge only refers to the possibility of there being a different date on the letter-heading itself and does not refer to the possibility of the date of posting. But that is a decision in line with s 196 and in line with the view that express notice in writing, where express notice in writing has got to be given, has got to be actually delivered, subject to the provisions of s 196.

A large number of cases were cited to me but there was no authority which showed that where the parties had gone out of their way to say that notice in writing had to be given to a named person then it was sufficient merely to put the letter in the post box. Counsel for the plaintiffs referred me to the Bills of Exchange Act 1882, s 49 (15), which provides that 'Where a notice of dishonour is duly addressed and posted, the sender is deemed to have given due notice of dishonour, notwithstanding any miscarriage by the post office'. True, that is dealing with another subject-matter but it is implicit in that section that unless there was something which enabled you to assume that which was in fact untrue, namely that the notice had been given, then of course you would have to prove actual notice, meaning by that service on the person concerned, because a deeming provision is merely saying that black shall be white. So far as bills of exchange are concerned even if the addressee has not received the notice he is deemed to have been given it notwithstanding any miscarriage by the Post Office. That is in line with s 196 and it is significant that it is necessary to put sub-s (15) into s 49.

Counsel for the plaintiffs' main submission turns on this: he says if you look at the contract cases, offer and acceptance, right at the beginning of the law of contract, you will find that it is possible to accept an offer by putting the acceptance in the post, and that the time for the contract is the date when the acceptance is put in the post, not the date when it is received and notwithstanding it may not be received. He says here we have an offer, and the exercise of the option by notice is the acceptance, so that it is pure contract. He cited for that proposition—which I think nobody quarrels with—a passage in Anson¹ which deals with the manner of acceptance and a later passage²:

'To understand the leading authority on this point, it is necessary to know that an offer made to one who is not in immediate communication with the offeror remains open and available for acceptance until the lapse of such a time as is prescribed by the offeror, or is reasonable as regards the nature of the transaction. During this time the offer is a continuing offer and may be turned into a contract by acceptance',

and the editor says it was undoubtedly necessary for the court to establish some definite rule as to the time of a postal acceptance, and convenience pointed to the time when the letter was posted rather than to the time when it was received by the offeror. Then he goes on³:

'Various attempts have been made to justify this rule analytically. One line of reasoning attempts to eliminate any difficulties as to *consensus* by treating the post office as the agent of the offeror not only for delivering the offer, but

¹ Law of Contract (23rd Edn, 1969), p 44

² Ibid, p 46

³ Ibid, p 47

a for receiving the notification of its acceptance; yet there is a certain artificiality in looking at the transaction in this way. Another supposes that the offeror must be considered as making, during every instant of the time his letter is traveling, the same identical offer to the offeree; and then the contract is completed by the acceptance of it by the latter. But this does not explain why posting uniquely constitutes an acceptance without notification. The better explanation
b would seem to be that, if hardship is caused, as it obviously may be, by the delay or loss of a letter of acceptance, some rule is necessary, and the rule at which the Courts have arrived, whether or not it can logically be supported, is probably as satisfactory as any other would be.'

c It is to be observed that the learned author says that in the case of an offer, when all you have to do is to accept, without being told how to accept or what you have to do, then posting is an 'acceptance without notification'. But, of course, in all cases in contract it depends on the wording of the contract itself and in the present case the contract requires acceptance by notification. It is quite clear from that passage, and from the other authorities which counsel for the plaintiffs read to me, that if you have merely got an offer which says nothing about the method of acceptance then it can be
d accepted by post, if that is the usual course of dealing, and the time when the acceptance is posted is the date of the contract.

The cases which counsel for the plaintiffs cited were *Henthorn v Fraser*¹, where the headnote reads²:

e '... where the circumstances under which an offer is made are such that it must have been within the contemplation of the parties that, according to the ordinary usages of mankind, the post might be used as a means of communicating the acceptance of it, the acceptance is complete as soon as it is posted.'

Counsel for the plaintiffs says of course that it was within the contemplation of the parties in the present case that the notice exercising the option should be sent by post, and so it was. But there is a difference between the case where you have a requirement
f of notice in writing to be given to the intending vendor, and a case such as *Henthorn v Fraser*¹ where you have an open offer with nothing said about how it can be accepted, and then the law, for the reasons given by Anson³, does not require notification but requires posting as being sufficient to constitute acceptance. To the same effect was *Stevenson, Jacques & Co v McLean*⁴ and the nearest case I think for counsel for the plaintiffs' purpose was *Bruner v Moore*⁵, which did concern an option. In that
g case there was an option to purchase certain patent rights during the period of six months from the date of the agreement. The option said nothing as to how the option was to be exercised. In the event Farwell J held that on the construction of that option and in the events which had then happened the option was in fact exercised in due time, so, as counsel for the defendant pointed out, what Farwell J had to say about acceptance is obiter. Nevertheless, of course, it is obiter to which I should pay
h very great attention. Farwell J said⁶:

'It is now argued that this option, having expired on March 29, a telegram and letter sent on the 28th, but not reaching the defendant until the 30th, were too late. In my opinion this contention fails also, for the option was duly exercised when the telegram was sent and the letter posted. [He then cites

i 1 [1892] 2 Ch 27, [1891-94] All ER Rep 908

2 [1892] 2 Ch at 27

3 Law of Contract (23rd Edn, 1969), pp 46, 47

4 (1880) 5 QBD 346

5 [1904] 1 Ch 305

6 [1904] 1 Ch at 316

Lord Herschell in *Henthorn v Fraser*¹:] "Where the circumstances are such that it must have been within the contemplation of the parties that, according to the ordinary usages of mankind, the post might be used as a means of communicating the acceptance of an offer, the acceptance is complete as soon as it is posted." In the present case the parties are American citizens staying temporarily at London hotels when they signed the contract. That contract obviously contemplates the events that in fact happened—that the two parties would separate and would visit various parts of Europe, and would communicate with one another constantly by letter and telegram. If there ever was a case in which the parties contemplated that "the post might be used as a means of communicating" on all subjects connected with the contract, this is that case. I hold, therefore, that the option was duly exercised.'

The authorities, particularly *Bruner v Moore*² and two later cases of *Household Fire and Carriage Accident Insurance Co Ltd v Grant*³ and *Re Imperial Land Co of Marseilles, Harris' Case*⁴, which counsel for the plaintiffs cited, do show that where you have an offer and no mode of acceptance is prescribed but it is to be assumed from the circumstances that post is one of the mediums of acceptance, then you can accept through the post, and the time of acceptance is the time of posting. But that has no relevance where the mode of acceptance is prescribed and in the present case this option prescribes that it shall be exercisable by notice in writing to the intending vendor. If, as I think, this means that notice must be given to the intending vendor, then we are dealing not with the cases which counsel for the plaintiffs cites, which relate to offer and acceptance without more; we are dealing with the question of how you are entitled to give notice to an intending vendor, and what you have to do in order to satisfy the requirements. It seems to me from s 196, and also as a matter of construction, that the intending vendor must get the notice, and subject only to the exemptions provided by s 196, namely that you take every possible reasonable precaution by giving it by registered post, and the notice is not returned undelivered. But it will be noticed that, when you use the registered post procedure, it is not the time when you hand it over to the Post Office which counts but the time when, in the normal course of events, it ought to reach, and nearly always does reach, the addressee. Accordingly, I do not think the cases which counsel for the plaintiffs cited are relevant here and in my judgment the notice had to be received by the defendant, and it clearly was not received.

Counsel for the plaintiffs had an alternative point. He tried to add together the letter which had been sent to the vendor's solicitor and the oral communication made by the vendor's solicitor to the vendor, and he said: 'Well, there you are'. This, I think, is a plea ad misericordiam. Counsel for the plaintiffs is saying: 'Well, suppose the notice did not reach the defendant, he knew that there was something like it with his solicitor'. But it is conceded that service on the solicitor is not good enough, and in my judgment what happened was this, that the defendant, before the expiry of the period knew that the plaintiffs wanted to exercise the option and he knew that the plaintiffs were trying to exercise the option, but that is all. He was hoping that they would not exercise the option, and the onus was clearly on them to exercise it, and they did not.

I was referred to *Hare v Nicoll*⁵, which for present purposes merely repeats the rule that, an option being a species of privilege for the benefit of the party on whom it is conferred, it is for that party to comply strictly with the conditions stipulated for the exercise of the option.

¹ [1892] 2 Ch at 33, [1891-94] All ER Rep at 911

² [1904] 1 Ch 305

³ (1879) 4 Ex D 216

⁴ (1872) 7 Ch App 587

⁵ [1966] 1 All ER 285, [1966] 2 QB 130

a Finally counsel for the plaintiffs gave an appeal to the merits. Of course I do not really know where the merits lie, but assume that they do lie with the plaintiffs, and assume that it was rough luck on them that they did not get their option exercised in due time, nevertheless counsel for the plaintiffs is only trying to persuade me to make bad law out of a hard case. There is no real difficulty. The option agreement says what is to be done, namely, that notice in writing has to be served on the intending vendor. Section 196 gives perfectly plain and alternative methods of doing this. b If that is not thought to be sufficient the notice can, of course, be delivered by hand and there was plenty of time. But if the person serving the notice goes outside s 196 he does so at his own peril. I must have regard simply to this, that in my judgment the notice had to be served on the defendant either by hand or in one of the manners authorised by s 196 or in some other manner. It was not in fact served on him and accordingly the option was not exercised.

c The result must be that I dismiss this action, with costs.

Action dismissed.

Solicitors: *Brecher & Co* (for the plaintiffs); *Bulcraig & Davis* (for the defendant).

Jacqueline Metcalfe Barrister.

Tarmac Roadstone Holdings Ltd v Peacock and others

e COURT OF APPEAL, CIVIL DIVISION

LORD DENNING MR, STAMP AND JAMES LJ

26th, 27th FEBRUARY 1973

f *Employment – Redundancy – Payment – Amount – Normal working hours – Overtime – Employee entitled to overtime pay – Contract fixing minimum number of working hours – Minimum number of working hours exceeding number of working hours without overtime – Contract guaranteeing employment for 40 hours a week at basic hourly rate – Contract obliging employee to work overtime when required by employer – Employer not obliged to provide overtime work – Employee regularly working 57 hour week – Whether contract ‘fixing’ minimum number of working hours in excess of number of hours without overtime – Whether normal working hours 57 hours a week – Contracts of Employment Act 1963, Sch 2, para 1 (1), (2).*

Under the provisions of his contract of employment the employee was guaranteed employment for 40 hours each week for which he was paid a basic hourly rate. He could, however, be required by his employers to work overtime, for which he was paid at overtime rates. In practice the employee regularly worked 57 hours a week and sometimes more. Eventually the employee was dismissed by reason of redundancy and claimed that the redundancy payment to which he was entitled under the Redundancy Payments Act 1965 was to be calculated on the basis that his ‘normal working hours’ were, by virtue of para 1^a of Sch 2 to the Contracts of Employment Act 1963, to be taken as 57 hours a week since he was contractually obliged to work for 17 hours in excess of the basic 40 hour week.

Held – The employee’s redundancy payment was to be calculated on the basis that his normal working hours were ‘the number of hours without overtime’ within para 1 (1) of Sch 2 to the 1963 Act, i.e. 40 hours a week, since the hours of overtime which

a Paragraph 1, so far as material, is set out at p 488 f to h, post.

he had worked were to be disregarded by virtue of para 1 (1). As the employers were not required by the contract of employment to employ the employee for a period in excess of 40 hours each week, it could not be said that the contract 'fixed' the minimum number of hours of employment at a figure in excess of the number of hours without overtime so as to increase the number of 'normal working hours' to that figure in accordance with para 1 (2) of Sch 2 to the 1963 Act (see p 489 a to c and h to p 490 a and d to j, post).

Armstrong Whitworth Rolls Ltd v Mustard [1971] 1 All ER 598 distinguished.

Notes

For the calculation of the amount of a redundancy payment, see Supplement to 38 Halsbury's Laws (3rd Edn) para 808F.

For the Contracts of Employment Act 1963, Sch 2, para 1, see 12 Halsbury's Statutes (3rd Edn) 215.

As from 27th July 1972 Sch 2, para 1, to the 1963 Act has been replaced by Sch 2, para 1, to the Contracts of Employment Act 1972.

Cases referred to in judgments

Armstrong Whitworth Rolls Ltd v Mustard [1971] 1 All ER 598, (1970) 9 KIR 279, 6 ITR 79, DC.

Darlington Forge Ltd, The v Sutton (1968) 3 ITR 196, DC.

Loman v Merseyside Transport Services Ltd (1967) 3 KIR 726, 3 ITR 108, DC.

Lynch v Dartmouth Auto Castings Ltd (1969) 4 ITR 273, DC.

Minister of Labour v Country Bake Ltd (1968) 5 KIR 332, 3 ITR 379, DC.

Pearson v William Jones Ltd [1967] 2 All ER 1062, [1967] 1 WLR 1140, (1967) 2 ITR 471, DC, Digest (Cont Vol C) 689, 816Ae.

Redpath Dorman Long (Contracting) Ltd v Sutton [1972] ICR 477, NIRC.

Appeal

This was an appeal by Tarmac Roadstone Holdings Ltd against the order of the National Industrial Relations Court (Sir John Donaldson P, Mr R Boyfield and Professor T L Johnston) dated 24th March 1972 dismissing the appellants' appeal against a decision of an industrial tribunal sitting at Middlesbrough (chairman H M Windsor Aubrey Esq) dated 15th December 1971 whereby it was held that the respondents, Max Peacock, Brian Frederick Lockwood and James Young, and each of them, were entitled to receive redundancy payments under the Redundancy Payments Act 1965 calculated on the basis that during the period of their employment with the appellants their normal working hours were 57 hours in each week and not 40 hours in each week as provided for in the conditions of the National Joint Industrial Council for the Slag Industry. The facts are set out in the judgment of Lord Denning MR.

Frank Whitworth QC and *Roger Ellis* for the appellants.

The respondents did not appear and were not represented.

LORD DENNING MR. Mr Brian Lockwood is a maintenance fitter at the Cargo Fleet Works of the appellants, Tarmac Roadstone Holdings Ltd ('the employers'). He is a man of 26 years of age. He was ten years with the employers from 4th September 1961 until his employment came to an end on 28th October 1971. It is admitted that he was dismissed for redundancy and that he is entitled to a redundancy payment under the Redundancy Payments Act 1965. But the question is, how is that redundancy payment to be calculated? This depends on what were his 'normal working hours'? He says 57 hours. His employers say 40 hours. The industrial tribunal found that they were 57 hours. The National Industrial Relations Court affirmed that decision. The employers appeal to this court.

a We have only heard arguments on behalf of the employers. I wish that we could have heard arguments on behalf of Mr Lockwood himself. But that has not been possible. He has written to the court explaining the position:

b 'Dear Sir, I hereby apologise for not being present or represented at the Appeal Court on Monday, 26 February 1973 at 12 o'clock. I have not been represented by my union because of the Industrial Relations Act. My union is the A.E.U. I therefore hope that British justice will prevail in my absence, and, if need be, hope that this letter will be read out at the hearing. Yours hopefully, Brian Frederick Lockwood.'

c When Mr Lockwood was employed in 1961, he was given the particulars which the employers are bound to give under the Contracts of Employment Act 1963. These stated the terms of his employment. They gave his normal hours of work 'As per Slag Industry'. The authorised overtime was 'As per Slag Industry'. The holidays were as for 'Slag Industry'.

d By referring to the 'Slag Industry', those particulars incorporated the conditions of employment which had been agreed by the National Joint Industrial Council for the Slag Industry. These conditions are set out in a little booklet which has been put before us. The relevant conditions are these:

'3 Each worker shall be guaranteed employment in accordance with the minimum basic weekly hours . . .

'8 The payment for the three weeks' holiday shall be for 49 complete weeks, each of 40 hours, excluding all overtime . . .

e '21 Hours of the working week

'(a) The normal single day shift week for all workers paid by the hour shall under these conditions consist of 40 hours actual work for which 40 hours shall be paid where these hours are not already in operation . . .

'23 Hours of work

'(a) The normal day week shall consist of 40 hours actual work for which 40 hours shall be paid . . .

f '26 Overtime All workers covered by these conditions shall work overtime in accordance with the demands of the industry during the normal week and/or at weekends.'

g Those conditions were incorporated into his contract of employment. They show that his normal working week for which he was paid his basic hourly rate was 40 hours a week. But that under condition 26 he would be required to work overtime if the employers asked him, in which case he would be paid overtime at overtime rates. These stepped up from 'time and one quarter' to 'double time' according to the quantity done and the day on which it was done.

h The evidence showed that Mr Lockwood as a regular practice worked 57 hours a week and sometimes more. He was paid his basic hourly rate for the 40 hours and overtime rate for the remaining 17 hours. He claims that he should have his redundancy pay on the basis of 57 hours. The employers rejected the claim. They said in their written answer:

i 'The normal hours of work on [Mr Lockwood's] contract of employment refers to the National Joint Industrial Council for the Slag Industry which provides that the hours of the working week shall consist of 40 hours actual work for which 40 hours shall be paid. It is considered that this case is similar in nature with the following Tribunal and High Court decisions.'

Then certain decisions are referred to. I will mention them later.

The industrial tribunal decided in the man's favour. They did so because they found that the overtime was compulsory on the man. They said:

'... we cannot exclude from our mind that the [respondents] were employed in an industry (unlike for example a factory manufacturing goods) where the necessities of the business made it very difficult to operate over a long period of time any regular fixed hours of employment for maintenance workers, ... we are of the opinion that the national agreement applying a 40 hour week was consensually varied on the engagement of the three [respondents] to whom it was made clear that the national agreement was being varied as regards themselves on the basis that *they were bound as a matter of contract to work a seven day week comprising 57 hours.*' a

The National Industrial Relations Court affirmed that decision. They said:

'In those circumstances it was open to the tribunal to conclude (although it did not have to reach that conclusion) that there was a contractual obligation on each of these men to work a longer number of hours. It has so found. It has found that these men had agreed to work 17 hours in excess of the 40-hour week, as compulsory overtime.' b

The court held that that was decisive.

The employers challenge that decision. They accept the finding that the overtime was compulsory on the man. But they say that it was not compulsory on the employer. Although the man was contractually bound to work 57 hours *if required*, the employers were not contractually bound to employ him for 57 hours. They were only bound to employ him for 40 hours. The employers say that under the statutory provisions this meant that the normal working hours were 40. c

The question depends on the true interpretation of Sch 2 to the Contracts of Employment Act 1963. This contains a definition of 'normal working hours' on which the redundancy payments are to be calculated. This appears from Sch 1 to the Redundancy Payments Act 1965. d

So I turn to para 1 of Sch 2 to the 1963 Act. It says this:

'(1) For the purposes of this Schedule the cases where there are normal working hours include cases where the employee is entitled to overtime pay when employed for more than a fixed number of hours in a week or other period, and, subject to the following subparagraph, in those cases that fixed number of hours (in this paragraph referred to as "the number of hours without overtime") shall be the normal working hours.' e

'(2) If in such a case—(a) the contract of employment fixes the number, or the minimum number, of hours of employment in the said week or other period (whether or not it also provides for the reduction of that number or minimum number of hours in certain circumstances), and (b) that number or minimum number of hours exceeds the number of hours without overtime, that number or minimum number of hours (and not the number of hours without overtime) shall be the normal working hours ...' f

Those provisions are very complicated, but on analysis they can be applied in practice to these situations: g

First, where there is a fixed number of compulsory working hours, and thereafter overtime is voluntary on both sides—so that the employer is not bound to employ the man for any overtime and the employee is not bound to serve it—then, although the overtime is worked regularly each week, nevertheless being voluntary, it does not count as part of the normal working hours. Such a situation is covered by para 1 (1). h

Second, when there is a fixed number of compulsory working hours and in addition a fixed period of overtime which is obligatory on both sides—so that the employer is bound to provide that overtime and the employee bound to serve it—then that fixed period of overtime is added to the fixed period of compulsory working hours so that the total number counts as the normal working hours. Such a i

situation is covered by para 1 (2). In short, 'guaranteed overtime' counts as part of normal working hours.

Third, where there is a fixed number of compulsory working hours, and overtime is obligatory on the man if asked but not on the employer—so that the employer is entitled to call on the man to work overtime but is not bound to call on him to do so—then the overtime does not come within the normal working hours. Such a case seems to me to come within para 1 (1). It comes within the words 'the employee is entitled to overtime pay when employed for more than a fixed number of hours in a week'. It does not come within the words of para 1 (2), because the contract of employment does not 'fix' the number of hours of employment. The overtime is not fixed but is at the option of the employer. This interpretation is borne out by a long series of cases in the Divisional Court: *Pearson v William Jones Ltd*¹, *Loman v Merseyside Transport Services Ltd*², *The Darlington Forge Ltd v Sutton*³, *Minister of Labour v Country Bake Ltd*⁴ and *Lynch v Dartmouth Auto Castings Ltd*⁵.

In those cases there was a fixed period of hours during which the employers were bound to employ the man and he was bound to work. It was 40 or 41 hours a week. In addition in every one of those cases he did in fact regularly work overtime, so as to get the job done, making his regular hours 50 or more hours a week. He was paid overtime rates for that overtime. But the employers were not bound to employ him for that overtime. The overtime was not fixed or guaranteed by the contract of employment. It did not count, therefore, towards the normal working hours. Each of the cases came within para 1 (1) and not para 1 (2).

After that long line of cases there came *Armstrong Whitworth Rolls Ltd v Mustard*⁶. Mr Mustard originally had normal working hours of 40 per week, but in fact worked more, for which he was paid overtime. Later on one employee left and there was a variation by agreement by which Mr Mustard was bound to work 60 hours a week and the employers were bound to employ him for those 60 hours. In short, the fixed number of compulsory working hours was 60. So construed, that case is consistent with the earlier cases.

Quite recently the whole matter was considered by the National Industrial Relations Court when Sir John Brightman was presiding. It is *Redpath Dorman Long (Contracting) Ltd v Sutton*⁷. The case was decided on the ground that the man was not bound to do overtime. It was expected on both sides, but not compulsory. So it did not form part of his normal working hours. But Sir John Brightman did make some observations on the position when the man is obliged to do overtime, if asked, but the employer is not bound to give it to him. He said⁸: 'The point is one which would seem to have been relevant in *Tarmac Roadstone Holdings Ltd. v. Peacock* . . . decided by another division of this court on March 24, 1972, but it appears to have escaped argument.' Reading between the lines, it is plain to me that Sir John Brightman was of opinion that in a case such as the present, where the obligation to do overtime is not obligatory on both sides, but only obligatory on the workman—so that the employer has an option whether to demand it or not—then that overtime does not come within the 'normal working hours' as defined in the statute. That seems to me to be correct. Applying it in this case, Mr Lockwood had fixed working hours of 40 hours a week. He regularly worked 57 hours a week. Seventeen hours were overtime which he was bound to work, if asked; but the employers were not bound to

¹ [1967] 2 All ER 1062, [1967] 1 WLR 1140

² (1967) 3 KIR 726

³ (1968) 3 ITR 196

⁴ (1968) 5 KIR 332

⁵ (1969) 4 ITR 273

⁶ [1971] 1 All ER 598

⁷ [1972] ICR 477

⁸ [1972] ICR at 483, 484

ask him. He was paid basic rates for 40 hours and overtime rates for 17 hours. On those facts, the normal working hours were 40 hours a week. That is the figure on which the redundancy payment is calculated. a

I would allow the appeal accordingly.

STAMP LJ. I entirely agree; but as we are differing from the judgment of Sir John Donaldson P in the Industrial Court as well as from the industrial tribunal, I will express my judgment quite shortly in my own words. The respondents' contracts of employment were subject to the relevant national agreement, which provided that the normal week should be 40 hours actual work, for which 40 hours should be paid. Under it all workers were bound to work overtime in accordance with the demands of the industry during the normal week and/or at weekends. At the outset the respondents were told or given to understand in effect that they were expected to do more than that, and unless prepared to do so, could not have the job. Throughout their employment they were called on to do and did do many more than 40 hours a week. In fact, they regularly did at least 57 hours a week and on occasion more. It may be that their services would have been dispensed with had they not done so. There are, however, in my judgment, no findings of fact in the tribunal's findings which could lead to the conclusion that the appellants ever bound themselves to provide the men with 57 hours per week. The 57 hours they worked were regular but were not fixed in the sense that it ever became a term of the employment that the employers should employ them for that time. Does the case then fall within para 1 (1) of Sch 2 to the Contracts of Employment Act 1963, to which one is referred by the Redundancy Payments Act 1965, in which case the redundancy payments should be calculated by reference to a 40 hour week, or does it fall within para 1 (2)? Unless the case is taken out of sub-para (1) by the effect of sub-para (2), the former subparagraph will, so far as regards this case, apply. Subparagraph (2) provides, in effect, that if a minimum number of hours for which the employee is bound to work is fixed by the contract of employment, and the minimum number of hours includes overtime, that minimum becomes the yardstick. That, as I understand it, is the effect of all the cases cited to this court and to which Lord Denning MR has referred. The present case does not in my judgment fall within sub-para (2). As I have said, it was never a term of the contract that the respondents should work and be paid for 57 hours, for the employers were not bound to provide them with that number of hours work. I cannot accept the view indicated by Sir John Donaldson P that, in order to come within sub-para (2), the obligation to work overtime does not have to be mutual or that the employer does not have to be under an obligation to provide overtime. For, if he is under no such obligation, it cannot, in my judgment, be truly said, within the meaning of subparagraph (2), that—I emphasise these words—the contract of employment fixes the number or the minimum number of hours of employment. I emphasise those words 'the contract of employment fixes', because it is on those words, with particular emphasis on the word 'fixes', that, in my judgment, the case turns. b
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JAMES LJ. For the reasons given in both the judgments expressed, I also would allow the appeal. It goes without saying that that applies not only to the case to which reference has been made, but to the other respondents, Peacock and Young, whose cases fall to be decided on exactly the same principles. g
h

Appeal allowed.

Solicitor: *M E Brown* (for the appellants). i

L J Kovats Esq Barrister.

Dowty Boulton Paul Ltd v Wolverhampton Corporation (No 2)

COURT OF APPEAL, CIVIL DIVISION

RUSSELL, BUCKLEY AND LAWTON LJJ

2nd, 5th, 6th, 7th, 8th, 9th, 28th FEBRUARY 1973

Local authority – Land – Power to appropriate land – Land no longer required for purposes for which acquired – Decision of local authority that land no longer required for those purposes – Jurisdiction of courts to review decision – Local authority acquiring land for purposes of aerodrome – Local authority conveying site adjoining land to plaintiffs to build factory – Plaintiffs aircraft manufacturers – Conveyance containing covenant by local authority to allow plaintiffs to use airfield for defined period for purposes of test, delivery and other flights in connection with their business – Local authority deciding that land no longer required for purposes of aerodrome – Resolution to appropriate land for purposes of housing scheme – Validity of resolution – Whether test flights etc of plaintiffs' aircraft a purpose for which land acquired – Whether court having jurisdiction to review local authority's decision that land no longer required for original purposes – Local Government Act 1933, s 163 (1).

The plaintiffs were aircraft manufacturers and the defendants a local authority. The defendants wished to establish a municipal aerodrome and wished to encourage the plaintiffs to establish an aircraft factory which would be a substantial employer of labour in the area. Accordingly arrangements were made between the plaintiffs and the defendants whereby the defendants in part acquired and in part appropriated a site for the purposes of an aerodrome. In November 1936 they conveyed to the plaintiffs a site adjoining the airfield. The conveyance imposed on the plaintiffs an obligation to build a factory on the site and gave them a right of way from the site to the airfield. The conveyance contained a covenant to allow the plaintiffs to use the airport for the purpose of test, delivery and other flights in connection with their business for 99 years or such longer period as the site should be used as a municipal aerodrome. The plaintiffs built their factory and manufactured aircraft there; the defendants licensed, managed and controlled the airfield, which the plaintiffs used for the purpose of their business for testing etc. From 1938 until the end of 1970 (subject to a period of requisitioning during and after the war) the airfield was used as an aerodrome by the plaintiffs as well as by members of the public. By 1957 the plaintiffs had ceased to manufacture aircraft. Thereafter they used the factory for making airframes or parts thereof and hydraulic equipment for aircraft and other uses. The plaintiffs' need to use the airfield for test flying therefore no longer presently existed; their use of it was virtually confined to executive flights in private aircraft owned by the plaintiffs. Those flights were not numerous; in 1970 there were none. The defendants no longer required the airfield as a municipal aerodrome. In December 1970 they closed the airport, since when there had been no traffic there. On 4th January 1971, in exercise of their powers under s 163 (1)^a of the Local Government Act 1933, they passed a resolution to re-appropriate the airfield 'for planning purposes'. The planning purposes that they had in mind were a comprehensive development of the area for housing. They also submitted

^a Section 163 (1), so far as material, provides: 'Any land belonging to a local authority and not required for the purposes for which it was acquired or has since been appropriated may be appropriated for any other purpose . . . for which the local authority are authorised to acquire land: Provided that . . . (ii) the appropriation of land by a local authority shall be subject to any covenant or restriction affecting the use of the land in their hands.'

a a formal application for planning permission to the Secretary of State. If that permission were granted the defendants would, by virtue of s 127 of the Town and Country Planning Act 1971, be able to carry out the necessary works and effectively destroy such airfield rights as the plaintiffs had on payment of compensation under that section. The plaintiffs brought proceedings to ensure the continuation of their rights, contending that the defendants had no authority under s 163 (1) of the 1933 Act to appropriate the land for planning purposes since it was still required for the purposes for which it had been acquired, having regard to the existence of the plaintiffs' rights under the 1936 conveyance which existed and were expressed to endure for the rest of the 99 year period. b

Held – The words 'not required' in s 163 (1) of the 1933 Act were to be construed as meaning 'not needed in the public interest of the locality'. Although the plaintiffs' rights under the 1936 agreement operated in equity to create an easement in their favour, it did not follow that because those rights remained in force and were capable of being used by the plaintiffs that the defendants could not come to the conclusion that the land was not required for the purposes of an aerodrome. Under s 163 (1) the defendants were the sole judges of the question whether the land was or was not required for the purpose for which it had been acquired or had been appropriated. In the absence of any allegation of perversity or bad faith on the part of the defendants, the court could not interfere with their decision. It followed therefore that the airfield had been validly appropriated for planning purposes (see p 497 j to p 498 c, p 499 c, p 501 f and p 502 c and g, post). c

Attorney-General v Manchester Corpn [1930] All ER Rep 653 applied. d

Attorney-General v Teddington Urban District Council [1898] 1 Ch 66 considered. e

Decision of *Plowman J* [1972] 2 All ER 1073 affirmed.

Notes

For the power of a local authority to appropriate land, see 24 Halsbury's Laws (3rd Edn) 598, 599, para 1103, and 37 *ibid* 483, 484, para 605.

For the Local Government Act 1933, s 163, see 19 Halsbury's Statutes (3rd Edn) 492. Section 163 is repealed by the Local Government Act 1972, s 272 and Sch 30, and replaced by s 122 thereof with effect from 1st April 1974 or such earlier date as may be appointed under s 273 (2). f

For the Town and Country Planning Act 1971, s 127, see 41 Halsbury's Statutes (3rd Edn) 1734.

Cases referred to in judgments

Attorney-General v Hanwell Urban District Council [1900] 2 Ch 377, 69 LJCh 626, 82 LT 778, CA, 11 Digest (Repl) 122, 141. g

Attorney-General v Manchester Corpn [1931] 1 Ch 254, [1930] All ER Rep 653, 100 LJCh 33, 144 LT 112, 11 Digest (Repl) 119, 121.

Attorney-General v Pontypridd Urban District Council [1906] 2 Ch 257, 75 LJCh 578, 95 LT 224, 70 JP 394, 4 LGR 791, CA, 11 Digest (Repl) 122, 142.

Attorney-General v Teddington Urban District Council [1898] 1 Ch 66, 67 LJCh 23, 77 LT 426, 61 JP 825, 11 Digest (Repl) 122, 140. h

Dowty Boulton Paul Ltd v Wolverhampton Corpn [1971] 2 All ER 277, [1971] 1 WLR 204, 69 LGR 192, 28 (2) Digest (Reissue) 1046, 681.

Ellenborough Park, Re, Re Davies (decd), Powell v Maddison [1955] 3 All ER 667, [1956] Ch 131, [1955] 3 WLR 892, CA; *affg* [1955] 2 All ER 38, [1955] 3 WLR 91, 19 Digest (Repl) 52, 286. j

Eshugbayi Eleko v Nigeria Government (Administering Officer) [1931] AC 662, [1931] All ER Rep 44, 100 LJPC 152, 145 LT 297, PC, 8 Digest (Repl) 770, 382.

Ripon (Highfield) Housing Order 1938, Re, Applications of White and Collins [1939] 3 All ER 548, [1939] 2 KB 838, 108 LJKB 768, 161 LT 109, 103 JP 331, 37 LGR 533, CA, 26 Digest (Repl) 700, 115.

Cases and authority also cited

- a** *Ashbridge Investments Ltd v Minister of Housing and Local Government* [1965] 3 All ER 371, [1965] 1 WLR 1320, CA.
Central Electricity Generating Board v Dunning [1970] 1 All ER 897, [1970] Ch 643.
Lamplugh, Re (1967) 19 P & CR 125.
Mint v Good [1950] 2 All ER 1159, [1951] 1 KB 517, CA.
b *Newcomen v Coulson* (1877) 5 Ch D 133, CA.
Pwllbach Colliery Co Ltd v Woodman [1915] AC 634, [1914-15] All ER Rep 124, HL.
Pyx Granite Co Ltd v Ministry of Housing and Local Government [1959] 3 All ER 1, [1960] AC 260, HL.
Robinson v Bailey [1948] 2 All ER 791, CA.
Royal Crown Derby Porcelain Co Ltd v Russell [1949] 1 All ER 749, [1949] 2 KB 417, CA.
c *Stenquil Investments Ltd v Hicklin* (23rd February 1966) unreported, [1966] Bar Library transcript 42A, CA.
Stourcliffe Estates Co Ltd v Bournemouth Corpn [1910] 2 Ch 12, [1908-10] All ER Rep 785, CA.
Todrick v Western National Omnibus Co Ltd [1934] Ch 561, [1934] All ER Rep 25, CA.
Judicial Review of Administrative Action by S A de Smith (2nd Edn, 1968) pp 90, 91.

d Appeal

The plaintiffs, Dowty Boulton Paul Ltd, appealed against a decision of Plowman J¹ dated 19th May 1972 whereby it was held that the defendants, Wolverhampton Corporation ('the corporation'), were entitled to appropriate land acquired by them for the purposes of an aerodrome, for planning purposes, notwithstanding that the corporation had contracted to make the aerodrome available for a period of 99 years from 1936 to the plaintiffs, then known as Boulton Paul Aircraft Ltd, for the purposes of the plaintiffs' business. The facts are set out in the judgment of Russell LJ.

K R Bagnall and Robert Pryor for the plaintiffs.

Jeremiah Harman QC and Elizabeth Appleby for the corporation.

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Cur adv vult

28th February. The following judgments were read.

RUSSELL LJ (read by Buckley LJ). This case came before Pennycuik V-C² in November 1970 on a motion for interlocutory relief which was refused. The action was tried before Plowman J in May 1972 and was dismissed¹. That dismissal is the subject of the plaintiffs' present appeal.

g As will be seen from the reports of those hearings, the position is briefly as follows. The plaintiffs in 1935 were aeroplane manufacturers at Norwich. At government request, they sought a suitable place in the Midlands to carry on their business; they would need a suitable existing factory, or a suitable site on which to build one, an adjacent airfield mainly for testing the aircraft they manufactured, and an available pool of skilled labour. Wolverhampton Corporation was minded to establish a municipal aerodrome and welcomed the establishment of a factory which would be a substantial employer of labour in the area.

h In the outcome, arrangements were made to suit both the corporation and the plaintiffs. The corporation acquired or appropriated at Barnhurst what became the site of the Wolverhampton Aerodrome for the purpose of its use as an airfield, and the conveyance of 1936, of which details are to be found in the reports below, was executed, containing, inter alia, an obligation on the plaintiffs to build a factory for

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¹ [1972] 2 All ER 1073, [1973] Ch 94

² *Dowty Boulton Paul Ltd v Wolverhampton Corpn* [1971] 2 All ER 277, [1971] 1 WLR 204

their business on the site thereby conveyed to them, a right of way over land of the corporation from that site to the airfield, and a right for the plaintiffs to use the airfield for flights for the purposes of their business at the factory. The factory was built and the plaintiffs' business was started up there, manufacturing aeroplanes; the corporation licensed, managed and controlled the airfield, and the plaintiffs used it for the purpose of their business for testing and so forth. At the outbreak of war the airfield was requisitioned by the Air Ministry and used by it for training purposes. In 1953 it was de-requisitioned and reverted to the control and management of the corporation as the municipal airport, the plaintiffs continuing their business at the factory. By 1957 the plaintiffs were no longer manufacturing aircraft, and thereafter used the factory for making airframes or parts thereof and hydraulic equipment for aircraft and other uses: the plaintiffs' need to use the aerodrome for test flying therefore no longer presently existed. The plaintiffs' use of the airfield was mainly for flying executives and staff in a group-owned plane to and from Cheltenham, where there was another centre of the group, or to and from the Continent, in particular Toulouse, in connection with hydraulic equipment for Concorde: such continental flights involved landing each way at some other airfield in England for customs clearance. Prior to 1970 the corporation was arriving at the conclusion that the Barnhurst site was not worth its upkeep as a municipal airport, and it has not formed any part of the plaintiffs' case that when it was closed as such it was, on any construction of s 163 of the Local Government Act 1933, still required for the purpose of a municipal airport. The evidence as to recent user of the airfield by the plaintiffs for the purpose of their business at the factory was that there were the following flight movements, i.e. take-off or landing in recent years: 1967—26; 1968—56; 1969—16; 1970—nil. These figures may not be absolutely complete, but to judge from the evidence as a whole they appear to me sufficiently to indicate the small degree of flight user by the plaintiffs. I should say that the plaintiffs never operated a flying school and so did not pay the £50 per annum for that user.

For some years the corporation had delegated or sub-contracted the management and control of the airfield to Don Everall (Aviation) Ltd. The corporation decided, with effect from the end of December 1970, not to renew this management arrangement, not to continue the airfield as a municipal aerodrome, and no longer to license the airfield, nor to maintain it as such. At the same time the corporation resolved to exercise its powers under s 163 to re-appropriate the airfield 'for planning purposes'. That section permits the site to be so re-appropriated by the corporation if it is 'not required for the purposes for which it was acquired or . . . appropriated'; but the section also contains a proviso that such re-appropriation was subject to rights such as were conferred on the plaintiffs by the 1936 conveyance in respect of the airfield site. Accordingly, *thus far* the re-appropriation, if valid, does not impinge on the plaintiffs' rights in respect of the airfield and is no breach of contract or obligation by the corporation. But the plaintiffs are anxious to establish that the re-appropriation was invalid for the following reason. The 'planning purpose' that the corporation has in mind is a comprehensive development of the area for housing, including streets, shops, schools and so forth. In order to achieve this in spite of the plaintiffs' rights they must (a) have validly re-appropriated, (b) obtain planning permission: the latter must come from the Secretary of State, since the re-appropriation involves departure from the relevant development plan. Application for such permission has been made; an inquiry has been held and the inspector has reported; the Secretary of State is deferring decision pending this litigation.

Now the crucial point is that if and when that permission is granted, the corporation will, by virtue of s 127 of the Town and Country Planning Act 1971, be able to carry out the necessary works and effectively to destroy such airfield rights as the plaintiffs have, on payment of compensation as provided by that section. It is in order to avoid that possible—it may be probable—outcome that the plaintiffs contend that there has not been a valid appropriation for planning purposes on the ground that it could

a not be said that the airfield site is not required for use as an airfield, having regard to the existence of the rights of the plaintiffs under the 1936 conveyance which exist and are expressed to endure for the rest of the 99 year period. It was contended that it is for the court to decide whether the factual precondition of non-requirement existed; that it was not necessary to show that the corporation had acted mala fide, nor that no local authority on the facts could reasonably form the view that land was not required for airfield purposes; that the airfield purpose of the original appropriation or acquisition included flight use by the plaintiffs who still require so to use it, and accordingly the airfield purpose was not spent; that if the question was whether the corporation required the land for the airfield purpose, they did so require it in order that they could continue to give effect to their obligations to the plaintiffs; that on the evidence the land was required for use as such by the plaintiffs both now and potentially to a greater extent in the future should they revert to manufacture of aircraft requiring flight testing.

c The corporation contended, on the basis of the decision of Maugham J in *Attorney-General v Manchester Corpn*¹, that the question whether the land was not relevantly required was for the decision of the local authority acting bona fide and not for the court; and further, that in any event the evidence as to airfield user by the plaintiffs in the present and future was so exiguous, tenuous and speculative that on any sensible construction of s 163, if it was for the court, the land was not relevantly required.

d Some matters somewhat peripheral to the essential question were debated as to the rights conferred by the 1936 conveyance on the plaintiffs. Since December 1970 there has been no use at all of the airfield for flights by the plaintiffs. I understand that even if the field were now sought to be used for flying in and out of the plaintiffs' personnel in the plaintiffs' own aircraft—in which case I gather no licence as an airfield is required—it could not be so used unless the grass is mown at least for appropriate runways. If the corporation refuse (as they do) to do that—I suppose probably in breach of their covenant to do all in their power to maintain the surface in a satisfactory state for flight use by the plaintiffs—and if there is no right of self help in that regard in the plaintiffs, I apprehend that it would be on any footing difficult to deny that the land was not relevantly required. On this point three questions were debated: whether a right such as the present one if granted is capable in law of being an easement; if so, whether it was purported to be granted, or was left as a matter purely of covenant; and whether, even if there was a valid grant of an easement, on the true construction of the instrument a right of self help on the particular point was embodied or implicit in the grant. For these purposes, of course, one must consider what the plaintiffs could have done since 1970, the appropriation or purported appropriation being irrelevant. As at present advised, I am minded to answer each of these three questions in favour of the plaintiffs. As to the first, if this had been expressed in terms of a grant (as was the right of way over the green strip leading to the airfield from the plaintiffs' factory site) I do not see in principle why such a right cannot exist as an easement. A tendency in the past to freeze the categories of easements has been overtaken by the defrosting operation in *Re Ellenborough Park, Re Davis (decd), Powell v Maddison*²; and see *Gale on Easements*³, on positive easements. As to the second point, it was stressed for the corporation that these flight rights were framed in covenant, in sharp contrast with the grant of the green right of way; but it is clear that an easement may be created as a result of covenant (see *Gale*³); it may well be that the draftsman in 1936 was apprehensive that it might be held that a right of this character if framed only in grant might be held not capable of being regarded as an easement and so be wholly inoperative; but that does not mean that, if it could operate in grant, covenant cannot embrace the equivalent. It is also to be observed that the benefit is

1 [1931] 1 Ch 254, [1930] All ER Rep 653

2 [1955] 3 All ER 667, [1956] Ch 131

3 14th Edn (1972), pp 22, 23

in terms to be attached to the factory site in the hands of successors. As to the third point, the plaintiffs are to be allowed to use the airport for relevant flights for a minimum of 99 years; the corporation covenants, so far as lies in its power, to maintain the surface in a condition enabling the user by the plaintiffs; it seems to me that if business efficacy is to be given to this agreement, detailed and fully drawn though it be, it should be taken to be part and parcel of the easement that if the corporation cannot, or in breach does not, mow the grass sufficiently for landing and take-off, the plaintiffs may enter and do what is needed. In any event, for the purpose of deciding the point in this appeal, I am prepared to assume those three points in the plaintiffs' favour. Accordingly, I approach the question of non-requirement on the footing that when the resolution for appropriation for planning purposes was passed by the corporation in January 1971, the land in question was neither in fact nor in law incapable of relevant airfield user by the plaintiffs.

The question whether land is not required for the purpose for which it was acquired has long been posed in statutory enactments relating to corporations and authorities with the ability compulsorily to acquire land. In general the situation was that land not so required had to be disposed of; it was regarded as basically wrong that it should be retained for some other purpose when the authority no longer needed it for the purpose for which it was compulsorily acquired. Subsequently, the statutory system has been to allow a local authority in such a case to appropriate the land to some other purpose for which it has powers of compulsory acquisition, I suppose to avoid the double step of (a) sale and (b) further compulsory acquisition. Section 163 of the Local Government Act 1933 is one example: as originally enacted, the exercise of the power of appropriation required the approval of the Minister, but that requirement was later dropped by amendment. It is a curious fact that no decision directly on this point is to be found, save in that of *Maugham J* in *Attorney-General v Manchester Corpn*¹. The question there arose under s 175 of the Public Health Act 1875, as amended by s 95 of the Public Health Acts (Amendment) Act 1907: thereunder land not required for the purpose for which it had been acquired might be appropriated for any other purpose, etc, etc. The terms of the statutory provision were not relevantly different from that now under consideration. The land in question had been acquired for street improvements, and the corporation purported to appropriate it for the purpose of a tuberculosis dispensary with the approval (then required) of the Minister of Health. One argument was whether inconsistent public rights had been acquired over the site; but the question was also raised whether the site could be said to be not required for the purpose for which it had been acquired. *Maugham J* said this²:

'I have already said that in my view *prima facie* the defendant Corporation, having acquired lands for a particular purpose, and having applied the lands with an intention that that application should be permanent, are not entitled to alter the purpose in question and to apply the land for a different one except under proper statutory authority or except under, it may be, the provisions of a general Act enabling them to do so. This leads me to what I consider to be the real point of this case—namely, the true construction of s. 95 of the Public Health Acts (Amendment) Act, 1907, which I have already mentioned. That section was no doubt passed, or partly passed, to prevent the evil which it was thought arose from the decision of the Court of Appeal in the case of *Attorney-General v. Hanwell Urban District Council*³. The headnote says (*inter alia*): "A local authority have no power to apply permanently land which they have acquired for one purpose to another purpose inconsistent with the original purpose, even though the land cannot possibly be required for that original purpose, and

1 [1931] 1 Ch 254, [1930] All ER Rep 653

2 [1931] 1 Ch at 269, 270, c f [1930] All ER Rep at 656

3 [1900] 2 Ch 377

a they will be restrained from so doing at the suit of the Attorney-General.” Sect. 95 provides that [his Lordship read the section, and continued:] Two questions arise under that section which are, I think, of considerable importance and of some difficulty. In the first place the question arises, What is the meaning of the phrase “not required for the purposes for which those lands have been acquired”? Who is to be the judge of that? Is it a question of fact on which
b the Court may express an opinion, or is it a question on which the determination of the local authority is to prevail? In answering that question, I think that I have to compare s. 175 of the Public Health Act, 1875. That section, after providing power to purchase, goes on to say: [His Lordship read the section, and continued:] I think that in such a case, either under s. 175 of the earlier Act, or under s. 95 of the amending Act, the local authority, acting in good faith, must be the sole
c judges of whether the land is no longer required, or is not required for the purpose for which the land was acquired. Of course they must act honestly. I need hardly say that the contrary is not suggested here. But I do not see any ground for thinking that the Court can substitute its judgment upon such a question for the local authority who are given by these Acts wide powers of local government. Accordingly, I must take it that, in the circumstances of this case, it has been
d determined in good faith by the Corporation that the land in question is not required for the purpose for which it was acquired in 1875.’

Later, in discussing whether public rights over the site had been acquired, he said this¹:

e ‘I should add that consideration of the sort of case to which s. 95 may apply must lead to the conclusion that, in the normal case, public rights will almost necessarily be affected by the alteration of the purposes for which land of the character in question has been appropriated. For example, it may be an open space, a swimming bath, or a market; in each of these cases people living in the neighbourhood have acquired some kind of right in relation to the land, while it is being used for that purpose. In the case of a market acquired by a local
f authority under a special Act, or under a general Act, it may very well be that people have built their shops or have constructed offices in the neighbourhood in reliance on the proximity of the market. It may be that such circumstances have arisen that it is unnecessary in the public interest any longer to retain that market.’

g It is to be observed that in that last sentence the judge treats ‘required’ as meaning needed or necessary in the public interest. It is true that at that time the appropriation could not be a first step on the road to extinction (with compensation) of private rights saved by, for example, the proviso to s 163, because there was then no equivalent of s 127 of the Town and Country Planning Act 1971; but the subsequent introduction of that equivalent cannot alter the construction of and approach to s 163. Now that decision, on an indistinguishable section, has, we are told, been ever since
h noticed in relevant textbooks without adverse comment. Counsel were unable to find any criticism in any learned articles, over a period in which there has been intensive study and analysis of the powers of the court to disagree with and substitute its own view of the validity of administrative acts for that of, for example, a local authority. Moreover, it is by no means without significance, and is indeed persuasive—
i though not, of course, conclusive—that the legislature has enacted the same formula in statutes subsequent to that clear decision. Further, for my part, I consider the decision to be correct. It is a function of a local authority to study and keep under review the needs of the inhabitants of the locality and to exercise to the best of its ability its powers with those needs in mind. This must involve the authority in

¹ [1931] 1 Ch at 271, 272, [1930] All ER Rep at 657

consideration of the relative importance of different needs, not least in connection with the use to which lands of the authority are to be put for the public benefit. I would construe 'not required' in the section as meaning 'not needed in the public interest of the locality' for the original purpose: and it appears that Maugham J¹ so construed them. Now that question, it is plain to me, involves matters both of degree and of comparative needs, as to which there can be no question but that the local authority is better qualified than the court to judge, assuming it to be acting bona fide and not on a view that no reasonable local authority could possibly take. In the present case lack of bona fides is no longer pursued, the abandonment of the site as a municipal airport is in no way criticised, and I can see no ground for holding that the decision of Maugham J¹, with which I agree, is not directly applicable. Moreover, insofar as the degree of private need for use of the airfield as such is said to be relevant, the evidence of likely need to use it for purposes of the plaintiffs' business (other than flight testing of aircraft manufactured at the plaintiffs' factory) is extremely small in extent and related to convenience rather than need; and the evidence directed to the possibility of future manufacture of aircraft, for which it might fairly be said that there would be a need for the airfield, is purely speculative and on balance of probability unlikely. In this context the manufacture of VTOL² and STOL³ aircraft (mentioned as conceivable possibilities) would require some concreting of the surface which in my view the corporation could not be required to do, nor the plaintiffs entitled to do; but even were my view wrong on that last point, it would not alter my view on the question of degree of private need for use of the airfield as such. It was argued for the plaintiffs that authority showed that the court will always enquire into and decide on the existence of a factual pre-condition of an administrative step; that non-requirement here was such; and that the views of Maugham J¹ were erroneous. It seems to me that this depends on what is meant by a factual pre-condition, or rather what sort of factual pre-condition is in question. We were referred to *Eshugbayi Eleko v Officer administering the Government of Nigeria (Administering Officer)*⁴, where the administrative or executive step that was challenged could only be taken if the appellant was a native chief in the particular area. That, of course, was a simple factual precondition which the court was as competent to decide as anyone else. In *Re Ripon (Highfield) Housing Order 1938, Applications of White and Collins*⁵ a compulsory order was quashed on the ground that the land formed part of a park, and such land was excluded from the power of compulsory purchase: a similar type of case. *Attorney-General v Pontypridd Urban District Council*⁶ does not in my view assist the plaintiffs on this point. There the authority proposed to erect on part of land acquired for electricity generation purposes, a substantial refuse destruction plant: the court held that in fact and law the plant was not an ancillary part of the electricity generating station, although it was proposed to use some of the heat engendered by the plant in aid of the generating station. Reliance was perhaps primarily placed on *Attorney-General v Teddington Urban District Council*⁷. In that case the authority had acquired land for sewage disposal purposes; some of it was not immediately required to be used or laid out for that purpose, and the authority proposed in the meantime to lay it out as pleasure grounds. Under the Public Health Act 1875, s 175, land if not required for the purposes for which it had been acquired was to be sold: there was not then the power of appropriation to other purposes introduced by the 1907 Act. It is correct to say that Romer J considered evidence on whether the land was required for its original purpose and concluded that the probable growth of population made it necessary to retain the land as reserve land available for sewage disposal. He also dealt at length with

¹ In *Attorney-General v Manchester Corpn* [1931] 1 Ch 254, [1930] All ER Rep 653

² I.e. vertical take-off and landing

³ I.e. short take-off and landing

⁴ [1931] AC 662, [1931] All ER Rep 44

⁵ [1939] 3 All ER 548, [1939] 2 KB 838

⁶ [1906] 2 Ch 257

⁷ [1898] 1 Ch 66

a the main matter argued, concluding that the authority was entitled to make temporary other use of the land provided that its treatment for that use was not inconsistent with its availability for sewage disposal purposes. That case is not I think inconsistent with the *Manchester* case¹: it does not seem to have been argued that it was for the authority only to determine the question of requirement: it may be that it was thought that special considerations might arise when the land was not reasonably immediately required for use for the particular purpose. Further, it may have been thought that where the alternative was only sale and not appropriation to some other public purpose, there was not quite the same element of judgment of differing public needs in the problem. In any event, I would follow the decision in the *Manchester* case¹ if there be a conflict not hitherto observed.

b Accordingly, in my judgment, the contention that the appropriate resolution was invalid on the ground that the land was still required for the purpose for which it was originally acquired or appropriated is unsound and the appeal should be dismissed.

c There may be other matters to be considered in other proceedings which I do not propose should be now decided. As I have observed, the appropriation resolution, if valid, does not constitute a breach of the corporation's obligations under the 1936 conveyance. There may, however, have been other breaches of the plaintiffs' rights since December 1970 which may or may not have been the cause of damage; for example, failure to do what lay within the power of the corporation to keep the surface in a satisfactory condition: against any actionable inconvenience caused by that would however, I suppose, be offset the unpaid £50 per annum. I gather that at some stage the corporation asserted that any use by the plaintiffs of the airfield after the resolution would be a trespass; but this was not treated by the plaintiffs as a repudiation and is not now asserted. Again, if by chance the planning permission for comprehensive development is not forthcoming, the questions of the ability of the plaintiffs to take any and what steps by way of self help may become of more importance for decision than as merely marginal to the present decision and therefore at present suitable for a merely tentative view and assumption. My understanding of what was said in the course of debate was that these matters, the rights of the plaintiffs and the nature of those rights, under the 1936 conveyance and the two subsequent agreements, were to be open and not concluded by the present proceedings, whether for assessment of compensation under s 127 or otherwise.

d **BUCKLEY LJ.** In 1935 the defendant corporation in part acquired and in part appropriated the land which thereafter became the site of the Pendeford Airport for the purposes of an aerodrome. In November 1936 the corporation conveyed to the plaintiff company, whom I will call 'Boulton Paul', the site adjoining the airfield which Boulton Paul has since used as a factory. The conveyance contained in cl 3 (ii) a covenant to allow Boulton Paul the use of the airport for the purpose of test, delivery and other flights in connection with their business of designing, manufacturing, assembling and repairing aircraft and parts thereof and accessories thereto for 99 years or such longer period as the site should be used as a municipal aerodrome. From 1938 until the end of 1970 (subject to a period of requisitioning during and after the war) the airfield was used as an aerodrome by Boulton Paul as well as by members of the public. In consequence, however, of a change in the nature of their business carried on at the factory, Boulton Paul's use of the airfield became very much reduced in the year 1957, when they ceased to manufacture aircraft at the factory, and therefore was virtually confined to executive flights in private aircraft owned by Boulton Paul. These were not numerous, amounting to only 26 movements in 1967, 56 in 1968 and 16 in 1969. There were none in 1970. In December 1970 the corporation closed the airport, since when there has been no traffic there. On 4th January 1971

the council of the corporation approved an earlier resolution of its town planning committee that approximately 213 acres of land held by the corporation for aerodrome purposes under the Civil Aviation Act 1949 be appropriated for planning purposes under the Town and Country Planning Acts 1962-1968. This refers to the Pendeford Airport.

The use in this resolution of the expression 'planning purposes' is no doubt to be attributed to the presence of those words in the Town and Country Planning Act 1971, s 127. The meaning of this term is not statutorily defined, and it might perhaps be thought that the resolution was not in terms which amounted to an appropriation to any particular purpose. It has not, however, been suggested that the resolution was ineffective on any such ground.

The question which we have to decide in this case turns on the construction of the Local Government Act 1933, s 163, as now amended. Under sub-s (1) of that section, land which has been acquired or appropriated by a local authority for or to a particular purpose may be appropriated for another purpose if, but only if, it answers to the description of 'any land belonging to a local authority and not required for the purposes for which it was acquired or has since been appropriated'. Part VII of that Act, within which s 163 is to be found, deals with the acquisition of, and dealings in, land by local authorities. Sections 157-162 are concerned with the acquisition of land by agreement or compulsorily. They empower a local authority to acquire land for the purposes of any of its functions under that or any other public general Act. It is common ground that a local authority which has in the exercise of its statutory powers acquired land for one purpose cannot thereafter appropriate it for use (not being a temporary use) for another purpose without statutory authority. The statutory power of re-appropriation here relied on is found in s 163. Accordingly, the question for decision is whether, at the date in January 1971 of the corporation's resolution re-appropriating the land for planning purposes, the area so re-appropriated was land which was no longer required for the purpose of an airport.

Counsel for the plaintiffs says that the corporation have never expressly declared that this site is no longer required as an airport, but have on the contrary from time to time recognised that it is still required by reason of the corporation's contractual obligation to Boulton Paul. He further contends that in establishing the airport the corporation had not this single object in view, but a dual purpose of which the primary and more important element was to make an airfield available to Boulton Paul and the secondary and less important element was the establishment of a municipal public airport. I feel unable to accept this latter submission, for on the facts it seems to me to be clear that the corporation acquired and appropriated this site for the single purpose of establishing an airport there, among the users of which would be Boulton Paul, but which would also be available for use by members of the public.

Counsel for the plaintiffs, in the course of his helpful argument, has strenuously contended that so long as the corporation's contractual obligations to Boulton Paul under the conveyance of 30th November 1936 remain in force, as they still do, the corporation cannot in law properly contend that it does not require the site as an aerodrome. I was at one stage attracted by this proposition. I have, however, reached the conclusion that having regard to the language and context of s 163 it is unsound. The Local Government Act 1933 is an Act dealing with the constitution, powers and duties of local authorities, and with their powers and duties, inter alia, in relation to the provision of services and facilities for the public in their areas. In this context, in my judgment, the question whether land belonging to a local authority is or is not required for the purpose for which it was originally acquired or has been appropriated must be answered on a broad view of local needs. In the present case I think we have to consider whether at the relevant date as a practical matter there was a need for an airport on this site. In answering this question I think that all relevant circumstances must be taken into account. For instance, it would not be right, I think, to shut one's eyes to such matters as the cost of maintenance and operation. Was the need of such

a a kind and extent that this expenditure would have been justified? It would, in my opinion, be ridiculous to suppose that the corporation could be bound to continue to operate the airfield merely because the owners of one or two privately-owned aircraft might find it convenient. I do not suggest that profitability necessarily or alone would be a satisfactory test. There might be local and special reasons which would make it desirable for a local authority to operate an airfield at a loss. The test can, I think, be formulated in some such way as this: taking all relevant considerations into account, can it sensibly be said that there is as a practical matter a need for an airfield on the site?

b For the corporation, much reliance has been placed on the decision of Maugham J in *Attorney-General v Manchester Corpn*¹, where the learned judge held that under the Public Health Acts (Amendment) Act 1907, s 95 (the language of which was in essentials the same as the language which we have to consider), the local authority, acting in good faith, must be the sole judge whether the land is or is not any longer required for the purpose for which it was acquired. Boulton Paul, on the other hand, have drawn the attention of this court to *Attorney-General v Teddington Urban District Council*², where Romer J, confronted with the question whether land acquired by a local authority for sewage purposes was still required for those purposes, found no difficulty in determining that question himself on the evidence adduced before him. They also relied on the observations of Luxmoore LJ in *Re Ripon (Highfield) Housing Order 1938, Applications of White and Collins*³, to the effect that, where jurisdiction to make or confirm an order is dependent on the existence of a particular state of facts, it seems almost self-evident that the court which has to consider whether there is such jurisdiction must be entitled to review the vital finding on which the existence of the jurisdiction relied on depends. Precisely similar reasoning, they say, applies in the present case where the power to re-appropriate is dependent on the fact that the land is no longer required for the purposes for which it was acquired or has been appropriated.

c Had the matter been *res integra*, I think that I should have been at least tempted to take a different view from that taken by Maugham J in *Attorney-General v Manchester Corpn*¹, but I agree that, since his decision in that case seems to have survived more than 40 years without attracting any adverse comment, during which period Parliament in the 1933 Act has employed the same form of words, which Maugham J held to make the local authority the sole judge of fact, we ought to follow his decision. But whether this be right or not can make no difference, in my opinion, to the result of this appeal: for if the court should be the judge of fact, I think that the finding should coincide with the view of the corporation. The corporation clearly acted on the view that the aerodrome was no longer required. The evidence has fully satisfied me that at the date of the resolution and at the present time this site was not and is not required as an aerodrome. It is true that the corporation's contractual obligations to Boulton Paul remain in force and that the corporation may have acted in breach of them and be liable to Boulton Paul accordingly; but those obligations are not such, in my opinion, that the court should compel their specific performance. Boulton Paul's present need to use the airfield is on the evidence very small. It is limited to the use of the airfield for executive flights, which really does not amount to more than a convenience. There is evidence which suggests that in certain eventualities Boulton Paul might wish to make use of the airport in connection with its business to a much greater extent, but this cannot be said to be at all predictable.

d In my judgment, the evidence shows that the condition of the power to re-appropriate contained in s 163 is satisfied in the present case. Accordingly, in my judgment, the re-appropriation was valid. I would dismiss this appeal.

1 [1931] 1 Ch 254, [1930] All ER Rep 653

2 [1898] 1 Ch 66

3 [1939] 3 All ER 548 at 559, [1939] 2 KB 838 at 855, 856

I add that I agree with the views expressed by Russell LJ on the question whether the covenant operated in equity to create an easement in favour of Boulton Paul, and the consequent right of Boulton Paul to carry out such work on the airfield as may be necessary to enable them to enjoy that easement. Indeed, I think that entering on the airfield and mowing the grass may properly be regarded as an exercise of the easement rather than of an ancillary right.

LAWTON LJ. I agree with both the judgments already delivered so far as they deal with the facts and the effect of the covenant whereby Dowty Boulton Paul Ltd acquired rights to use the airfield. I am mindful, however, of the submission made by counsel for the corporation that it was not competent for this court (there being no allegation of perversity or bad faith) to decide on the evidence whether the airfield was still required for the purposes for which it was acquired or appropriated in 1935. In my judgment, counsel's submission was well-founded. It is supported by Maugham J's judgment in *Attorney-General v Manchester Corpn*¹. I would follow that case.

As Russell LJ has dealt with the history of s 163 of the Local Government Act 1933, I can turn at once to its construction. In its context it is one of ten sections which authorise local authorities to acquire and dispose of land; and having been acquired, land may be sold, if it is not required for the purpose for which it was acquired, or exchanged for other land (see s 165).

When exchanging land a local authority, which is not a parish council, has no restriction of any kind on its powers save the need to obtain the consent of the Minister if s 26 of the Town and Country Planning Act 1959 applies. Since it is clearly the right of a local authority to decide for itself when to acquire and exchange land for the purposes of local government it would, so it seems to me, be an odd result if it could neither change its mind as to the purpose for which it wanted to use land already acquired nor decide when to sell without the possibility of the court intervening. Negotiating to buy land from a local authority would be a frustrating and long-drawn out undertaking if an aggrieved person, or the Attorney-General in a relator action, could intervene by asking the court to adjudge that the local authority had no right to sell because there was evidence that the land available for sale was still required for the purpose for which it had been acquired. Drafting requisitions on title to find out whether land was still required for the purpose for which it had been acquired might necessitate a long probe into local affairs. I agree with Maugham J that there is no ground for thinking that the court can substitute its judgment on such a question for that of a local authority which has been given by the 1933 Act wide powers of local government.

I appreciate that *Attorney-General v Manchester Corpn*¹ appears to be in conflict on this point with *Attorney-General v Teddington Urban District Council*². I am unable to reconcile the two cases; but, like Russell LJ, I would follow the *Manchester* case¹.

A factor which has weighed heavily with me in preferring the *Manchester* case¹ to the *Teddington* case² is the fact that it has been in the Law Reports now for 42 years and, as far as the researches of counsel have been able to discover, it has never been doubted either in any judgment or in any textbook. These years have seen a greater use of statutory powers than at any time in our history, and the exercise of these powers has been under constant scrutiny by the courts which have not hesitated to exercise their supervisory powers if the law and the facts called for intervention. In a recent book entitled 'Final Appeal', which is a study of the House of Lords in its judicial capacity, the authors³ list 25 appeals during the period 1952 to 1971 in which important points of public law have been considered and in many of them the supervisory

¹ [1931] 1 Ch 254, [1930] All ER Rep 653

² [1898] 1 Ch 66

³ Louis Blom-Cooper QC and Gavin Drewry

- a powers of the courts over administrative acts have been under review. Not once did the *Manchester* case¹ receive their Lordships' critical attention.
I would dismiss the appeal.

Appeal dismissed. Leave to appeal to the House of Lords refused.

- b Solicitors: Gregory, Rowcliffe & Co, agents for Midwinter, Jones & Co, Cheltenham (for the plaintiffs); Sharpe, Pritchard & Co, agents for K Williams, Town Clerk, Wolverhampton.

Mary Rose Plummer Barrister.

c

Edkins v Knowles

- d QUEEN'S BENCH DIVISION

LORD WIDGERY CJ, JAMES LJ, ASHWORTH, WILLIS AND GRIFFITHS JJ
4th APRIL, 4th MAY 1973

- e Road traffic – Driving with blood-alcohol proportion above prescribed limit – Evidence – Provision of specimen – Breath test – Requirement to take test – Person driving or attempting to drive – Suspicion of alcohol or of commission of moving traffic offence – Suspicion arising after person has ceased driving – Whether necessary that suspicion should arise at time person driving – Considerations to be taken into account in determining whether person driving at relevant time – Road Safety Act 1967, s 2 (1).

- f Two plain clothes police officers in a police car saw the respondent motorist driving a car fast and erratically. The officers followed him for three miles to a holiday camp where he lived; as they followed him they sent out a radio call requesting the attendance of a traffic patrol car. They did not attempt to overtake the respondent as they thought it would be dangerous to do so. When the respondent had finally stopped in the holiday camp they drew up beside him, identified themselves and asked him to await the arrival of the traffic patrol car. He did so remaining in the driving seat of his car. Five minutes later the traffic patrol car arrived with uniformed officers. One of the plain clothes officers then brought the respondent over to the traffic control car and in the presence of the respondent told a uniformed officer how the respondent had driven. The uniformed officer noticed that the respondent's breath smelt of drink and then asked the respondent for a specimen of breath, which proved positive. A subsequent laboratory test revealed a blood-alcohol proportion above the prescribed limit. The respondent was charged with an offence under s 1 (1) of the Road Safety Act 1967. The justices dismissed the charge, on a submission of no case to answer, on the ground that the uniformed officer had no power under s 2 (1)^a of the 1967 Act to require the respondent to take a breath test. On appeal,

i [1931] 1 Ch 254, [1930] All ER Rep 653

- j a Section 2 (1) provides: 'A constable in uniform may require any person driving or attempting to drive a motor vehicle on a road or other public place to provide a specimen of breath for a breath test there or nearby, if the constable has reasonable cause—(a) to suspect him of having alcohol in his body; or (b) to suspect him of having committed a traffic offence while the vehicle was in motion. Provided that no requirement may be made by virtue of paragraph (b) of this subsection unless it is made as soon as reasonably practicable after the commission of the traffic offence.'

Held – The justices had been right to dismiss the information. The uniformed officer had no power under s 2 (1) to require a breath test since his suspicion that the respondent had alcohol in his body or had committed a moving traffic offence had not been formed at a time when the respondent was driving, but only some five minutes after the respondent had reached the end of his journey and when he was effectively prevented from driving by the plain clothes officers (see p 508 g and h, post).

Observations on the considerations to be taken into account in determining whether a motorist is driving at the relevant time for the purposes of s 2 (1) of the 1967 Act (see p 508 a to f, post).

Pinner v Everett [1969] 3 All ER 257 applied.

Sakhuja v Allen [1972] 2 All ER 311 considered.

Notes

For the power to require a motorist to take a breath test, see Supplement to 33 Halsbury's Laws (3rd Edn) para 1061A, 3, and for cases on the subject, see Digest (Cont Vol C) 931-933, 322k-322kl.

For the Road Safety Act 1967, ss 1, 2, see 28 Halsbury's Statutes (3rd Edn) 459, 462.

As from 1st July 1972, ss 1 and 2 of the 1967 Act have been replaced by ss 6 and 8 of the Road Traffic Act 1972.

Cases referred to in judgment

Pinner v Everett [1969] 3 All ER 257, [1969] 1 WLR 1266, 113 JP 653, [1970] RTR 3, HL, Digest (Cont Vol C) 932, 322kc.

Sakhuja v Allen [1972] 2 All ER 311, [1973] AC 152, [1972] 2 WLR 1116, [1972] RTR 315, HL.

Cases also cited

Campbell v Tormey [1969] 1 All ER 961, [1969] 1 WLR 189, DC.

Copeland v McPherson 1970 SLT 87.

Cozens v Brutus [1972] 2 All ER 1297, [1972] 3 WLR 521, HL.

Erschine v Hollin [1971] RTR 199, DC.

Farrell v Brown 1971 SLT 40.

Harman v Wardrop [1971] RTR 127, 55 Cr App Rep 211, DC.

MacLeod v Rennie 1970 SLT (Notes) 9.

R v Bates p 509, post, DC.

R v Herd [1973] RTR 165, CA.

R v Jones (BJM) [1970] 1 All ER 209, [1970] 1 WLR 211, CA.

R v Masters [1972] RTR 492, CA.

R v Wall [1969] 1 All ER 968, [1969] 1 WLR 400, CA.

Sasson v Taverner [1970] 1 All ER 215, [1970] 1 WLR 338, DC.

Smith v Fyfe 1971 SLT 89.

Stevens v Thornborrow [1969] 3 All ER 1487, [1970] 1 WLR 23, DC.

Taylor v Houston, Swan v Houston 1971 SLT 39.

Timmins v Perry [1970] RTR 477, DC.

Trigg v Griffin [1970] RTR 53, DC.

Williams v Jones [1972] RTR 4, DC.

Wright v Brobyn [1971] RTR 204, DC.

Case stated

This was an appeal by way of case stated by justices for the borough of Weymouth and Melcombe Regis acting in and for the borough in respect of their adjudication as a magistrates' court sitting at Weymouth on 28th July 1972.

1. On 27th June 1972 an information was preferred by the appellant, Christopher Edkins, against the respondent, Kenneth James Knowles, that he on 25th April 1972 drove a certain motor vehicle, namely a motor transit van on a certain road called

a Littlemoor Road, he having consumed alcohol in such a quantity that the proportion thereof in his blood as ascertained from a laboratory test for which he subsequently provided a specimen under s 3 of the Road Safety Act 1967 exceeded the prescribed limit at the time he provided the specimen, contrary to s 1 (1) of the Road Safety Act 1967.

2. The justices, after hearing the evidence for the prosecution, found the following facts. (a) On 25th April 1972 at about 11 p m the respondent drove a vehicle in Littlemoor Road at a fast speed and swung across the centre of the road three or four times. His driving was observed by two plain clothes officers travelling in a CID car after they had been overtaken by the respondent. The two officers followed the respondent, during which time two further instances of bad driving occurred. The second of those involved the respondent's vehicle overtaking two vehicles where the road started to dip down and swept into a right-hand bend. The two officers kept the respondent's vehicle in sight and followed him for something over three miles into a holiday camp, which at that particular time of year was not open to visitors but in which the respondent was living. During the pursuit a wireless call was transmitted by the officers through a force controller, requesting the attendance of a traffic patrol car. No attempt had been made to overtake and stop the respondent, although the road was comparatively clear. The two officers did not stop the respondent's vehicle on the main road as they were of the opinion it was too dangerous to do so. (b) On arrival at the holiday camp the CID car was driven up close to the driver's door of the respondent's vehicle (then halted). The respondent was told about the manner of his driving by Det Con Robbins, an observer in the CID car, who identified himself to the respondent. The respondent was requested to await the arrival of the traffic patrol car and that he did remaining in the vehicle. Subsequently there was a conversation as to the ownership of the vehicle and about stolen goods, vans and antiques. (c) At some time up to five minutes later a Pc Knight arrived on the scene. On his arrival Pc Knight saw the respondent seated in the driving seat of the transit van and observed one of the CID officers bring him over to the police vehicle. Det Con Robbins then informed Pc Knight, in the presence and hearing of the respondent, of the circumstances of the alleged driving. Police constable Knight then asked the respondent whether he was the driver at the time of the described incident to which the respondent replied 'Yes'. While talking to the respondent Pc Knight noticed that his breath smelt strongly of alcohol. (d) Police constable Knight then had reasonable cause to suspect that the respondent had been the driver of the vehicle and that he had committed a moving traffic offence while the vehicle had been in motion and further that he had alcohol in his body. The constable then asked for a breath test and that proved positive. (e) The respondent was arrested; a further specimen was taken some 20 minutes later, and that test also proved positive. The testing procedure was then carried out, a sample of the respondent's urine was analysed and it contained not less than 174 milligrammes of alcohol in 100 millilitres of urine.

3. It was contended by the respondent that there was no case for him to answer on the following grounds: (a) first, the breath specimen had been requested by the uniformed officer in a private place not being 'at or nearby' the public road on which it was alleged that the moving traffic offence had been committed; (b) secondly, the pursuit had not been made by a constable in uniform. Nor had the pursuit, the alleged bad driving, or the requirement to provide a specimen of breath, been part of the same sequence of events. The justices were referred to passages from *Sakhujia v Allen*¹ and in particular to passages in the judgments of Lord Hailsham of St Marylebone LC² and Lord Pearson³.

j 4. No argument was addressed to the justices by the appellant.

1 [1972] 2 All ER 311, [1973] AC 152

2 [1972] 2 All ER at 325, [1973] AC at 169

3 [1972] 2 All ER at 336, 342, [1973] AC at 183, 189, 190

5. The justices retired with their clerk and came to the following conclusions: (a) That there was evidence that the respondent had been driving a vehicle on a public road and that he had been required to take a breath test 'there or nearby'. (b) That the respondent was not quoad Pc Knight 'a person driving or attempting to drive a vehicle'. At the time that officer formed his suspicion the respondent was no longer in the vehicle and his journey was complete. (c) The justices considered the reference to the Scottish case of *Copeland v McPherson*¹ in Boney, 'The Road Safety Act, 1967'², and so commenced with an argument diametrically opposed to the conclusion which the justices finally came to. It seemed to them that such a conclusion rendered s 2 (2) of the Act unnecessary. If suspicion might thus be related to an unobserved driving then the time element became largely irrelevant and any uniformed officer was thus empowered to test any motorist of whom complaint had been made by an informer and indeed the necessity of producing a uniformed officer would merely permit delay. (d) Looking carefully at the ratio decidendi of *Pinner v Everett*³, 'although a man may still be driving (a car) within the meaning of the section after his (car) has stopped and he is no longer in the driving seat this will only be the case if the reason for the stopping (of the car) and his absence from the driving seat is connected with the driving'. The justices concluded that the driving could not be extended for some two to five minutes to await the arrival of the witness, Pc Knight. They considered the passages to which they had been referred in *Sakhuja v Allen*⁴ and other parts of that judgment. There the meaning of 'driving or attempting to drive' was not interpreted conclusively and *Pinner v Everett*³ remained therefore an authority to which they had to give weight. *Sakhuja v Allen*⁴ did, however, suggest a further criteria—that there should be a sequence, thus avoiding the use of artificial limits of time and description. Thus in the present case if one extended the 'driving' to the time at which the uniformed officer arrived one lost the sequence. That avoided the artificial interpretation whereby a strange officer might be brought to any person who had completed a journey and then formed a suspicion and the difficulty which would arise if some doctrine on the lines of 'instant pursuit' was not accepted. (e) It appeared to the justices that the section required a relationship between constable and driver and that to dismiss the case would be to reason within the limits of the two latter cases.

Accordingly the justices dismissed the information. The appeal first came before the court (Lord Widgery CJ, Ashworth and Bridge JJ) on 5th March 1973 when it was adjourned for hearing before a full court of five judges.

N R Blaker QC and *D C Jenkins* for the appellant.

J B R Hazan QC and *D A Paiba* for the respondent.

D H Farquharson QC and *B H Anns* as amici curiae.

Cur adv vult

4th May. **GRIFFITHS J** read the following judgment of the court at the request of Lord Widgery CJ. This is an appeal by way of case stated by the justices of the borough of Weymouth and Melcombe Regis from their decision dismissing an information which charged the respondent with driving a motor vehicle on a road at a time when the level of alcohol in his blood exceeded the prescribed limit, contrary to s 1 (1) of the Road Safety Act 1967.

The justices found the following facts. At about 11 p m two plain clothes police officers in a police car saw the respondent driving fast and erratically. They followed

1 1970 SLT 87

2 (1971), p 45

3 [1969] 3 All ER 257, [1969] 1 WLR 1266

4 [1972] 2 All ER 311, [1973] AC 152

a him for about three miles to a disused holiday camp where he was living; as they followed they sent out a wireless call requesting the attendance of a traffic patrol car. They did not attempt to overtake and stop the respondent as they thought it would be too dangerous to do so. But when the respondent finally stopped in the holiday camp they drew up beside him, identified themselves, and asked him to await the arrival of the traffic patrol car. The respondent did so remaining seated in his car. About five minutes later the traffic patrol car arrived with uniformed officers. b A plain clothes officer then brought the respondent over to the traffic patrol car and in the presence of the respondent told a uniformed officer, Pc Knight, how the respondent had driven. Police constable Knight noticed that the respondent's breath smelt strongly of alcohol. As a result of what he had been told and smelt, Pc Knight then had reasonable grounds to suspect the respondent of having committed a traffic offence whilst the vehicle was in motion and of driving whilst he had alcohol in his body. c The constable asked for a breath test which proved positive. The respondent was arrested and the prescribed testing procedure followed, which revealed that his urine contained 174 milligrammes of alcohol in 100 millilitres of urine, well above the permitted limit.

d The respondent did not give evidence, but it was submitted on his behalf that he had no case to answer on the grounds that Pc Knight had no right to require him to take a breath test. The first submission was that the breath specimen had not been requested 'nearby' a road or other public place. The justices rightly rejected that submission.

e The second submission was that the respondent could not lawfully have been required to take a breath test, as he had ceased driving before a constable in uniform had reasonable grounds to suspect him of having alcohol in his body or of having committed a moving traffic offence. This submission was based on the recent decision of the House of Lords in *Sakhuja v Allen*¹. In that case all the members of the appellate committee held that the requirement to take a breath test under s 2 (1) of the Act did not have to be made whilst the motorist was driving or attempting to drive so long as it formed part of a relevant single transaction or chain of events flowing from the driving. f But there was a difference of opinion as to the time at which the constable in uniform must suspect the motorist of having alcohol in his body, or of having committed a moving traffic offence. Lord Hailsham of St Marylebone LC and Viscount Dilhorne, on their construction of s 2 (1), held that the suspicion did not have to arise whilst the motorist was driving or attempting to drive; it sufficed if the uniformed constable had reasonable grounds for suspicion at the time he required a breath test, provided the driving, the suspicion and the requirement formed part of a continuous chain of events forming a single transaction. g The majority however held that in the previous decision of *Pinner v Everett*² the House of Lords had decided that the requirement for a breath test was not valid unless the constable in uniform formed a suspicion while the motorist was still driving that he had alcohol in his body, or had committed a moving traffic offence. Undoubtedly many of the difficult problems of fact that arise in attempting to determine whether at a given moment in time a motorist is driving would be avoided, and the Act would be much easier to administer, if this court was free to follow Lord Hailsham of St Marylebone LC and Viscount Dilhorne. It would result in the conviction of the respondent, and many might see little injustice in that considering he was driving with approaching double the prescribed limit of alcohol in his blood. But we are bound by the majority, h and short of reconsideration of *Pinner v Everett*² by the House of Lords, it must now be taken as settled that the suspicion of a constable in uniform must arise while the j

1 [1972] 2 All ER 311, [1973] AC 152

2 [1969] 3 All ER 257, [1969] 1 WLR 1266

motorist is driving or attempting to drive, before he can be required to take a breath test. a

Whether the motorist is driving at the relevant time is a question of fact to be determined by the justices, directing themselves to the same considerations as a judge would direct a jury in his summing-up. *Pinner v Everett*¹ and other decisions provide guidance as to the considerations that are relevant in determining this question. The court has considered all these decisions and it is not necessary to lengthen this judgment by an elaborate citation of authority. Whilst it is not possible to reconcile all the decisions one with another, the court is satisfied that their collective effect may be summarised as follows: b

(1) The vehicle does not have to be in motion; there will always be a brief interval of time after the vehicle has been brought to rest and before the motorist has completed those operations necessarily connected with driving, such as applying the hand-brake, switching off the ignition and securing the vehicle, during which he must still be considered to be driving. c

(2) When a motorist stops before he has completed his journey he may still be driving; an obvious example is when he is halted at traffic lights. Each case will depend on its own facts, but generally the following questions will be relevant: (a) What was the purpose of the stop? If it is connected with the driving, and not for some purpose unconnected with the driving, the facts may justify a finding that the driving is continuing although the vehicle is stationary. (b) How long was he stopped? The longer he is stopped the more difficult it becomes to regard him as still driving. (c) Did he get out of the vehicle? If he remains in the vehicle it is some, though not a conclusive, indication that he is still driving. d

(3) If a motorist is stopped by a constable in uniform who immediately forms the suspicion that the motorist has alcohol in his body, the motorist should be regarded as still driving at the moment when the suspicion is formed; but if an appreciable time elapses before the constable's suspicion is aroused it will be a question of fact and degree whether the motorist is still to be considered as driving at that time. e

(4) When a motorist has arrived at the end of his journey then subject to the brief interval referred to in (1) above he can no longer be regarded as driving. f

(5) When a motorist has been effectively prevented or persuaded from driving he can no longer be considered to be driving.

Returning now to the present case, the justices held that *Pc Knight* was not entitled to require a breath test, and dismissed the information. They were right to do so. The constable was only entitled to require a test if he had reasonable grounds of suspicion under s 2 (1) (a) or (b) at a time when the respondent was driving. In fact he did not form his suspicion until about five minutes after the respondent had reached the end of his journey and at a time when he was effectively prevented from driving by the plain clothes officers. On these facts the justices rightly concluded that the respondent was not driving when first suspected by *Pc Knight*. This appeal will therefore be dismissed. g

Appeal dismissed. Leave to appeal to the House of Lords refused. h

Solicitors: *Sharpe, Pritchard & Co*, agents for *J R Pryer*, Dorchester (for the appellant); *Thicknesse & Hull*, agents for *Pengilly & Ridge*, Weymouth (for the respondent); *Treasury Solicitor*.

N P Metcalfe Esq Barrister. i

R v Bates

COURT OF APPEAL, CRIMINAL DIVISION

LORD WIDGERY CJ, LAWTON LJ AND ASHWORTH J

2nd APRIL, 4th MAY 1973

Road traffic – Driving with blood-alcohol proportion above prescribed limit – Evidence – Provision of specimen – Breath test – Requirement to take test – Person driving or attempting to drive – Issue whether accused driving or attempting to drive at relevant time – Issue of fact for jury – Proper direction to jury in clear cases – Road Safety Act 1967, s 2 (1).

S was driving his car when he was overtaken by another car driven by the appellant. Both vehicles stopped at a road junction. Thereupon S got out of his car and, telling the appellant that he was drunk, physically prevented him from continuing his journey by standing in front of the appellant's car. The appellant eventually pulled into the kerb and got out of his car. Some 15 minutes later S signalled a passing police patrol car, and explained to the uniformed police officers what had happened. They administered a breath test to the appellant which proved positive. A subsequent urine test revealed a blood-alcohol proportion above the prescribed limit. The appellant was charged with an offence under s 1 (1) of the Road Safety Act 1967. The jury were directed that if they found the facts proved as testified by the prosecution witnesses they should convict the appellant on the basis that, as he was driving or attempting to drive at the time when the police officers formed their suspicion that he had alcohol in his body, they were entitled to require him to take a test under s 2 (1)^a of the 1967 Act. The appellant was convicted and appealed.

Held – The issue whether or not a motorist was driving or attempting to drive at the relevant time was one of fact for the jury, although in certain cases a judge, with his knowledge of the authorities, might have to indicate that the evidence was really all one way. In any event, since the appellant had been effectively prevented or dissuaded from driving before the police officers arrived, he could no longer be considered to be driving or attempting to drive for the purposes of s 2 (1) of the 1967 Act. Accordingly the appeal would be allowed and the conviction quashed (see p 511 e, p 512 a to c, post).

Dictum of Sachs LJ in *R v Jones (EJM)* [1970] 1 All ER at 212 and *Edkins v Knowles* p 503, ante, applied.

R v Kelly [1970] 2 All ER 198 disapproved.

Notes

For the power to require a motorist to take a breath test, see Supplement to 33 Halsbury's Laws (3rd Edn) para 1061A, 3, and for cases on the subject, see Digest (Cont Vol C) 931-933, 322k-322kl.

For the Road Safety Act 1967, ss 1, 2, see 28 Halsbury's Statutes (3rd Edn) 459, 462. As from 1st July 1972, ss 1 and 2 of the 1967 Act have been replaced by ss 6 and 8 of the Road Traffic Act 1972.

^a Section 2 (1) provides: 'A constable in uniform may require any person driving or attempting to drive a motor vehicle on a road or other public place to provide a specimen of breath for a breath test there or nearby, if the constable has reasonable cause—(a) to suspect him of having alcohol in his body; or (b) to suspect him of having committed a traffic offence while the vehicle was in motion. Provided that no requirement may be made by virtue of paragraph (b) of this subsection unless it is made as soon as reasonably practicable after the commission of the traffic offence.'

Cases referred to in judgment

Edkins v Knowles p 503, ante, DC. a

R v Jones (E J M) [1970] 1 All ER 209, [1970] 1 WLR 211, 134 JP 215, 54 Cr App Rep 148, [1970] RTR 56, CA, Digest (Cont Vol C) 932, 322kl.

R v Kelly [1970] 2 All ER 198, [1970] 1 WLR 1050, 134 JP 482, [1970] RTR 301, CA, Digest (Cont Vol C) 932, 322kf.

Cases also cited b

Harman v Wardrop [1971] RTR 127, 55 Cr App Rep 211, DC.

Pinner v Everett [1969] 3 All ER 257, [1969] 1 WLR 1266, HL.

R v Masters [1972] RTR 492, CA.

Sakhuja v Allen [1972] 2 All ER 311, [1973] AC 152, HL.

Stevens v Thornborrow [1969] 3 All ER 1487, [1970] 1 WLR 23, DC. c

Appeal

On 22nd June 1972 in the Crown Court at Birmingham before Judge Ross and a jury the appellant, Edward John Bates, was convicted of driving a motor vehicle with a blood-alcohol concentration above the prescribed limit, contrary to s 1 (1) of the Road Safety Act 1967. He was fined £150, payable on 22nd August 1972, or three months' imprisonment in default. He was also disqualified for 12 months. He appealed against his conviction on the ground that he was not driving or attempting to drive at the time when the constable in uniform had reasonable cause to suspect him of having alcohol in his body and the trial judge had been wrong in directing the jury to the contrary. At the conclusion of argument on 2nd April 1973 the Court of Appeal announced that the appeal would be allowed and the conviction quashed, and that reasons would be given at a later date. The facts are set out in the judgment of the court. d

J A D Owen QC and *D R D Hamilton* for the appellant.

B R Escott Cox for the Crown. e

Cur adv vult

4th May. **LORD WIDGERY CJ** read the following judgment of the court. On 22nd June 1972 at the Birmingham Crown Court the appellant was convicted of driving a motor vehicle with a blood-alcohol concentration above the prescribed limit, contrary to s 1 of the Road Safety Act 1967, and was fined the sum of £150 and disqualified for 12 months. He now appeals against his conviction. f

The facts are somewhat unusual. A Mr Smart was driving his car along Stechford Road, Birmingham, at about 2.45 p m on 11th December 1971. He was overtaken by another vehicle driven by the appellant in such a manner that when the two cars stopped at a road junction, Mr Smart got out, went ahead of the appellant's car and addressed the appellant saying 'What's your trouble?' The appellant made no reply, and Mr Smart smelling alcohol, and noticing that the appellant was drowsy, said: 'You're drunk.' He told the appellant to get out of his car; the appellant demurred and said he was going on. Mr Smart said: 'You're not going on', and Mr Smart then physically prevented the car from moving by standing in front of it. At Mr Smart's insistence the appellant pulled his car into the kerb and got out, and a conversation then followed which lasted a quarter of an hour. Throughout this conversation the appellant was asking whether he could not be allowed to go on, because he wanted to attend a football match, and Mr Smart was consistently responding that the appellant was not to go anywhere. Eventually, after this period of about a quarter of an hour, Mr Smart managed to attract the attention of a policeman in a patrol car, and when that car stopped he explained the situation to two police officers in uniform in the patrol car. The police officers then took over and administered a breath test which proved positive, whereupon they arrested the appellant. No issue arose at the trial as to the necessary statutory requirements relative to the obtaining of a laboratory g
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a specimen, and in due course the urine test administered to the appellant showed a reading of 266 milligrammes of alcohol per 100 millilitres of urine.

b At the trial the facts to which I have briefly referred were spoken to by Mr Smart, and by the police officers in question. Counsel for the appellant indicated that he would not call evidence, and submitted that the appellant was not a person driving or attempting to drive at the time when the breath test was administered. Both the trial judge and counsel, relying on the decision of this court in *R v Kelly*¹, took the view that if the jury were satisfied on the facts as previously stated, the question of whether the appellant was driving or attempting to drive when the police officers approached, was a matter of law. The trial judge gave a reasoned ruling on this issue, concluding that as a matter of law the appellant was driving or attempting to drive at the relevant time. He accordingly directed the jury that if they found the facts as spoken to by the witnesses for the prosecution, they should, as a matter of law, convict of the offence charged, and this the jury did.

c The appeal as presented in this court has raised two main issues. First, whether it was possible to hold that the appellant was driving at the material time, when he had been physically prevented from driving in the manner above described. Secondly, whether it was right for the judge to rule, as a matter of law, that on the facts spoken to by Mr Smart, the appellant was driving. The first question also arose in the case in the Divisional Court of *Edkins v Knowles*², judgment in which has just been delivered. In that case also the accused had been physically prevented from driving by two plain clothes police officers who had indicated to him in the clearest terms that he was to wait by his vehicle until uniformed officers arrived. In the judgment of the full court in this latter case it was decided that a motorist who had been effectively prevented or dissuaded from driving could no longer be considered to be driving for present purposes. That in itself would justify this court in allowing the present appeal but we think it desirable to say a word or two about the second point which has undoubtedly been the subject of conflicting decisions, and is giving some difficulty in practice.

d *R v Kelly*¹ was similar to the present case in that, there again, there was no real dispute as to the facts. The motorist had stopped his car and left it, heading in the direction of a telephone box, when he was stopped by a police officer who suspected that the appellant had alcohol in his body. The trial judge heard argument from both counsel whether in those circumstances the officer's suspicion had been aroused at a time when the motorist was still driving, and informed counsel that he would direct the jury that that condition was satisfied. In this court the attitude of the judge in treating the matter as one of law on which he should give a direction to the jury was upheld, although e this court reached a different conclusion whether, as a matter of law, the necessary conditions of s 2 (1) were satisfied. In dealing with the propriety of giving the jury a ruling on this question, I said when giving the judgment of the court³:

f 'In cases where the primary facts are not in dispute and where, therefore, the only issue left is whether on those primary facts, and the authorities, the accused person is or is not driving, we think that the presiding judge must face the responsibility that the only matter outstanding is a matter of law and give his ruling on it.'

g Unfortunately this court, in *R v Kelly*¹, was not referred to the earlier judgment in *R v Jones (E.J.M)*⁴, where precisely the opposite view had been taken, and where Sachs LJ, in giving the judgment of the court, said⁵: 'The issue of whether an accused is driving at a relevant time is, of course, one of fact that has to be left to the jury'

i 1 [1970] 2 All ER 198, [1970] 1 WLR 1050

2 Page 503, ante

3 [1970] 2 All ER at 200, [1970] 1 WLR at 1052

4 [1970] 1 All ER 209, [1970] 1 WLR 211

5 [1970] 1 All ER at 212, [1970] 1 WLR at 215

(unless an admission is made) . . . Since the decision in *R v Kelly*¹ trial judges have been faced with these two conflicting authorities, and, as we have already said, some confusion has resulted. In future the authority of *R v Jones (EJM)*² should be followed, and the principle stated in *R v Kelly*¹ should be regarded as erroneous. Although we recognise the difficulty which trial judges will often have in summing-up such issues to a jury, we are impressed by the fact that the constitutional requirement that issues of fact should always be decided by the jury, and not be the subject of a direction, is a paramount consideration.

We think therefore that when a trial involves the question whether the motorist was or was not driving at the appropriate time, the issue should, in the end, be left to the jury. There will, of course, be cases in which the judge, with his knowledge of the authorities, may have to indicate to the jury that the argument is really all one way. In *Edkins v Knowles*³ this court summarised the main principles on which this issue depends, and if the judge finds that by applying those principles a conclusion one way or the other seems to him virtually inevitable, he is entitled in his discretion to make his views clear. We think, however, that in the end the matter should be left to the jury, and that for the future at any rate the principle of *R v Jones (EJM)*² should be preferred. The decision of the court having already been announced, those are the reasons on which that decision was based.

Appeal allowed. Conviction quashed.

Solicitors: *Jones, Grove & Co*, Birmingham (for the appellant); *D Emrys Morgan*, Birmingham (for the Crown).

N P Metcalfe Esq Barrister.

Practice Direction

FAMILY DIVISION

Ward of court – Leave – Leave for ward to go out of jurisdiction – Leave for temporary visits abroad – Power to give general leave for such visits – Order giving general leave – Conditions attached to it – Certificate of compliance with conditions.

Where in wardship proceedings in the Family Division the court is satisfied that the ward should be able to leave England and Wales for temporary visits abroad without the necessity for special leave, an order may be made giving general leave for such visits, subject to compliance with the condition that the party obtaining the order (who will normally be the party having care and control of the ward) must lodge at the registry at which the matter is proceeding at least seven days before each proposed departure: (a) a written consent in unqualified terms by the other party or parties to the ward's leaving England and Wales for the period proposed; (b) a statement in writing giving the date on which it is proposed that the ward shall leave England and Wales, the period of absence and the whereabouts of the minor during such absence; and, unless otherwise directed, a written undertaking by the applicant to return the ward to England and Wales at the end of the proposed period of absence.

On compliance with these requirements a certificate, for production to the immigration authorities, stating that the conditions of the order have been complied with, may be obtained from the registry.

Issued by the President of the Family Division.

D NEWTON

Senior Registrar

11th May 1973

¹ [1970] 2 All ER 198, [1970] 1 WLR 1050

² [1970] 1 All ER 209, [1970] 1 WLR 211

³ See p 508, ante

C & J Clark Ltd v Inland Revenue Comrs

CHANCERY DIVISION

MEGARRY J

28th, 29th, 30th MARCH 1973

- a** Income tax – Close company – Apportionment of income – Apportionment for surtax – Apportionment among participators – Addition to income to be apportioned – Amounts of annual payments deducted in arriving at company's distributable income – Covenanted donations to charity – Trading company – Prohibition on apportionment in absence of shortfall assessment – Whether prohibition applying to amounts of annual payments deducted in arriving at company's distributable income – Whether covenanted donations to charity may be apportioned even though no shortfall assessment – Finance Act 1965, s 78 (2), (4), as amended by the Finance Act 1966, s 27, Sch 5, para 10 (1).

Statute – Construction – Conflict between provisions of statute – Provision expressed to be 'subject to' other provision – Whether phrase 'subject to' implying that provisions should be construed so as to conflict.

- d** The taxpayer company, a close company for the purposes of corporation tax, was also a trading company. During the accounting period from 6th April 1966 to 31st December 1966 it paid, under the provisions of a deed of covenant, a total sum of £53,354 as a donation to a charitable trust established in 1959. In November 1967 the inspector of taxes confirmed that under the Finance Act 1965, s 77, no action relating to shortfall in distributions was proposed to be taken in relation to the taxpayer company. In December 1968, however, the Revenue issued a notice to the taxpayer company, apportioning the sum of £53,354 for the purposes of surtax under the provisions of s 78 (2)^a of the Finance Act 1965. The Special Commissioners held that the apportionment had been validly made. On appeal by the taxpayer company, the Crown contended that s 78 (2) empowered them to make an apportionment of the income of a close company which was a trading company, and on which no shortfall assessment had been made under s 77, in respect of sums (such as covenanted donations to charity) which fell within s 78 (2), since s 78 (4), which prohibited an apportionment of the income of a trading company on which no shortfall assessment had been made, was expressed to be 'Subject to' sub-s (2).

- g** **Held** – The taxpayer company's appeal would be allowed and the notice of apportionment discharged. Subsection (2) of s 78 did not contain an independent power to apportion income of a close company; its only function was to make an addition to the income to be apportioned if an apportionment was made under the powers conferred by sub-s (1) or sub-s (3) of s 78. The words 'Subject to' in s 78 (4) merely had the effect of demonstrating which provision was to prevail in the event of a conflict between sub-s (4) and the provisions to which it was expressed to be subject; **h** they did not imply that there must necessarily be a conflict between those provisions and so could not be taken to demonstrate that s 78 (2) allowed an apportionment to be made even if there had been no shortfall assessment. It followed that, since there had been no shortfall assessment on the taxpayer company in respect of the accounting period ended 31st December 1966, the amount of the covenanted donation to the charity could not be apportioned for surtax amongst the participators **j** of the taxpayer company (see p 520 a b e f and j to p 521 c and p 522 h, post).

Notes

For apportionment provisions in relation to close companies, see Supplement to 20 Halsbury's Laws (3rd Edn) para 2044.

a Section 78, as amended and so far as material, is set out at pp 517-519, post

For the effect of provisos and exceptions in the construction of a statute, see 36 Halsbury's Laws (3rd Edn) 399-401, para 604. a

For the Finance Act 1965, ss 77, 78, see 45 Halsbury's Statutes (2nd Edn) 620, 621.

For the Finance Act 1966, s 27, Sch 5, para 10, see 46 Halsbury's Statutes (2nd Edn) 279, 312.

For 1970-71 and subsequent years ss 77 and 78 of the 1965 Act have been replaced respectively by ss 289-290 and ss 296-298 of the Income and Corporation Taxes Act 1970. In relation to accounting periods ending after 5th April 1973, ss 289-290 and ss 296-298 of the 1970 Act have been repealed by the Finance Act 1972, ss 94, 134 and Sch 28, Part VI, and replaced by Sch 16 to the 1972 Act. For the power to apportion amounts deducted in respect of certain annual payments, see para 3 of Sch 16 to the 1972 Act. b

Cases cited c

Associated Newspapers Group Ltd v Fleming (Inspector of Taxes) [1972] 2 All ER 574, [1972] 2 WLR 1273, Tax Cas Leaflet 2448, HL.

Attorney-General v Prince Ernest Augustus of Hanover [1957] 1 All ER 49, [1957] AC 436, HL.

Comrs for the General Purposes of the Income Tax for the City of London v Gibbs [1942] 1 All ER 415, [1942] AC 402, sub nom *R v General Comrs of Income Tax for the City of London*, ex parte Gibbs 24 Tax Cas 221, HL. d

Chamberlain v Inland Revenue Comrs [1945] 2 All ER 351, 28 Tax Cas 88, CA.

Coathew Investments Ltd v Inland Revenue Comrs [1966] 1 All ER 1032, 43 Tax Cas 301, [1966] 1 WLR 716, HL.

Dale v Inland Revenue Comrs [1953] 2 All ER 671, [1954] AC 11, 34 Tax Cas 468, HL.

Engineering Industry Training Board v Samuel Talbot (Engineers) Ltd [1969] 1 All ER 480, [1969] 2 QB 270, CA. e

Green v Bowes-Lyon [1961] 3 All ER 843, [1963] AC 420, HL.

Greenberg v Inland Revenue Comrs [1971] 3 All ER 136, [1972] AC 109, 47 Tax Cas 240, HL.

Inland Revenue Comrs v Wilsons (Dunblane) Ltd [1954] 1 All ER 301, [1954] 1 WLR 282, sub nom *Wilsons (Dunblane) Ltd v Inland Revenue Comrs* 35 Tax Cas 107, HL. f

Kirkness (Inspector of Taxes) v John Hudson & Co Ltd [1955] 2 All ER 345, [1955] AC 696, sub nom *John Hudson & Co Ltd v Kirkness (Inspector of Taxes)* 36 Tax Cas 28, HL.

Rowe, Re, Pike v Hamlyn [1898] 1 Ch 153, CA.

Stenhouse Holdings Ltd v Inland Revenue Comrs (1970) 46 Tax Cas 670, HL.

Whitney v Inland Revenue Comrs [1926] AC 37, 10 Tax Cas 88, HL.

Case stated g

1. At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on 25th and 26th January 1971, C & J Clark Ltd ('the company') appealed against an apportionment of income of the company for the purposes of surtax made under the provisions of s 78 of the Finance Act 1965 for the accounting period from 6th April 1966 to 31st December 1966 as follows:

	£	s	d	h
John Anthony Clark	689	5	11	
Peter Thompson Clothier	536	19	4	
Others	52,127	14	9	
Total income apportioned	53,354	0	0	j

2. The sole question for decision was whether the apportionment could validly be made pursuant to the provisions of sub-s (2) of s 78 when, apart from those provisions, no apportionment fell to be made under the section.

3. The company's advisers had, since the commissioners' decision was given, brought to their notice information from which it appeared that there would unavoidably be much delay in agreeing figures pursuant thereto. They had asked the

a commissioners in those circumstances to state a case in principle, and, the Crown's representative having notified them that he supported that request, the commissioners acceded to it.

b 4. In a document proved or admitted before the commissioners there was set out a computation of the amount of the company's distributable income for the period from 6th April 1966 to 31st December 1966 (the amount as computed therein being £98,479), together with certain particulars of distributions (in which the amount of distributions computed to be apportionable to the period 6th April 1966 to 31st December 1966 was stated to be £35,662).

5. The following facts were admitted between the parties:

c (1) The company was incorporated on 16th November 1903 under the Companies Acts 1862 to 1900 with limited liability for the purpose of acquiring the business of boot and shoe manufacturers, paper box makers and other business at that time carried on by the firm of C & J Clark.

(2) The company was throughout the period relevant to the appeal, and remained, the parent company of the well-known group of companies which carried on in the main the business of boot and shoe manufacturers and distributors. The company carried on and was still carrying on the business of boot and shoe manufacturers.

d (3) The company's period of account ('the accounting period') from 2nd January 1966 to 31st December 1966 was an accounting period for the purposes of corporation tax.

e (4) The accounting period fell partly in the year 1965-66 and partly in the year 1966-67 and in pursuance of the provisions of para 14 of Sch 18 to the Finance Act 1965 the part of the accounting period from 2nd January to 5th April 1966 fell to be dealt with as a separate accounting period for the purposes of Chapter III of Part IX of the Income Tax Act 1952, and the part from 6th April to 31st December 1966 ('the relevant accounting period') fell to be dealt with as a separate accounting period for the purposes of ss 77 and 78 of the Finance Act 1965.

f (5) Throughout the relevant accounting period the issued share capital of the company was £5,068,282, divided into 50,000 5 per cent cumulative redeemable preference shares of £1 each, £100,000 5 per cent cumulative preference shares of £1 each and 4,918,282 ordinary shares of £1 each a majority of which was held by members of the Clark family and by trustees of their family trusts.

(6) The company was a close company for the purposes of corporation tax throughout the relevant accounting period.

g (7) The profits for the accounting period as computed for corporation tax purposes and on which the company was assessed to corporation tax amounted to £259,008.

(8) In the relevant accounting period the company made monthly payments of £6,666 13s 4d (less income tax) to the trustees of the Clark Foundation in accordance with the provisions of two deeds of covenant dated 22nd July 1960 and 26th May 1961 respectively made between the company of the one part and the trustees for the time being of the Clark Foundation, a charitable trust established by a trust deed dated 24th August 1959.

h (9) The company also made a payment of £21 (less income tax) to the Outward Bound Trust Ltd.

(10) The above-mentioned payments, totalling £53,354, were covenanted donations to charity within the meaning of s 52 (4) of the Finance Act 1965 and were accordingly treated for corporation tax purposes as charges on income under the provisions of that section.

i (11) On 30th October 1967 a print of the company's accounts to 31st December 1966, together with a detailed trading account and corporation tax computation and supporting schedules, were forwarded by the company's auditors to the Inspector of Taxes, Bridgwater, under the provisions of para 11 of Sch 18 to the Finance Act 1965.

(12) On 28th November 1967 the inspector of taxes confirmed that no action was

proposed under s 77 of the Finance Act 1965, and accordingly no assessment has been made on the company under that section in respect of the relevant accounting period. a

(13) On 17th December 1968 the Board of Inland Revenue issued a notice to the company that in accordance with the provisions of s 78 of the Finance Act 1965, the income of the company for the relevant accounting period in the amount of £53,354 had been apportioned for the purposes of surtax as follows: b

	£	s	d
John Anthony Clark	689	5	11
Peter Thompson Clothier	536	19	4
Others	52,127	14	9
	<hr/>		
Total income apportioned	53,354	0	0
	<hr/>		

c

[Paragraph 6 set out the cases¹ referred to.]

7. It was contended on behalf of the company: (1) that under the provisions of s 78 of the Finance Act 1965, other than sub-s (2) thereof, no apportionment could, on the admitted facts set out above, be made under that section for the relevant accounting period; (2) that in those circumstances the provisions of s 78 (2) did not supply or import any power to make, and so did not authorise the making of, any apportionment under s 78; (3) that the reference to sub-s (2) in the opening words of sub-s (4) of s 78 did not override the first of the two specific provisions enacted in the last-mentioned subsection, that is to say, the provision that an apportionment was not to be made under s 78 of a company's income for an accounting period unless an assessment was made on the company under s 77 in respect of a shortfall in its distributions for that period, and that no assessment had been so made in respect of the relevant accounting period. d

8. It was contended on behalf of the Crown: (1) that the amounts of income of the company which were the subject of the apportionment made for surtax purposes under s 78 of the 1965 Act, were on the admitted facts set out above amounts of the kind described in sub-s (2) of s 78; (2) that on a proper construction thereof, s 78 authorised the making of an apportionment thereunder of such amounts, irrespective of whether or not any such apportionment would fall to be made by virtue of the provisions of s 78 other than those contained in sub-s (2) thereof; (3) that the reference to sub-s (2) in the opening words of sub-s (4) of the section applied in relation to each of the two specific provisions thereafter set out, and that those provisions did not accordingly preclude the making, by virtue of sub-s (2) of s 78, of the apportionment against which the appeal was made; (4) that the apportionment be in principle upheld. e

9. The commissioners gave their decision as follows: f

'We the Commissioners who heard the Appeal were of opinion that the words "there shall be added" in subsection (2) of Section 78 of the Finance Act, 1965, did not become ineffective by reason only of there being on the admitted facts set out herein no amount of income to be apportioned otherwise than by virtue of the provisions of the said subsection (2), and further that the provisions of the said Section 78 did on a proper construction thereof authorise the making of an apportionment thereunder of amounts of the kind described in the said subsection (2) notwithstanding that no apportionment fell to be made by virtue of the provisions of the said Section exclusive of subsection (2) thereof. As regards the reference to subsection (2) in the opening words of subsection (4) g

¹ *Chamberlain v Inland Revenue Comrs* [1945] 2 All ER 351, 28 Tax Cas 88, CA; *Coathew Investments Ltd v Inland Revenue Comrs* [1966] 1 All ER 1032, [1966] 1 WLR 716, 43 Tax Cas 301, HL. h

- a of the said Section 78, it seemed to us that it should be taken to apply in relation to both, and not only to the second, of the provisions thereafter set out, and that those provisions did not therefore operate to bar the apportionment which was the subject of the appeal before us. We held accordingly that the appeal failed and that the said apportionment was in principle valid, and left figures to be agreed.'
- b 10. Immediately after the determination of the appeal the company declared its dissatisfaction therewith as being erroneous in point of law and in due course required the commissioners to state a case for the opinion of the High Court.
11. The question of law for the opinion of the court was whether the commissioners' decision set out in para 9 above was correct.
- M P Nolan QC and P G Whiteman for the company.
- c Gerald Godfrey QC and Patrick Medd for the Crown.

- MEGARRY J.** This is an appeal from the Special Commissioners. The appellant is a company called C & J Clark Ltd, which is the parent company of a group of companies engaged in boot and shoe manufacture and distribution: I shall refer to it as 'the company'. The whole case centres on the Finance Act 1965, s 78. The point in issue is an apportionment of income of the company for the purposes of surtax made under s 78 for the accounting period 6th April to 31st December 1966. The apportionment was made by the Board of Inland Revenue to certain participators, a term defined by Sch 18, para 4, to the 1965 Act, but, broadly speaking, meaning shareholders. A sum of some £50,000 was concerned, though what is in issue is not the figures but whether any apportionment at all could validly be made. Counsel
- e for the company said No and counsel for the Crown Yes.

- Much was common ground. At all material times the company was a close company within para 1 of Sch 18 to the 1965 Act. The sum in dispute consists wholly of payments made by the company to charities which were 'covenanted donations to charities' within s 52 (4) of the 1965 Act, and these were treated for corporation tax purposes as charges on income within the section. In October 1967 the company
- f followed the procedure laid down by para 11 of Sch 18 to the 1965 Act, sending the requisite documents to the inspector of taxes; and in November 1967 the inspector confirmed that no action was proposed under s 77 of the 1965 Act.

- I pause there. Section 77 provides for an assessment to be made on a company if, and only if, there was a 'shortfall' in the company's distributions for any accounting period. By sub-ss (2), (3) and (4), the shortfall is to be ascertained by reference
- g to the 'required standard' there laid down. In other words, if in any accounting period a company did not distribute enough of its profits as dividends, and so on (see Sch 18, para 1), then the company was to be assessed to tax on a sum equal to the income tax for which the company would be liable on a distribution equal to the shortfall. Without a shortfall, there could be no assessment on the company under s 77. The result of the action taken by the company and the inspector under
- h Sch 18, para 11, was that thereafter no shortfall assessment under s 77 could be made on the company in respect of the accounting period in question, save in exceptional circumstances which do not arise here: Sch 18, para 11 (4). No question of any such assessment thus arises in the case in any direct way; but the absence of any such assessment is at the centre of the argument on s 78.

- I turn, then, to s 78. It was round the first four subsections that the argument
- j revolved. These subsections, I was told, are innocent of any reported authority. Subsection (1) reads as follows:

'Subject to the provisions of this section, the income of a close company for any accounting period may for purposes of surtax be apportioned by the Board among the participators, and any amount apportioned to a close company (whether originally or by one or more sub-apportionments under this provision)

may be further apportioned among the participators in that company; and on any such apportionment section 249 of the Income Tax Act 1952, as adapted by this section, shall apply as it applied on an apportionment of a company's income under Chapter III of Part IX of that Act.' a

By itself, the subsection thus confers a general power on the Board of Inland Revenue to apportion the whole income of a close company for any accounting period among the participators. It is not confined to an amount equal to the shortfall, nor by itself is its operation dependent upon any shortfall assessment having been made on a company. Dependence on a shortfall assessment is brought in by sub-s (4), to which I shall come in due course. b

Next there is sub-s (2):

'For purposes of an apportionment under this section, there shall be added to the amount of income to be apportioned any amounts which were deducted in respect of annual payments in arriving at the company's distributable income for the accounting period and which in the case of an individual would not have been deductible or would have been treated as his income in computing his total income for surtax.' c

It is common ground that the covenanted payments to charity in question in this case fall within this subsection. The amounts deducted in respect of these payments are accordingly 'to be added to the amount to be apportioned' under the subsection. The subsection is thus essentially concerned with making an addition to the amount of income to be apportioned. d

I turn to sub-s (3). This is as follows:

'Except in the case of a trading company, there may be apportioned under this section, if the Board see reason for it, the whole of a company's income for an accounting period up to the amount of the required standard (notwithstanding that there has been no shortfall in distributions for that period), together with any addition to be made under subsection (2) above but with such reduction, if any, as may be just in respect of distributions made for the period to persons other than participators and associates of participators (or amounts treated as such for purposes of section 77 above): Provided that for this purpose the required standard shall be treated as reduced by so much of any shortfall in the distributions for the period as would under section 77 (4) above be disregarded in an assessment made in respect of that shortfall.' e

Again I pause. First, Parliament is making a plain distinction between trading companies and other companies; and the company with which I am concerned is admittedly a trading company. If a company is not a trading company, sub-s (3) allows the whole of the company's income up to the amount of the required standard to be apportioned under s 78, even if there has been no shortfall; and this power extends to 'any addition' to be made under sub-s (2), such as covenanted donations to charity like those made by the company in this case. But this power is expressly excluded in the case of trading companies by the opening words of the subsection: the power to apportion under the subsection in accordance with sub-s (3) even if there has been no shortfall, does not apply to trading companies, and therefore does not apply to the company in the case before me. f

I turn to sub-s (4). I shall read this with the words which the Finance Act 1966, s 27 and Sch 5, para 10 (1), added to it before it took effect. The subsection is not subdivided, and of course I must construe it in its undivided state. But as an aid to clarity of exposition I shall read the subsection with the subdivisions [a] and [b] that I notionally inserted in the course of argument. Thus edited, the subsection is as follows: g

'Subject to subsections (2) and (3) above, [a] an apportionment shall not be made under this section of a company's income for an accounting period unless h

a an assessment is made on the company under section 77 of this Act in respect of a shortfall in its distributions for that period, and [b] the amount apportioned shall be the amount of the shortfall taken into account in making that assessment.'

b Two points require mention. First, the opening words are 'Subject to subsections (2) and (3) above': and these words have been much discussed. Second, the subsection does two quite different things. First, limb [a] prohibits any apportionment under s 78 unless a shortfall assessment is made under s 77. Second, limb [b] lays down what the amount of the apportionment is to be. If I leave on one side the argument about the effect of the opening words of sub-s (4), it is clear that in the case of any company, whether or not a trading company, an apportionment can be made under sub-s (1) if, and only if, there is a shortfall assessment. It is also clear that in the case of a company which is not a trading company, an apportionment may be made under sub-s (3) even if there has been no shortfall. Trading companies are thus plainly better off in this respect than non-trading companies.

c I can now indicate what is in issue. Subsection (2) is the only part of s 78 under which any apportionment of the covenanted donations among the participators can be made; and this is common ground. Put as shortly as possible, what counsel *d* for the company says is that sub-s (2) does not confer any power to apportion, but merely directs an addition to be made to the amount of income to be apportioned if there is to be an apportionment of that income: if there is no apportionment of income, there cannot under sub-s (2) be any addition of the covenanted donations to that income. Furthermore, sub-s (4) prohibits any apportionment where, as here, there has been no shortfall assessment. True, that is qualified by the opening words *e* 'Subject to subsections (2) and (3) above', but this, said counsel, is merely a protective provision, in relation to sub-s (2) protecting what sub-s (2) may add to the income which is being apportioned. 'Subject to' is not the same as 'Except under', which might be said to assume that an apportionment could be made under sub-s (2) in cases where there has been no shortfall assessment. In relation to sub-s (3), which *f* allows an apportionment for non-trading companies even if there has been no shortfall, again 'Subject to' is merely protective, so as to allow sub-s (3) to operate despite the terms of sub-s (4).

At that point I pause again. Counsel for the Crown attacked these contentions as not giving proper effect to the words 'Subject to'. He emphasised the two limbs of sub-s (4) as being distinct in their operation. He accepted that in relation to sub-s (3) the words 'Subject to subsections (2) and (3)' worked properly. In sub-s (4) limb *g* [a] prohibited apportionments unless there had been a shortfall assessment. Subsection (3) allowed an apportionment where there had been no shortfall, and so in order to protect this provision it was right to subject sub-s (4) to sub-s (3). In sub-s (4), limb [b] regulated the amount to be apportioned: but as sub-s (3) had its own formula for the amount to be apportioned, again it was right to protect sub-s (3) and to subject sub-s (4) to sub-s (3). In relation to sub-s (3), the words 'Subject to' in sub-s (4) thus took effect and had content for both limbs of sub-s (4). But that, said *h* counsel for the Crown, contrasted strongly with the use in sub-s (4) of the phrase 'Subject to subsections (2) and (3)' in relation to sub-s (2). There was indeed content and purpose in the 'Subject to' in relation to limb [b] of sub-s (4), dealing with amount. Subsection (2) had its own provision for amount, and so it was right to protect that provision by subjecting the provisions as to amount in sub-s (4) [b] to sub-s (2). But *i* it was otherwise in relation to sub-s (4) [a]. There was nothing in sub-s (2) relating to apportionments being made where there was no shortfall, and so the prohibition in sub-s (4) [a] against making apportionments unless there had been a shortfall assessment did not need to be subjected to sub-s (2) unless sub-s (2), by implication, was to be treated as allowing apportionments to be made even if there was no shortfall. In other words, so ran the argument, in order to give content and effect

to the opening 'Subject to' in sub-s (4), sub-s (2) must be read as authorising apportionments even where there is no shortfall. a

The highest compliment that I can pay this argument is that it is ingenious; but it seems to me to be fallacious and unreal. It drove counsel for the Crown into strange contentions. It requires the innocent and much-used phrase 'Subject to' to be treated as implying that the master provisions (if I may so describe sub-ss (2) and (3)) are contrary to each and every part of the subject provisions, and so require protecting from every part of the subject provisions by the words 'Subject to'. I have never met such a contention before, and if it were right I think it would strike terror into the hearts of Parliamentary counsel when contemplating their output over the last two decades. Counsel for the Crown did not shrink from the contention that the phrase 'Subject to' in effect warranted that without it each and every part of the two sets of provisions would be locked in conflict: he did not shrink, but I recoil. When counsel's attention was drawn to the first words in s 78 (1), 'Subject to the provisions of this section', he understandably did not contend that this meant that there was conflict between sub-s (1) and every other part of every other subsection of s 78. Yet his explanation seemed to me to increase the frailty of his main contention. It was that whereas the initial 'Subject to' in s 78 (1) was general and forward-looking, referring to the subsequent subsections, the 'Subject to' in sub-s (4) was specific and backward-looking, referring back to two identified subsections. Therefore, he said, the former 'Subject to' was free from the warranty of conflict that the latter gave. I cannot see why the simple phrase 'subject to' should be subject to such delicate adjustments; and if it were, I can foresee trouble, if, say, sub-s (6) of a section with ten subsections began 'Subject to sub-s (1) above and to the following provisions of this section'. b

In my judgment, the phrase 'subject to' is a simple provision which merely subjects the provisions of the subject subsections to the provisions of the master subsections. Where there is no clash, the phrase does nothing: if there is collision, the phrase shows what is to prevail. The phrase provides no warranty of universal collision. Where it appears in the opening words of s 78 (4), it does nothing, in my judgment, to demonstrate that sub-s (2) allows an apportionment to be made even if there has been no shortfall. c

That is not all. It seems to me that there is a firm contrast between the drafting of sub-ss (1) and (3), on the one hand, and sub-s (2) on the other. The main provision of sub-s (1) is that the income in question 'may for purposes of surtax be apportioned by the Board among the participators'. This plainly confers on the Board a discretionary power to apportion. Again, in sub-s (3), the main provision is that 'there may be apportioned under this section, if the Board see reason for it, the whole of a company's income'; and this, too, plainly confers on the Board a discretionary power to apportion. I think that at one stage counsel for the Crown derived some comfort from my observation that as the power of the Board under sub-s (3) was limited by the words 'if the Board see reason for it', the absence of any such limitation from sub-s (1) might lead an over-literal interpreter of statutes to assert from the contrast that the power under sub-s (1) could therefore be exercised even if the Board saw no reason for it. I accept, of course, that the drafting of statutes is sometimes less than perfect, and that there may at times be contrasts that afford a moment's light relief from sterner tasks: but I do not think that this absolves me from attempting to put a fair meaning on the words used. d

Subsections (1) and (3), therefore, plainly confer on the Board a discretionary power to apportion. Subsection (2), on the other hand, is framed in an entirely different way. First, it is drafted in the language not of a discretionary power but of an obligation: the operative words are 'there shall be added'. Second, the thing to be done under the subsection is not that income is to 'be apportioned' but that the covenanted payments, and so on, are to be 'added to the amount of income to be apportioned'. The process envisaged is not that of apportioning but that of adding, e

a as is emphasised by the words 'any addition to be made under subsection (2) above' that appear in sub-s (3). Third, the language of sub-s (2) is plainly directed to an apportionment under s 78, in a manner which assumes that that apportionment will come from some other subsection of s 78. Subsection (2) begins 'For purposes of an apportionment under this section', and then it goes on with another reference to apportionment, 'there shall be added to the amount of income to be apportioned'.
b As sub-s (2) lies between immediate neighbouring subsections each of which plainly confers a power to apportion, I do not see why one should attempt to torture the language of sub-s (2) into itself conferring any power to apportion: there is ample content to be found in sub-ss (1) and (3) for the apportionment to which sub-s (2) refers. As it seems to me, the language of sub-s (2) is framed so that the subsection does not come into play unless there is first an apportionment under sub-ss (1) or (3):
c if there is, sub-s (2) makes an addition to the income to be apportioned: if there is not, sub-s (2) lies silently by and does nothing: and that is the crux of the case.

Now counsel for the Crown accepted that the meaning that he sought to put on s 78 less well accorded with the literal meaning of the language of the section, but he said that in these days one must not be too literal. He accordingly presented his argument in the form of a five-point analysis of the section. His five heads of analysis
d were the arithmetical, the functional, the linguistic, the analogous and the historical; and he supported his submissions by a number of authorities. The arithmetical head was directed against treating sub-s (2) as merely providing for something to be added to the amount of income to be apportioned, and as showing that what linguistically merely made an addition to an apportionment could stand on its own as a substantive provision for making an apportionment. I can only say that the authorities cited, though interesting, seemed to me to be of very little relevance. The
e functional head was similar to the well-known mischief rule. An Act must be construed so as to be workable, even if its language is in some degree inept, and it must be construed so as to cure whatever mischief is being aimed at. This head shaded into the argument on anomalies: if the section was construed as counsel for the company would construe it, it produced anomalies, said counsel for the Crown, which
f his construction avoided. One alleged anomaly was that if a company had a pound's worth of income which was apportioned under the section, and a million pounds' worth of covenanted payments, under sub-s (2) the million would be added to the pound, and the whole apportioned, whereas if there was not even a pound to be apportioned, the million could not, on the construction of counsel for the company, be added, and would not be apportioned.

However striking this point is at first blush, I do not think that it survives close
g examination. Even if the point were as it was put, that might well mean no more than that the legislature had failed to strike every possible case. Nor do I find any reality in the prospect of a trading company so adjusting its covenanted charitable donations as to absorb all its distributable profits and leave no distributable income, thereby preventing the existence of any required standard under s 77 (2) and leaving nothing to apportion. If one accepts to the full that in cases of real doubt the courts are
h more ready today than they once were to modify a strictly literal reading of a statute so as to make it efficacious and sensible in its operation, I cannot see either sufficient doubt about the meaning of s 78 or sufficient anomalies, impracticabilities or states of unreasonableness in the operation of the section, as read literally, to impel me to depart from its ordinary literal meaning.

i Counsel for the Crown's historical approach proved to be an inversion of history, in that it was based on considering not the ancestors of s 78 but its posterity. He relied on the Finance Act 1972, Sch 16, para 3 (1), as showing what, he said, s 78 (2) had really done all along. I cannot see how this sub-paragraph helps him. It is drafted in quite different language, it uses the phrase 'there may be apportioned' instead of 'there shall be added', and it is contained in an Act which is professedly to 'grant certain duties, to alter other duties, and to amend the law relating to the National

Debt and the Public Revenue, and to make further provision in connection with Finance'. No doubt in certain cases a later Act may, by making amendments to an earlier Act on a basis which assumes that the earlier Act had a particular meaning, help to establish that the earlier Act did have that meaning. But when Parliament sweeps away one provision and in an amending Act enacts in its place another provision which is drafted quite differently, it seems to me to be impossible to rely on the later provision as showing what the earlier provision really meant. He who says 'Yes' and later changes his mind and says 'No' does not thereby demonstrate that for him 'Yes' means 'No'. I cannot see how the language of independent apportionment in the 1972 Act shows that the language of dependent addition in s 78 (2) of the 1965 Act is to be construed as being language of independent apportionment. I may add that I do not think I need mention separately counsel for the Crown's linguistic analysis: one way and another I think I have dealt sufficiently with his contentions under this head.

Finally, I must mention the decision of the Special Commissioners. For convenience of reference, I have inserted letters in order to divide it up. It reads as follows:

'We the Commissioners who heard the Appeal were of opinion [a] that the words "there shall be added" in subsection (2) of Section 78 of the Finance Act, 1965, did not become ineffective by reason only of there being on the admitted facts set out herein no amount of income to be apportioned otherwise than by virtue of the provisions of the said subsection (2), and further [b] that the provisions of the said Section 78 did on a proper construction thereof authorise the making of an apportionment thereunder of amounts of the kind described in the said subsection (2) notwithstanding that no apportionment fell to be made by virtue of the provisions of the said Section exclusive of subsection (2) thereof. [c] As regards the reference to subsection (2) in the opening words of subsection (4) of the said Section 78, it seemed to us that it should be taken to apply in relation to both, and not only to the second, of the provisions thereafter set out, and that those provisions did not therefore operate to bar the apportionment which was the subject of the appeal before us. We held accordingly that the appeal failed and that the said apportionment was in principle valid, and left figures to be agreed.'

On this, I would say that under para [a] the question is not so much whether s 78 (2) became ineffective because there was no income to apportion, but whether it ever was effective to confer any power to apportion, or, indeed, to do anything save make a mandatory addition to any apportionment that had been made. As for [b], that seems to me to be in part a repetition of the first point and in part an assertion, rather than a reason. Paragraph [c] reflects the argument that the words 'Subject to' at the beginning of sub-s (4) had the powerful effect that I have rejected. Further, I think that not only does sub-s (4) 'bar the apportionment', but also that sub-s (2) confers no power to make an apportionment, and so there is no apportionment to be barred. The legislation is complex, and I have by no means explored every facet of every argument put before me; but I have reached the conclusion that the decision of the Special Commissioners is wrong, and that the appeal must be allowed.

Appeal allowed; notice of apportionment discharged.

Solicitors: *Slaughter & May* (for the company); *Solicitor of Inland Revenue.*

Rengan Krishnan Esq Barrister.

Murphy v Ingram (Inspector of Taxes)

CHANCERY DIVISION

MEGARRY J

6th, 9th APRIL 1973

Income tax – Relief – Children – Income of child – Reduction or disallowance of relief – Child entitled in his own right to an income exceeding prescribed amount – Daughter – Marriage during year of assessment – Post-nuptial income of daughter – Income deemed for income tax purposes to be husband's income and not to be her income – Whether daughter entitled to post-nuptial income in her own right – Whether post-nuptial income to be disregarded for purposes of child relief – Income Tax Act 1952, ss 212 (4) (as substituted by the Finance Act 1963, s 13), 354 (1).

The taxpayer's daughter was born in May 1946. During the first 2½ months of the fiscal year 1969-70 she was receiving full-time instruction at a university. On 19th June 1969 she finished her university course and on 19th July she married. Since then she had been living with her husband. In October 1969 she began employment as a teacher. For the year 1969-70 her income prior to her marriage was only £10, whereas her income subsequent to her marriage was not less than £270. The taxpayer was assessed to income tax for the year 1969-70 on the basis that, by virtue of s 212 (4)^a of the Income Tax Act 1952, he was not entitled to claim child relief under s 212 (1) in respect of the daughter since her total income for that year was not less than £280. The taxpayer claimed that he was entitled to the full amount of child relief on the ground, inter alia, that on her marriage the daughter ceased to be a 'child' of his for the purposes of s 212 (4).

Held – (i) Section 212 was to be construed in the context of relationship and the relationship between the taxpayer and his daughter did not change on her marriage; accordingly the daughter did not cease to be the taxpayer's child for the purposes of s 212 (4) (see p 527 j to p 528 c, post).

^a Section 212, so far as material, and as amended by the Finance Act 1957, s 12, the Finance Act 1963, ss 12, 13, and the Finance Act 1969, s 11, provides:

⁽¹⁾ If the claimant proves (a) that there is living at any time within the year of assessment a child of his with respect to whom one of the conditions in subsection (2) of this section is fulfilled . . . he shall, subject to the provisions of this and the next following section, be entitled in respect of each such child to a deduction from the amount of income tax with which he is chargeable equal to tax at the standard rate on the appropriate amount for the child. In this provision, "child" includes a stepchild and an illegitimate child whose parents have married each other after his birth.

^(1A) The appropriate amount for the child shall vary according to the age of the child at the commencement of the year of assessment, and subject to subsection (4) of this section—(a) for a child shown by the claimant to have been then over the age of sixteen, shall be one hundred and sixty-five pounds . . .

⁽²⁾ The conditions referred to in subsection (1) of this section are—(a) that the child is born in, or is under the age of sixteen years at the commencement of, the year of assessment referred to in that subsection; or (b) that the child is over the age of sixteen years at the commencement of that year of assessment but is receiving full-time instruction at any university, college, school or other educational establishment . . .

⁽⁴⁾ In the case of a child who is entitled in his own right to an income exceeding £115 a year the appropriate amount for the child shall be reduced by the amount of the excess, and accordingly no relief shall be allowed under this section where the excess is equal to or greater than the amount which apart from this subsection would be the appropriate amount for the child: Provided that in calculating the income of the child for the purpose of this subsection no account shall be taken of any income to which the child is entitled as the holder of a scholarship, bursary, or other similar educational endowment . . .

(ii) However, as the daughter had been living with the husband since marriage, her post-nuptial income was, under s 354 (1)^b of the 1952 Act, 'deemed for income tax purposes to be [her husband's] income and not to be her income'. The taxpayer's entitlement to child relief under s 212 (4) was an income tax purpose. It followed that, for that purpose, the daughter's post-nuptial income was deemed to be her husband's income and therefore was not income to which she was 'entitled in [her] own right' within s 212 (4). Accordingly, since the income to which the daughter was entitled in her own right for the fiscal year 1969-70 was only £10, the taxpayer was entitled to full child relief for that year (see p 534 h and j, post).

Leitch v Emmott [1929] All ER Rep 638 and *Re Cameron (decd)*, *Kingsley v Inland Revenue Comrs* [1965] 3 All ER 474 distinguished.

Notes

For the reduction and disallowance of relief in relation to children entitled to income in their own right, see 20 Halsbury's Laws (3rd Edn) 441, 442, para 824, and for cases on the subject, see 28 (1) Digest (Reissue) 448, 1603-1606.

For the Income Tax Act 1952, ss 212 and 354, see 31 Halsbury's Statutes (2nd Edn) 202, 342.

For 1970-71 and subsequent years of assessment ss 212 and 354 of the 1952 Act have been replaced by ss 10 and 37 of the Income and Corporation Taxes Act 1970.

Cases referred to in judgment

Cameron (decd), *Re*, *Kingsley v Inland Revenue Comrs* [1965] 3 All ER 474, [1967] Ch 1, 42 Tax Cas 539, [1966] 2 WLR 243, sub nom *Cameron's Executors v Inland Revenue Comrs* 44 ATC 259, [1965] TR 271, 28 (1) Digest (Reissue) 387, 1420.

East End Dwellings Co Ltd v Finsbury Borough Council [1951] 2 All ER 587, [1952] AC 109, 115 JP 477, 49 LGR 669, HL, 45 Digest (Repl) 369, 169.

Elmhirst v Inland Revenue Comrs [1937] 2 All ER 349, [1937] 2 KB 551, 21 Tax Cas 381, 106 LJKB 416, 157 LT 119, 28 (1) Digest (Reissue) 386, 1418.

Leitch v Emmott [1929] 2 KB 236, 14 Tax Cas 633, [1929] All ER Rep 638, 98 LJKB 673, 141 LT 311, CA, 28 (1) Digest (Reissue) 385, 1411.

Levy, Re, ex parte *Walton* (1881) 17 Ch D 746, [1881-85] All ER Rep 548, 50 LJCh 657, 45 LT 1, CA, 4 Digest (Repl) 11, 4.

Luke v Inland Revenue Comrs [1963] 1 All ER 655, [1963] AC 557, [1963] 2 WLR 559, 42 ATC 21, [1963] TR 21, 1963 SLT 129, sub nom *Inland Revenue Comrs v Luke* 40 Tax Cas 630, 1963 SC (HL) 65, HL, 28 (1) Digest (Reissue) 332, 1200.

National Bank of Greece SA v Westminster Bank Executor & Trustee Co (Channel Islands) Ltd [1970] 3 All ER 656, [1970] 1 WLR 1400, HL, Digest (Cont Vol C) 594, 894a.

Nugent-Head v Jacob (Inspector of Taxes) [1948] 1 All ER 414, [1948] AC 321, 30 Tax Cas 83, [1948] LJR 759, [1948] TR 23, HL, 28 (1) Digest (Reissue) 385, 1412.

Palmer v Cattermole (Inspector of Taxes) [1937] 2 All ER 667, [1937] 2 KB 581, 21 Tax Cas 191, 106 LJKB 826, 157 LT 552, 28 (1) Digest (Reissue) 384, 1404.

Case stated

1. At a meeting of the General Commissioners for the Division of Wembley held on 23rd March 1972 in the London Borough of Harrow, GH Murphy of 29 Sunny Gardens Road, London NW4 ('the taxpayer') appealed under s 42 (3) of the Taxes Management Act 1970 against a decision of an inspector of taxes under that section which disallowed the taxpayer's claim to child allowance for the year ended 5th April 1970 in respect of his child Eileen Murphy, born on 9th May 1946.

2. The question for decision was whether the taxpayer was entitled to the child allowance within the provisions of s 212 (4) of the Income Tax Act 1952, as amended by s 13 of the Finance Act 1963.

^b Section 354 (1) is set out at p 528 d and e, post

a 3. The taxpayer was present and gave evidence which the commissioners accepted.
4. The following facts were proved or admitted: (a) The taxpayer had a daughter, Eileen ('the daughter'), born on 9th May 1946. (b) The daughter was receiving full-time instruction at the University of York until 19th June 1969. (c) She married on 19th July 1969 and began employment as a teacher in October 1969. (d) The daughter's total income between 6th April 1969 and the date of her marriage was £10. (e) The daughter's total income between the date of her marriage and 5th April 1970 was not less than £270. (f) Her total income for the year ended 5th April 1970 was not less than £280.

b 5. The taxpayer contended: (a) that by a notice of coding dated 27th October 1969 the inspector of taxes had granted an allowance in respect of the daughter; (b) that by a letter dated 27th October 1970 from the inspector to the taxpayer the inspector asked for further information of the daughter's income before the application for an allowance could be finally determined; (c) (i) that under s 212 (4) of the Income Tax Act 1952:

'No relief shall be allowed under this section in respect of any child who is entitled in his own right to an income exceeding seventy pounds a year: Provided that in calculating the income of the child for the purpose of this subsection no account shall be taken of any income to which the child is entitled as the holder of a scholarship, bursary, or other similar educational endowment.'

d (ii) That under s 13 of the Finance Act 1963:

e 'Section 212 of the Act of 1952 (child relief) shall have effect for the year 1964-65 and subsequent years of assessment as if subsection (4) . . . were amended by the substitution of the following for the words preceding the proviso:—“(4) In the case of a child who is entitled in his own right to an income exceeding £115 a year the appropriate amount for the child shall be reduced by the amount of the excess, and accordingly no relief shall be allowed under this section where the excess is equal to or greater than the amount which apart from this subsection would be the appropriate amount for the child:” . . .’

f (d) that between those two Acts there were four sections or subsections plus a schedule that particularly governed the position with others lending collateral support; (e) that following the daughter's marriage she ceased to be a child within s 212 (4) of the Income Tax Act 1952 and s 13 of the Finance Act 1963 and thus ceased to be the subject of the claim, Eileen Murphy; (f) that on the daughter's marriage she ceased to be a daughter and became the wife of her husband; thus it was incorrect for the Inland Revenue to say that she was a child for the remainder of the year under review for income tax purposes; (g) that the daughter was not entitled to the income from the date of her marriage in her own right, but that by s 354 (1) of the Income Tax Act 1952 the income was that of her husband and that the taxpayer had no power to obtain from her or from her husband disclosure of her income; (h) that if the daughter's income exceeded £115 per annum any reduction fell to be made in the year following her marriage; the taxpayer had no power to obtain disclosure of her income by her husband.

i 6. It was contended by the inspector of taxes: (a) that s 354 of the 1952 Act was concerned only with the machinery of taxation; (b) that a married woman was not deprived by s 354 of the 1952 Act in favour of her husband of the right to receive income due to her; (c) that s 354 of the 1952 Act was not relevant to the construction of s 212 of the 1952 Act as amended by s 13 of the 1963 Act; (d) that a person who was a child for the purposes of s 212 of the 1952 Act was despite her marriage entitled in her own right for the purposes of s 13 of the 1963 Act to any income due to her under general law; (e) that the daughter was entitled in her own right during the year ended 5th April 1970 to the total income of £280; (f) that the taxpayer

was, therefore, not entitled under the provisions of s 13 of the 1963 Act to the child allowance. a

[Paragraph 7 set out the cases¹ referred to.]

8. The commissioners' decision was as follows:

'We were satisfied: (a) That the daughter remained a child within the meaning of Section 212 (4) of the Income Tax Act 1952 and Section 13 of the Finance Act 1963 notwithstanding her marriage. (b) That to support a claim b to child allowance it was the [taxpayer's] responsibility to satisfy H.M. Inspector of Taxes that he was entitled to such an allowance. That the [taxpayer] had failed to do so. (c) That the definitions and logic introduced by the [taxpayer] were not applicable to the Section of the Income Tax Acts by which child allowance should be determined. (d) That H.M. Inspector of Taxes was correct in disallowing the [taxpayer's] claim to the child allowance in the absence of c evidence of support of the [taxpayer's] claims. We therefore refused the appeal.'

9. Immediately after the determination of the appeal the taxpayer expressed his dissatisfaction with the decision as being erroneous in point of law and in due course required the commissioners to state a case for the opinion of the High Court.

The taxpayer appeared in person. d

Patrick Medd for the Crown.

MEGARRY J. This is an appeal from the General Commissioners for the Division of Wembley. It raises a question of some general interest, especially to parents whose daughters marry and enter employment soon after ending their university or other full-time education. The appellant taxpayer is, I understand, a former official of the Inland Revenue, although I gather that he had little to do with the use of reports of taxation cases. He conducted his appeal in person, while Mr Medd appeared for the Crown. e

The sole subject of dispute concerns the taxpayer's claim for child allowance in respect of his daughter Eileen for the year 1969-70. She was born on 9th May 1946 and during the first 2½ months of the fiscal year in question, until 19th June 1969, she was receiving full-time instruction at the University of York. A month later, on 19th July 1969, she married: and in October 1969 she began employment as a teacher. For the fiscal year, her income prior to her marriage was £10, whereas, subject to the contentions of the taxpayer, her income after the marriage was not less than £270, so that for the year as a whole her income was not less than £280. Her income thus exceeded £115 a year by £165, the amount on which the allowance for child relief is claimed by the taxpayer, and the result is that, on this footing, s 212 (4) of the Income Tax Act 1952, as amended, caused the whole of the taxpayer's claim for child relief to be disallowed. If, of course, Eileen's income after her marriage is to be disregarded, as the taxpayer contends, then he is entitled to the whole of the child relief. The sole issue in the case is whether he is thus entitled. f

The Income Tax Act 1952, s 212, in the amended form in which it was in force for the year in question, gives the right to a child allowance equal to tax at the standard rate on the appropriate amount 'If the claimant proves—(a) that there is living at any time within the year of assessment a child of his' with respect to whom the necessary conditions are satisfied. Subsection (1A) lays down the appropriate amount, which in the present case is £165. Subsection (2) lays down alternative conditions of the child being born in the year of assessment, or being under 16 years of age at the commencement of the year, or, if over 16 then, receiving full-time instruction at an educational establishment. There is then sub-s (4): g

¹ *Re Cameron (decd)*, *Kingsley v Inland Revenue Comrs* (1965) 42 Tax Cas 539; *Leitch v Emmott* (1929) 14 Tax Cas 633 h

a 'In the case of a child who is entitled in his own right to an income exceeding £115 a year the appropriate amount for the child shall be reduced by the amount of the excess, and accordingly no relief shall be allowed under this section where the excess is equal to or greater than the amount which apart from this subsection would be the appropriate amount for the child: Provided that in calculating the income of the child for the purpose of this subsection no account shall be taken of any income to which the child is entitled as the holder of a scholarship, bursary, or other similar educational endowment.'

b I do not think I need read any more of the section.

c In support of his contentions the taxpayer addressed me for over two hours, reading from what was evidently a carefully prepared statement; and in reply he read a further statement of this type. Some of the matters to which he referred were plainly outside the scope of an appeal by way of case stated, as where he read at length from the correspondence that he had had with the Revenue authorities. His comments ranged wide, from breach of natural law and ultra vires to the inadmissibility of hearsay evidence and the inaccuracy of some of the notes provided by the Revenue authorities in connection with income tax returns; and he was much concerned with the absence of any right of his to require Eileen or her husband to disclose to him her income after marriage, although he accepted that for the fiscal year in question it must have been at least £270. As he had put together a connected address, it seemed simpler and fairer to listen to all he had to say, however lacking in relevance to the appeal, rather than to interrupt him each time he went beyond what fairly seemed to arise within the limited scope of an appeal by way of case stated. I do not propose to discuss such matters, especially as counsel for the Crown has refrained from commenting on them; but the taxpayer's submissions contained two real points, and these I must consider. He did not, I may say, refer me to any of the reported authorities on the law of income tax, although in reply he mentioned certain cases on the meaning of 'children' under the general law.

e The first of the two points was that when Eileen married, she ceased to be a 'child' for the purposes of s 212 (4). The result was that no income that she received after her marriage fell to be included in calculating the £115 a year, on the ground that there was no 'child who is entitled in his own right to an income exceeding £115 a year' within the subsection. On this argument it might be said that on marriage there was similarly not a 'child' for the purposes of sub-s (1), which confers the right to relief; but this was admittedly immaterial, for Eileen's unmarried existence during the earlier part of the year, when on any footing she was a 'child', sufficed to confer the right to relief. That provision merely requires the child to be 'living at any time within the year of assessment'.

f The question, then, was whether for the purposes of sub-s (4) Eileen ceased to be a 'child' when she married. The taxpayer relied on the concluding words of sub-s (1), which run 'In this provision, "child" includes a stepchild and an illegitimate child whose parents have married each other after his birth', contending that this did nothing to turn a married woman into a child; and of course this is so. But the difficulty in the taxpayer's argument arises at an earlier stage. Subsection (1) is framed in terms of the claimant proving that there was 'a child of his' living, and so on. The reference to 'a child' in sub-s (4), disallowing or reducing what is conferred by sub-s (1), must plainly refer to the same type of child. I do not see how any limitation by reference to the married or unmarried state of a male or female is to be read into or deduced from this language, nor do I see how there can be any implication as to age, particularly in view of the sliding scale of the appropriate amount laid down by reference to age in subsection (1A), with the largest amount for those 'over the age of sixteen'. The short question, then, is whether, on marriage, a daughter ceases for this purpose to be a 'child', or a 'child of his', that is, her father, or ceases to be his daughter. The context is that of the extent to which a claimant

is entitled to an allowance in respect of a child of his, and this is a context of relationship. I cannot see that a daughter ceases to be the child or daughter of her parents as soon as she marries, either for this or for any other relevant purpose. The daughter ceases to be only a daughter and becomes a wife as well; but her blood relationship to her parents remains. During the argument I reminded the taxpayer of the old saying—

'A son is your son till he gets him a wife,
A daughter's your daughter for all of your life.'

That, of course, is not a saying of authority, nor is it directed to this subject-matter: but it illustrates the normal and natural relationship between a daughter and her parents. In my judgment, Eileen remained a 'child' within sub-s (4) when she married, and that marriage did not result in her subsequent income being ignored on this score for the purposes of the subsection. This is what the General Commissioners held on this point, and in this I think they were right.

The second and more substantial point taken by the taxpayer was based on the Income Tax Act 1952, s 354 (1). This reads as follows:

'Subject to the provisions of this Part of this Act, a woman's income chargeable to income tax shall, so far as it is income for a year of assessment or part of a year of assessment during which she is a married woman living with her husband, be deemed for income tax purposes to be his income and not to be her income: Provided that the question whether there is any income of hers chargeable to income tax for any year of assessment, and, if so, what is to be taken to be the amount thereof for income tax purposes, shall not be affected by the provisions of this subsection.'

This, said the taxpayer, meant that the whole of Eileen's income received after her marriage and while she was admittedly living with her husband was to be 'deemed for income tax purposes to be his income and not to be her income'; and as s 212 plainly fell within the words 'for income tax purposes', this established that Eileen's post-nuptial income was not hers within s 212. Accordingly, for income tax purposes her income for the year in question was a mere £10, and so the taxpayer was entitled to the whole of the child allowance in respect of her. I may say that there is no suggestion that Eileen had sought to be separately assessed.

On a literal reading of the statute the taxpayer's contentions seem unanswerable. The essential words are wide and emphatic. The deeming is not for any limited purpose, but 'for income tax purposes', and that, with no apparent restriction, must mean for all income tax purposes. Further, the deeming is both positive and negative, covering 'to be' and 'not to be' alike: the income is to be deemed 'to be his income' and is also to be deemed 'not to be her income'. The question, then, is whether there is anything to displace this apparent result.

On this point, counsel for the Crown relied on certain authorities, two of which had been put before the General Commissioners. First, there was *Leitch v Emmott*¹ concerning the assessment of a widow. This was cited from the report in the Tax Cases, but for various reasons I prefer to use the version in the Law Reports. First, the headnote in the Tax Cases gives little or no indication of the process of reasoning involved in the decision: the Law Reports sets out the relevant statutory provision and the ratio decidendi, whereas although the catchwords in the Tax Cases mention r 16, the headnote does not quote or even mention the rule, and it states the conclusion in seven words that give no indication of what the point was, namely 'Held, that she was correctly so assessed'. Second, the Law Reports version includes a report of the argument of counsel, which the Tax Cases lacks. Third, the language of the judgments appearing in the Law Reports differs in a number of respects from

¹ [1929] 2 KB 236, 14 Tax Cas 633, [1929] All ER Rep 638

a that in the Tax Cases; and almost certainly these revisions were made or approved by the judges. The revised language of the judges seems to me to be preferable to the unrevised. The Tax Cases series, if I may say so, has many virtues. For long the practice has been to set out the case stated in full, the volumes are relatively slender to handle, the series is not diluted by cases on other subjects, and it includes many cases that are never reported in the Law Reports. I would say nothing if cases
 b reported in the Law Reports were cited from the Tax Cases on points that arose unexpectedly during argument: but despite my interest in the Law Reports, I think I ought to say that where the few substantive cases round which an appeal turns are reported in the Law Reports, I consider that efforts should be made to assist the court by citing the cases from that series, and that this should be done in this court, and not merely in the House of Lords (see the statement by Lord Hailsham of St Marylebone LC in *National Bank of Greece SA v Westminster Bank Executor & Trustee Co (Channel Islands) Ltd*¹).

c Now in *Leitch v Emmott*² the provision in question was a proviso to r 16 of the All Schedules Rules³ of the Income Tax Act 1918. The rule ran thus:

d 'A married woman . . . entitled to any property or profits to her separate use, shall be assessable and chargeable to tax as if she were sole and unmarried: Provided that—(1) the profits of a married woman living with her husband shall be deemed the profits of the husband, and shall be assessed and charged in his name, and not in her name or the name of her trustee; . . .'

e I think I need read no more. In that case a husband died a few days after a fiscal year had begun, and his wife was held to be liable to income tax under Case III of Sch D in respect of income from War Stock during the first year of her widowhood, computed, notwithstanding the proviso, on the basis of her income from the same source in the preceding year while she was a married woman. The Court of Appeal, reversing the decision of Rowlatt J, rejected the argument that because of the proviso the widow had had no income while she was a wife. Lord Hanworth MR said⁴:

f 'We must, I think, take r. 16 as we find it and treat the proviso as a proviso. Rule 16 provides that a married woman shall be assessable and chargeable to tax. Bearing this in mind, the proviso will operate as a proviso and no more by allowing the husband to be the source through which collection shall be made. For that purpose and in that sense the profits which are not his are to be deemed to be his and in no other sense.'

g Lawrence LJ said⁵:

h 'Rule 16 provides, in the first instance, that a married woman entitled to any property to her separate use shall be assessable and chargeable to tax as if she were sole and unmarried. Then, turning back to r. 2 of the Rules applicable to Case III, we find that the measure of that charge to tax is the amount of the income from her investments arising in the year preceding the year of assessment. It is clear to my mind, therefore, that the married woman is charged to tax in respect of her income for the year of assessment, to be measured by the income from the same investments received by her in the preceding year, thus showing that the income for the purpose of the charge and of the measure of the tax is treated as her income. The proviso does not alter the character of the income charged to tax or the measure of the tax, but merely provides, with the
 j

1 [1970] 3 All ER 656, [1970] 1 WLR 1400

2 [1929] 2 KB 236, 14 Tax Cas 633, [1929] All ER Rep 638

3 See the Income Tax Act 1918, Sch 1, 'General Rules applicable to Schedules A, B, C, D and E'

4 [1929] 2 KB at 244, 14 Tax Cas at 641, [1929] All ER Rep at 641

5 [1929] 2 KB at 246, 247, 14 Tax Cas at 642, 643, [1929] All ER Rep at 642

object of facilitating the collection of the tax, that the assessment and charge shall be made in the name of the husband and that for that purpose the wife's income shall be treated as the income of the husband. This provision does not, in my judgment, operate to convert the income of the wife into income of the husband further than is necessary for the purpose of collecting the tax; with the result that it affords no valid ground for the contention that there was no income arising from the wife's investments in the year preceding the year of assessment within the meaning of r. 2 of Case III.' a
b

It is in this passage that in *Elmhirst v Inland Revenue Comrs*¹ Lawrence J said that the real ground of the decision was stated.

The third member of the court in *Leitch v Emmott*², Sankey LJ, said this³:

"The word "deemed" introduces an artificial definition which, in my view, is only intended to be applied as long as the conditions exist to which it is intended to apply. There is some authority for that in the judgment of James L.J. in *Ex parte Walton*⁴: "When a statute enacts that something shall be deemed to have been done, which in fact and truth was not done, the Court is entitled and bound to ascertain for what purposes and between what persons the statutory fiction is to be resorted to." Founding myself upon those words, I turn to the proviso to r. 16, and it is to be observed that in the proviso what is being dealt with are "the profits of a married woman living with her husband." It starts with that assumption and then says that in that case—namely, when the profits are the profits of a married woman living with her husband, they shall be deemed to be the profits of the husband and shall be assessed and charged in his name; but they still remain the profits of the married woman living with her husband, because that is the subject with which the proviso is dealing. It appears to me that they are none the less her profits in one sense, although for the purposes, as it seems to me, of collection, they shall be deemed to be the profits of the husband and shall be assessed and charged in his name. I think that the assessment and charging in his name obviously only refers to a case when the husband is still alive and his wife living with him; but if those conditions do not exist, if the conditions upon which the artificial "deeming" depend no longer exist, then I think the profits are the profits belonging to the married woman. I cannot see, therefore, how they can be excluded as the source for taxation purposes. In other words, I think that the statutory election, if I may call it so, only applies for the purpose of collection, and when the conditions no longer exist the profits are those of the married woman.' c
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The proviso was thus read as converting the wife's income into the husband's income not for all income tax purposes but only for the purpose of collecting tax, or, as Lawrence J put it in *Palmer v Cattermole (Inspector of Taxes)*⁵ 'for the purposes of assessment and collection'.

In *Elmhirst v Inland Revenue Comrs*⁶ the problem arose in relation not to the ending of a marriage by death but the beginning of a marriage. The wife had a large income of her own, and Lawrence J in effect held that the proviso did nothing to alter the computation of the wife's income. Her ante-nuptial income could therefore be taken into account for the purposes of average; all that the proviso did was to make her income, when ascertained, the income of her husband, to be assessed and charged in his name. h
j

¹ [1937] 2 All ER 349 at 352, [1937] 2 KB 551 at 556, 21 Tax Cas 381 at 388

² [1929] 2 KB 236, 14 Tax Cas 633, [1929] All ER Rep 638

³ [1929] 2 KB at 248, 14 Tax Cas at 643, 644, [1929] All ER Rep at 642, 643

⁴ (1881) 17 Ch D 746 at 756, [1881-85] All ER Rep 548 at 553

⁵ [1937] 2 All ER 667 at 669, [1937] 2 KB 581 at 586, 21 Tax Cas 191 at 194

⁶ [1937] 2 All ER 349, [1937] 2 KB 551, 21 Tax Cas 381

a Rule 16 endured until it was repealed by the Finance Act 1950, s 50 and Sch 8, Part II. In its place, s 30 of that Act enacted provisions which were repeated in the consolidation Act, the Income Tax Act 1952. Section 30 (1) of the 1950 Act was reproduced verbatim in s 354 (1) of the 1952 Act, which I have already read, with only the immaterial omission of the word 'following' in front of the word 'provisions' in the opening phrase. Contrasted with r 16, the change in language is marked. First, the substantive words of r 16, making the wife 'assessable and chargeable to tax as if she was sole and unmarried', disappear. Instead, the words deeming the wife's income to be her husband's are promoted from being a mere proviso to being themselves the substantive provision. Second, the new provision has a proviso which did not appear in the earlier Act; I shall consider this later. Third, the former r 16 was framed in terms of 'shall be assessable and chargeable' in the substantive provision, and 'shall be assessed and charged' in the proviso, whereas the new provision contains no such limiting expressions. The word 'chargeable' appears in the phrases referring to her 'income chargeable to income tax', and 'assessment' appears in the phrases 'year of assessment': but there is no trace of an imperative direction as to what is to be assessable and chargeable, or assessed and charged, with the restrictions that this suggests. Provision that income thus deemed to be the husband's is to be assessed on him instead of the wife was made in a separate subsection, formerly the Finance Act 1950, s 30 (2), and later the Income Tax Act 1952, s 354 (2). Fourth, in the proviso to the former r 16 the words of deeming were merely the single positive phrase 'shall be deemed the profits of the husband', whereas in the new provision they are a double phrase, both negative and positive, namely, 'shall be deemed . . . to be his income and not to be her income'. Fifth, in the new provision the deeming is 'for income tax purposes', whereas no such words appeared in the old r 16.

e In those circumstances, it seems plain that it cannot be safely assumed that decisions on r 16 necessarily apply to the quite different language of what became s 354 (1) of the 1952 Act. What was a mere proviso to an enactment relating to how a married woman should be assessable or chargeable, and was itself drafted in terms of what was to be assessed and charged in the name of the husband, became a substantive enactment, not confined to assessment and charge but expressed to be 'for income tax purposes'; and words deeming the income to be the husband's were replaced by words deeming the income not only to be the husband's but also not to be the wife's. These changes gave ample scope for an argument that the language of the new provision was no longer confined to the process of assessment and collection, but applied for all income tax purposes.

g Counsel for the Crown's answer was to refer me to the reserved judgment of Harman LJ in *Re Cameron (decd)*, *Kingsley v Inland Revenue Comrs*¹, based on the new provision, s 354 (1) of the 1952 Act. The question there was one of allowances and claims for repayment in respect of farming losses to which a widow had become entitled during her husband's life. The Inland Revenue claimed that by virtue of s 354 the sums repaid or repayable formed part of the husband's estate for the purposes of estate duty. Harman LJ, however, held that although the husband or his personal representatives were the only persons who could claim the sums in question, they could receive them only in a fiduciary capacity, and must account to the wife for them. After discussing various other cases and contentions, he cited *Leitch v Emmott*², and read nearly the whole of the passage from the judgment of Lawrence LJ³ that I have already read. He then concluded his judgment by saying⁴:

i 'Relying on that authority, I would hold that the income remains the income of the wife and so far as collected by the husband must be accounted for to her.'

1 (1965) 42 Tax Cas 539

2 [1929] 2 KB 236, 14 Tax Cas 633, [1929] All ER Rep 638

3 [1929] 2 KB at 246, 247, 14 Tax Cas at 642, 643, [1929] All ER Rep at 642

4 (1965) 42 Tax Cas at 543

When counsel for the Crown cited *Re Cameron*¹ there was some discussion about the apparent omission to mention any difference between the statutory language before Harman LJ and that before the Court of Appeal in *Leitch v Emmott*²; and a tentative inference was drawn from the eminence of counsel who argued *Re Cameron*¹ that it was improbable that the change in language had escaped attention during argument. That in a sense made the absence from the judgment of any mention of the changed language the more remarkable; Harman LJ³ had merely remarked that the claim in *Leitch v Emmott*² had been 'under the old Rule 16 of the General Rules applicable to all Schedules of the Income Tax Act, 1918, the precursor of Section 354'. During the adjournment, however, I found that *Re Cameron*⁴ had been reported in the Law Reports; and this report indicated that the inference tentatively made from the report in the Tax Cases was unfounded. In the Law Reports, the arguments of counsel are reported⁵, and these show that there was apparently no mention during argument of either *Leitch v Emmott*² or r 16. It is therefore most improbable that counsel drew the attention of the court to the difference in language between r 16 and s 354 (1). *Leitch v Emmott*² must, it seems, have been brought into the case by Harman LJ after he had reserved judgment. I would only add that this is a further instance of the desirability of citing revenue cases reported in the Law Reports from those reports and not merely from the Tax Cases.

The question, then, is what is the right course for me to adopt. *Re Cameron*⁴ has the high authority of any decision of Harman LJ, and although the decision was at first instance, he was then a senior member of the Court of Appeal, and his judgment was a reserved judgment. On the other hand, the judgment is treating a decision on one statutory provision as applying to another statutory provision in substantially different language, in a case where those differences were never, it seems, the subject of any discussion in argument by counsel. Furthermore, the case is distinguishable in that what was in issue was estate duty and not income tax. Even if s 354 (1) is given its widest application, an enactment making a wife's income her husband's and not hers 'for income tax purposes' does not on the face of it make her income his and not hers for the purposes of estate duty. In other words, even if for income tax purposes the deeming of the wife's income to be the husband's and not hers has ceased merely to be for the purposes of assessment and collection, and applies for all income tax purposes, it is still perfectly possible to hold that for all other purposes, including estate duty, the wife's income is her own. Looked at in that way, *Re Cameron*⁴ may be read as having perhaps treated *Leitch v Emmott*² as being relevant mainly as an illustration that a statutory deeming for a limited purpose, be that purpose narrow or wide, is not to have effect outside that purpose. Accordingly, I do not think that *Re Cameron*⁴ binds me, either directly or by judicial comity, to decide this case in favour of the Crown; and the earlier cases are plainly distinguishable in that the statutory language there in question was quite different.

I therefore return to s 354, and seek to construe it with the history of previous decisions in mind, but without, it seems, any direct authority on the matter. I cannot find any real assistance in the headings. Section 30 of the 1950 Act appeared in Part II of the Act, together with 13 other sections dealing with a variety of matters, under the title 'Income Tax'; and this helps not at all. Section 354 of the 1952 Act is the first of eight sections which constitute Part XIV of the Act, entitled 'Special Provisions as to Married Persons'; and the most that can be said about Part XIV is that much of it has a general procedural flavour. Yet there are also substantive provisions, such as

1 (1965) 42 Tax Cas 539

2 [1929] 2 KB 236, 14 Tax Cas 633, [1929] All ER Rep 638

3 (1965) 42 Tax Cas at 543

4 [1965] 3 All ER 474, [1967] Ch 1, 42 Tax Cas 539

5 [1967] Ch at 4-7

a ss 354 (3) and 358, relating to the amount of personal reliefs, and of course it is a personal relief with which I am concerned in this case; and see s 354 (5).

Then there is the proviso to s 354 (1) of the 1952 Act; and as Harman LJ said in *Re Cameron*¹ this is not easy to understand. He suggested that it was¹—

b 'put in ex cautela so that it cannot be argued that making the wife's income the husband's results in her having no income. What I think you are directed to do by the proviso is to ascertain first what is her income for income tax purposes and then to subject that income to the subsection as being "a woman's income chargeable to income tax".'

c Counsel for the Crown suggested that the proviso might be directed to cases where there was a non-resident wife with her own foreign income. In such a case, the proviso would prevent that income, which otherwise would not be chargeable to income tax, from being made chargeable to income tax merely because the husband was resident and the wife's income would by the substantive part of sub-s (1) be deemed to be his. Questions of residence in relation to a wealthy wife arose in *Elmhirst v Inland Revenue Comrs*², I may say, and possibly they suggested the proviso. In his reply, counsel for the Crown also suggested that the language might have resulted from the decision of the House of Lords in *Nugent-Head v Jacob (Inspector of Taxes)*³. The words of the proviso relating to the amount of the wife's income, too, accord with the *Elmhirst* case², in that the process of computation of the amount of the wife's income is not to be affected by the deeming provisions of the subsection. Be that as it may, I do not find the proviso of any assistance to counsel for the Crown in the question before me: there is no suggestion that the income in question, whether treated as Eileen's or her husband's, is not 'chargeable to income tax'.
e If anything, the proviso seems to me to assist the taxpayer, in that it may be said that the proviso constitutes the only qualification to the general and far-reaching enactment that the wife's income is to be deemed to be her husband's income and not hers 'for income tax purposes', that is, for all income tax purposes not embraced by the proviso. Without the proviso, it might be less difficult to imply some limitation to the scope of 'for income tax purposes'; but *expressum facit cessare tacitum*.
f If by 'for income tax purposes' Parliament had really meant no more than 'for the purposes of assessment and collection', it would have been easy enough to say so, especially with the guidance given by the previous provision and the decisions on it. Yet when statutory phrases such as 'assessed and charged' are repealed and replaced by the words 'for income tax purposes', I do not think that I ought to strain to construe the new and different language as showing an intention to adhere to the old meaning of the old language.
g

h It has also been contended that s 354 (1) was intended to operate only as between husband and wife and the Revenue authorities, and that it was to be ignored quoad others, such as the wife's parents. Counsel for the Crown said that 'for income tax purposes' in the context really means no more than 'for the purposes of income tax that are here relevant', and that is for the charging and collecting of tax in relation to husband and wife. To such a contention I think a similar answer must be given. I can see no language in the section to support such a contention; and as I have already indicated, the proviso and the phrase 'for income tax purposes' (which is not the same as 'for their income tax purposes') seem to me to point against any implied restriction.

j On the authorities and the arguments that have been put before me, I find it difficult to see what general considerations there are which could override or mould

1 [1965] 3 All ER at 476, [1967] Ch at 8, 42 Tax Cas at 541

2 [1937] 2 All ER 349, [1937] 2 KB 551, 21 Tax Cas 381

3 [1948] 1 All ER 474, [1948] AC 321, 30 Tax Cas 83

the language of the statute. The fact that under s 212 (1) the same child relief is a
 accorded to a taxpayer whose child is living for a single day in the year as to one whose
 child is alive throughout the year in question is discouraging to any contention that
 the child relief is intended to provide any fair or proportionate counterbalance
 (albeit partial) to the cost to the parent of maintaining the child. A similar comment
 may be made in relation to the date when a child attains the age of 16 or ceases to
 receive full-time instruction. It may well be that an 'all or nothing' approach was b
 adopted in the cause of simplicity: but this approach undoubtedly produces anomalous
 results as between one parent and another whose circumstances are on all fours
 save as regards the relevant dates affecting their children. Similarly, I recognise,
 and assert, the apparent anomaly that the taxpayer's contention produces as between
 two parents whose circumstances are on all fours save that the daughter of one
 marries (as in this case) and the daughter of the other does not. A daughter who soon c
 after the start of a fiscal year becomes employed at a living wage or salary is likely
 in most cases, at all events, to be as much or as little 'off her father's hands' in a
 financial sense whether or not she is married; and so it is not easy to see why the
 effect on the father's tax affairs should differ in one case from that in the other.
 Again, no distinction seems to be made between a father who maintains his son at
 home and at a fee-paying school, and a father whose much older son has cut himself d
 off from his family and is supported by a scholarship, whether here or abroad. If
 the subject of child relief were otherwise free from anomalies, I should find more
 weight than I do in the argument that the language of the statute should be moulded
 so as to produce a reasonable result. But when Parliament has built anomalies into
 the system, then until that system is recast (as well it might be), I find it hard to see
 that it would be right or decorous for a judge of first instance (albeit sitting in a e
 Revenue appeal) to seek to avoid another anomaly by doing to the language of the
 Act even the violence that Lord Reid was willing to do to the statutory language in
*Luke v Inland Revenue Comrs*¹. After all, there is no equity about a taxing Act; and
 my duty is to attempt to put a fair meaning on the words of the statute. To deem,
 if I may say so, is usually perilous, in that it is always difficult to foresee all the possible
 consequences of the artificial state of affairs that the deeming brings into being. As f
 Lord Asquith of Bishopstone said in *East End Dwellings Co Ltd v Finsbury Borough*
*Council*²:

'If one is bidden to treat an imaginary state of affairs as real, one must surely, g
 unless prohibited from doing so, also imagine as real the consequences and
 incidents which, if the putative state of affairs had in fact existed, must
 inevitably have flowed from or accompanied it.'

A research student in search of a suitable topic for a thesis might do worse than to
 choose as his subject 'The Dangers of Deeming'.

I come back to the essential question before me. The child relief for the taxpayer
 is disallowed under s 212 (4), as amended, if the child, Eileen, was entitled in her own h
 right to the post-nuptial income which she had in the year in question. That is plainly
 an income tax purpose. Under s 354 (1), as Eileen is living with her husband, that
 post-nuptial income is to be 'deemed for income tax purposes to be his income and
 not to be her income'. How, then, for income tax purposes can Eileen be said to be
 entitled in her own right to income which the statute says is to be deemed for income
 tax purposes to be her husband's income and not hers? I cannot see that she can. j
 Surprising though the result may be, and aware as I am that my decision may well
 result in the taxpayer being launched on a course on which he will be taken to the

¹ [1963] 1 All ER 655 at 665, [1963] AC 557 at 577, 40 Tax Cas 630 at 646

² [1951] 2 All ER 587 at 599, [1952] AC 109 at 132

a Court of Appeal and perhaps beyond, I can only do the best I can on the material before me.

The decision of the General Commissioners does not in terms deal with the point. They held that the onus was on the taxpayer to support his claim for child allowance (as indeed it is), that the 'definitions and logic introduced by the [taxpayer] were not applicable to the Section of the Income Tax Acts by which child allowance should be determined', and that the inspector was correct in disallowing the taxpayer's claim to the child allowance in the absence of evidence in support of his claims. I have every sympathy with the General Commissioners in being faced with these problems of statutory construction without the aid of professional legal argument in support of the taxpayer's claim; and I should make it clear that much of the reasoning by which I have reached my conclusion in the taxpayer's favour was not put forward by the taxpayer. Nevertheless, I do not see any effective answer to that reasoning, and in my judgment the decision of the General Commissioners was wrong. The appeal must therefore be allowed.

Appeal allowed.

d Solicitor: *Solicitor of Inland Revenue.*

Rengan Krishnan Esq Barrister.

Brenner v Rose

CHANCERY DIVISION

f BRIGHTMAN J

21ST NOVEMBER 1972

Partnership — Relations between partners — Good faith — Partnership property — Leasehold interest — Underlease of premises where partnership business carried on — Acquisition of leasehold reversion by one of the partners — Dissolution of partnership — Appointment of receiver — Rent in arrears — Landlord's right to claim possession with leave of court — Whether fact that landlord a partner raising any equity which would preclude court from giving leave.

In April 1971 B and R began trading in partnership. The premises at which they carried on business were subject to an underlease at a rent of £1,000 per annum. The underlease was a partnership asset. In October 1971 a writ was issued for the dissolution of the partnership and subsequently W was appointed receiver. At about the same time as the appointment, R acquired the leasehold reversion expectant on the underlease. By November 1972 two quarterly payments of rent under the underlease had fallen into arrear and remained unpaid. The receiver had about £1,150 in hand and liabilities of about £6,000. R then made an offer to the receiver that he would accept a surrender of the underlease on the terms that the rent which was in arrear would be forgone and that one past quarterly payment of £250 would be refunded, an offer which was worth £750 to the partnership; a further term was that no liability would be enforced against the partnership as regards other breaches of covenant. According to the evidence the market value of the underlease was speculative with a top limit of £1,000. On a summons by the receiver

for directions whether or not he should seek to sell the benefit of the underlease and whether or not he ought to pay the rent under the underlease as it fell due, a

Held – (i) The general rule was that the court would grant leave to a landlord to recover possession of demised premises, notwithstanding a receivership, unless there were special circumstances to justify a different course (see p 538 h, post); dictum of Romer LJ in *Hand v Blow* [1901] 2 Ch at 737 applied.

(ii) R's fiduciary capacity as a member of the partnership, which included the benefit and burden of the underlease, did not raise any sort of equity which could prevent him from exercising the rights of a landlord which he would have had as a stranger to the partnership. There would, therefore, be no grounds for refusing R leave to recover possession in forfeiture proceedings (see p 539 b and c, post); *Bevan v Webb* [1905] 1 Ch 620 applied. b

(iii) It followed that the alternatives were either to direct that R's offer be accepted, or to direct that the receiver pay the rent under the underlease as it fell due and seek to sell the benefit of the underlease. Since, on the evidence, the second course would put the receiver in jeopardy as to his remuneration and costs, the first alternative should be adopted (see p 539 e, post). c

Notes d

For the requirement of good faith between partners, see 28 Halsbury's Laws (3rd Edn) 525, 526, paras 1015-1018, and for cases on the subject, see 36 Digest (Repl) 527-530, 908-932.

For partnership property and property of separate partners, see 28 Halsbury's Law (3rd Edn) 530-534, paras 1025-1031, and for cases on the subject, see 36 Digest (Repl) 537-541, 984-1011. e

For the effect on a landlord's rights of the appointment of a receiver, see 32 Halsbury's Laws (3rd Edn) 421, 422, para 691, and for cases on the subject, see 39 Digest (Repl) 54-56, 658-675.

Cases referred to in judgment f

Bevan v Webb [1905] 1 Ch 620, 74 LJCh 300, 93 LT 298, 36 Digest (Repl) 530, 931.
Hand v Blow [1901] 2 Ch 721, 70 LJCh 687, 85 LT 156, 9 Mans 145, CA, 39 Digest (Repl) 55, 663.

Cases also cited

Barton, Thompson & Co Ltd v Stapling Machines Co [1966] 2 All ER 222, [1966] Ch 499. g
Forster v Manchester and Milford Railway Co, Re Manchester and Milford Railway Co (1880) 49 LJCh 454.
General Share and Trust Co v Wetley Brick and Pottery Co (1882) 20 Ch D 260, CA.
Griffith v Owen [1907] 1 Ch 195, [1904-7] All ER Rep 718.
Hay v Swedish & Norwegian Railway Co Ltd (1889) 5 TLR 460, CA.
Keech v Sandford (1726) 2 Eq Cas Abr 741, [1558-1774] All ER Rep 230, 22 ER 629. h
Morris v Baker (1903) 73 LJCh 143.
Randall v Russell (1817) 3 Mer 190, [1814-23] All ER Rep 427, 36 ER 73.

Summons

By a writ issued on 29th October 1971, the plaintiff, Martin Maurice Brenner, sought against the defendant, Malcolm Joel Rose, the dissolution of a partnership carried on by them at 225 Finchley Road, London, NW3, the underlease of which premises was an asset of the partnership. The defendant having acquired the leasehold reversion expectant on the underlease, and a receiver, George Alfred Wale, having been appointed in the proceedings, the receiver on 17th May 1972 issued a summons for directions whether or not he should seek to sell the benefit of the underlease, and j

a whether or not he ought to pay the rent under the underlease as it fell due. The facts are set out in the judgment.

Colin Sydenham for the receiver.

I H Maxwell for the plaintiff.

P S A Rossdale for the defendant.

b **BRIGHTMAN J.** This summons arises out of a partnership action. The applicant is the receiver appointed in the course of the action. The respondents are the plaintiff, Martin Maurice Brenner, and the defendant, Malcolm Joel Rose, who were the partners.

c The partnership commenced in April 1971. The affairs of the partnership were carried on at certain premises which were subject to an underlease, dated 18th August 1971, granted to the defendant. It is not in dispute that the underlease is a partnership asset. Under the terms of the underlease the property was let for a period expiring in 1988, with provision for two rent reviews in the meantime. There is a covenant against assignment or underletting without the consent of the landlord, which consent is not to be unreasonably withheld. There is also a covenant
d against carrying on certain specific trades or businesses, or permitting user for sleeping or residential occupation, and in particular a covenant that the lessee—

‘will only use the said demised premises for the purpose of the trade or business or occupation of Ladies Outfitters or such other trade or business or occupation as shall be approved of by the Lessor and Superior Lessors whose approval shall not be unreasonably withheld by the Lessor’.

e The partners traded in harmony for the brief period of six months. They fell out in September 1971. In the following month a writ was issued for the dissolution of the partnership. Both parties are in agreement that the affairs of the partnership should be wound up by the court. In November 1971 there was an application for the appointment of a receiver. The present receiver was then appointed. He closed
f down the business in February 1972.

In May 1972 the stock of the business, such as it was, was sold to the defendant for £650. In November 1971 the leasehold reversion, expectant on the underlease which was the partnership asset, was acquired by the defendant. Since the defendant acquired the leasehold reversion, two quarters’ rent have fallen into arrear, that is, the rent due in June and September 1972. The present amount of the rent is £250
g a quarter. In about another month there will be a further quarter’s rent due if the underlease has not in the meantime been disposed of. The receiver has a sum of about £1,150 in hand. He has liabilities of about £6,000.

In May 1972, the underlease not having been realised for the benefit of the partnership, the defendant’s solicitors wrote a letter to the receiver, offering to accept on behalf of the defendant a surrender of the underlease on the terms that the March
h 1972 payment of rent would be forgone and there would be a refund of the rent paid in December 1971. The offer might be regarded as worth something of the order of two quarters’ rent, i.e. £500. On the matter coming before the court today, and in circumstances which I will outline in a minute, the offer has been brought up to date by the defendant. The March 1972 rent has since been paid, but the
i June and September 1972 instalments are still unpaid. The current offer by the defendant is to accept a surrender on the terms that the June and September instalments of rent should be forgone, and that the March 1972 payment be refunded, i.e. an offer which might be regarded as worth £750 to the partnership. The offer is on terms that no liability would be enforced against the partnership in respect of other breaches of covenant, such as the covenant to keep the premises in repair which, on the evidence, they certainly are not at the moment.

The receiver has issued a summons which, so far as present purposes are concerned, can be regarded as an application for directions whether he ought to seek to sell the benefit of the underlease, and whether he ought to pay the instalments of rent now due and the instalment which will become due next month. a

At this stage I should mention that the receiver has sought advice from a firm of estate agents on the market value of the underlease. The property is situated at 225 Finchley Road, London, NW3, and is in close proximity to other trading concerns with a profitable flow of pedestrian traffic in the vicinity. The estate agents advise that the current rent of £1,000 a year is approximately the full market rental. They advise that if the property were offered for sale, it is not likely that it would realise more than £1,000. They add that the open market value of the leasehold interest could probably be described as purely nominal. They state that if their valuation were the subject of any form of litigation they might feel some difficulty in substantiating the probability of a premium. It is, perhaps, not altogether easy to see what the estate agents have in mind, but it is the only evidence of market value before the court. I think, for the purpose of reaching a conclusion, I must regard the value as speculative with perhaps a top limit of £1,000. b

Now on the figures, if the rent is paid to date, and if the December 1972 rent is allowed for as well—because it would seem unlikely that a sale could be negotiated until after the December quarter day and probably completion would be somewhat later—there would not be much money left in the hands of the receiver after the sum of £750 is paid out and the costs and expenses of a sale are allowed for. There are no other assets of any other kind in the hands of the receiver, except the £1,150 which I have mentioned. It therefore seems to me, on the evidence I have, that if the arrears of rent and the December rent are paid out of the money in the hands of the receiver, the attempted sale of the underlease would be a gamble which might well put the receiver's financial position in jeopardy. On the other hand if the offer made by the defendant is accepted, not only is the £1,150 retained intact, but there will be another £250 coming in to the receivership as well. c

It is however submitted by counsel for the plaintiff that the receiver should not be authorised or directed to pay the current arrears of rent or the December rent until an endeavour has been made to market the underlease at a price which will cover these rents and leave a profit for the receivership over and above the rents so paid. Counsel for the plaintiff has further submitted that the defendant is in some way inhibited from exercising his rights as landlord by reason of the fact that the underlease is partnership property and that he, the defendant, is a trustee of that property. d

I must therefore consider whether I am entitled to keep the defendant, as landlord, out of possession and out of the rents while endeavours are made to realise this asset. It is true that, as a receiver has been appointed, it is not open to the defendant, as landlord, to enforce his legal right under the terms of the underlease to enter into possession of the property on the ground of non-payment of rent, unless he obtains leave from the court. But the general rule seems to be that the court will grant leave to a landlord to recover possession of the demised premises, notwithstanding the receivership, unless there are special circumstances to justify a different course. I refer in particular to *Hand v Blow*¹ and I read this passage from the judgment of Romer LJ:² e

... in a case where the landlord, by reason of his not being paid or of his covenants not being complied with, has a right to complain and to re-enter, he can apply, notwithstanding the appointment of a receiver, and obtain leave from the Court to re-enter, and so take away from the receiver his right of occupation; f

¹ [1901] 2 Ch 721

² [1901] 2 Ch at 737

a and he can also, in a proper case, get leave to distrain: but the mere appointment of a receiver does not of itself, in my opinion, give the landlord any special rights, and has never, so far as I know, been held to do so.'

b I read that interpretation of the law as meaning that in the case before me I ought, if forfeiture proceedings were before me, to give the landlord the right to re-enter should the rent be unpaid and, by parity of reasoning, to direct the receiver to pay the rent if I do not allow the landlord to go into possession.

c In my judgment the right of the landlord in such circumstances either to have possession or to recover the rent is not to be whittled away by the mere fact that he is one of the partners, and is a purchaser of the reversion expectant on the underlease. I do not see that the defendant's fiduciary capacity as a member of a partnership which includes the benefit and burden of the underlease raises any sort of equity which should be allowed to prevent him from exercising the rights as landlord which he would have had if he were a stranger to the partnership. I need only refer to *Bevan v Webb*¹.

d So in the present circumstances it seems to me that the choice before the court is either to accept the offer made by the defendant to take a surrender of the underlease, waive all existing breaches of covenant and repay one quarter's rent, or alternatively to direct the receiver to pay the rent already in arrear, to pay, in due course, the December rent, to endeavour to sell the underlease and to take his chance as to what he may get as a result of that operation. On the evidence before me the second course would I think put the receiver in jeopardy as to his remuneration and costs. There is no offer by the plaintiff to pay arrears of rent out of his own money which might have safeguarded the position of the receiver.

e In these circumstances my proper course is to direct that the offer by the defendant be forthwith accepted, and that the receiver give up possession. If a document of surrender is needed, then no doubt that document can be agreed, or if necessary settled by the court. It does not hold up in any way the acceptance of the defendant's offer, which is now complete and unconditional, and a contract exists.

f Order accordingly.

Solicitors: *Fairchild, Greig & Co* (for the receiver); *Fremont & Co* (for the plaintiff);
A E Samuels & Co (for the defendant).

Susan Corbett Barrister.

Director of Public Prosecutions v Ellis

QUEEN'S BENCH DIVISION

LORD WIDGERY CJ, ASHWORTH AND BRIDGE JJ

9th MARCH 1973

Currency control – Exchange control – Evasion of restrictions or requirements imposed by Act – Power of Treasury to require information to be furnished for detecting evasion of Act – Extent of power – Exchange Control Act 1947, Sch 5, Part I, para 1 (1), Part II, para 1 (1).

In 1963 the respondent paid a resident in the scheduled territories £14,000. That sum was provided by his sister, and with the proceeds French francs were acquired. The respondent's sister used that sum to buy a property in France. In 1970, at the respondent's suggestion, the sister paid £3,000 to another resident in the scheduled territories, and with that sum French francs were acquired for expenditure on repairs to that property. In 1971, in answer to enquiries by the Treasury, the respondent referred to those sums. Thereafter the sister and her husband were charged with, and convicted of, contravening s 7 (1) (a)^a of the Exchange Control Act 1947 in respect of the £3,000 payment, and s 2 (1)^b of that Act in respect of the £14,000. Following their conviction a Treasury inspector wrote to the respondent asking him (i) whether he knew that the payment made in 1963 to a resident in the scheduled territories was made in association with the acquisition of property in France by the respondent's sister and brother-in-law; and (ii) whether he knew of the existence of the property in France and that his sister had paid £3,000 for repairs to it. The respondent refused to answer those two questions. He was thereupon formally directed by the Treasury to do so and when he again refused was charged with contravening para 1 (1)^c of Part I, and para 1 (1)^d of Part II, of Sch 5 to the 1947 Act. The magistrate dismissed the information on the grounds that para 1 (1) of Part I of Sch 5 was directed to the discovery of non-compliance with the Act rather than with the prosecution of an offender and, the non-compliance having been detected, the Treasury could not, having secured the conviction of the respondent's sister and her husband, ask the respondent in effect whether he was guilty as well. On appeal by the Crown,

Held – On the true construction of para 1 (1) of Part I of Sch 5 the Treasury had power to ask questions the answers to which might incriminate the person of whom they were required, and it was no defence that an evasion had been detected and others had already been convicted; the Treasury could therefore require the respondent to answer both questions as the first was for the purpose of detecting whether or not there had been an evasion of the Act by him which was separate and distinct from the evasions on the part of the sister and her husband, and in relation to the second the fact that the offence committed by the sister under s 7 had been detected did not preclude them from detecting the identity of all the persons participating in the evasion; accordingly the appeal would be allowed and the case sent back to the magistrate with a direction to convict (see p 545 d to j, post).

Notes

For offences under the Exchange Control Act 1947, see 27 Halsbury's Laws (3rd Edn) 145, 146, para 233.

For the Exchange Control Act 1947, ss 2, 7, Sch 5, Part I, para 1, Part II, para 1, see 22 Halsbury's Statutes (3rd Edn) 903, 907, 947, 949.

^a Section 7 (1), so far as material, is set out at p 543 b, post

^b Section 2 (1) is set out at p 543 a, post

^c Paragraph 1 (1) of Part I is set out at p 543 d, post

^d Paragraph 1 (1) of Part II, so far as material, is set out at p 543 f, post

Case stated

a This was an appeal by way of a case stated by the chief metropolitan stipendiary magistrate (Sir Frank Milton) in respect of his adjudication as a magistrates' court sitting at Bow Street on 5th July 1972.

b 1. On 16th March 1972 an information was preferred by the appellant, Frederick Powell for and on behalf of the Director of Public Prosecutions, against the respondent, Timothy Mitchell Ellis, that the respondent, between 16th January and 1st February 1972 within the Greater London area, being in the United Kingdom and having been given by the Treasury directions which required him within 14 days of 17th January 1972 to furnish in writing to one F Powell (being a person designated in the directions as a person authorised to require it) such information in his possession or control as F Powell (being the person so authorised) required for the purpose of securing compliance with or detecting evasion of the Exchange Control Act 1947, contravened the requirement, contrary to para 1 (1) of Part I and para 1 (1) of Part II of Sch 5 to the Exchange Control Act 1947.

c 2. The chief metropolitan magistrate heard the information on 21st June 1972 when he reserved his decision which he gave on 5th July 1972. He found the following facts: (a) By a letter of directions dated 13th May 1971 (and given pursuant to para 1 of Part I of Sch 5 to the 1947 Act) the Treasury required the respondent to furnish in writing signed by him to Inspector F Powell such information and produce such documents as Inspector Powell might require respecting the matters referred to in such letter. (b) A copy of that letter and of the other letters referred to below were annexed to and formed part of the case stated¹. (c) The letter dated 13th May 1971 was served on the respondent on 4th June 1971 by Inspector Powell, who informed the respondent of the information he required in relation to two payments made by or on behalf of the respondent's sister. (d) The respondent wrote to Inspector Powell by letter dated 15th September 1971. That letter was received by Inspector Powell on 22nd October 1971. In that letter the respondent referred to one payment made by him with funds made available to him by his sister and paid by him into the account of Ahmad Homoud Alkalid of PB 212, Kuwait, and one payment by his sister to Josef Yassawi of PB 280, Kuwait, Alkalid and Yassawi having accounts in London. (e) By letter dated 18th November 1971 Inspector Powell asked for further information as to the two payments of £14,000 and £3,000 therein referred to, and the respondent replied by letter dated 22nd December 1971 saying that he was awaiting legal advice. (f) By letter dated 4th January 1972 the respondent's solicitors notified Inspector Powell that the respondent had been advised that he was not obliged to supply the information requested. (g) By a letter of directions dated 14th January 1972 (given as aforesaid and served on the respondent on 17th January 1972) the Treasury directed the respondent to furnish in writing the information there specified. (h) By letter dated 24th January 1972 the respondent's solicitors informed the Treasury that the respondent had been advised that he was not obliged to answer the questions asked in the letter dated 14th January 1972. (i) On 1st November 1971 the respondent's sister and her husband were each convicted by the Harlow magistrates' court (i) of making a payment of £3,000 to a person resident in the scheduled territories in association with the acquisition by Barclays Bank (France) Ltd, of 38,775 French francs, contrary to s 7 (1) (a) of the Exchange Control Act 1947; (ii) failing to offer 138,300 French francs (the proceeds of the sum of £14,000) to an authorised dealer, contrary to s 2 (1) of the 1947 Act.

j 3. It was contended on behalf of the respondent that the powers of the Treasury under Sch 5, Part I, para 1 (1) were limited to 'securing compliance with or detecting evasion' of the Act. The alleged function of the questions put in the letter of 17th January 1972 was to 'detect evasion' of the provisions of the Act. Since the evasion, and two illegal payments of £14,000 and £3,000, had been detected and the respondent's sister and her husband had been convicted of offences arising out of those

¹ Not reproduced in this report

evasions before the letter of 17th January 1972 was served on the respondent, that letter could not be said to be 'requiring information which the Treasury may require for the purpose of . . . detecting evasion' of the Act. The appellant did not contend that the letter could be said to be directed 'to securing compliance with . . . the Act'. That had already been secured and the respondent's sister and her husband had been ordered to make the necessary monetary adjustments to regularise transactions. a

4. It was contended on behalf of the appellant that the respondent had contravened a requirement imposed by a direction validly given under para 1 (1) of Part I of Sch 5 to the 1947 Act. The information sought was required by the Treasury for the purpose of detecting evasion of the Act on the part of the respondent. The fact that the respondent's sister and her husband had been convicted under s 7 (1) (a) of the Act in respect of the £3,000 payment and under s 2 (1) of the Act in respect of the francs, though it established evasion of the Act on their part, did not preclude the Treasury from requiring information for the purpose of detecting evasion of the Act on the part of others who had been or might have been involved in the transactions. The term 'evasion' could not be confined to the mere unlawful payment by itself. Each act of evasion of the Act was within Part I of the Act. The questions asked were for the purpose of detecting whether the respondent had himself paid the sum of £14,000 in contravention of the Act and whether he had aided and abetted his sister in contravening the Act, and thereby himself evaded the Act. The questions asked were within the powers given by para 1 (1). b

5. No cases were referred to. c

6. The magistrate was of the opinion that para 1 (1) of Part II of Sch 5 was a penal section and that therefore para 1 (1) of Part I of the schedule must be strictly construed. The Treasury by their letter of 17th January 1972, having secured the conviction of his sister and her husband, were asking the respondent in effect whether he was guilty as well. Paragraph 1 (1) envisaged the discovery of a non-compliance with the 1947 Act rather than the prosecution of an offender. As the non-compliance had been detected well before the service of the letter dated 17th January 1972, the magistrate concluded that the Treasury had no power to require the information sought in that letter. He accordingly dismissed the information and awarded the respondent £150 on account of his costs. d

Gordon Slynn for the appellant. e

E R Meyer for the respondent. f

BRIDGE J delivered the first judgment at the request of Lord Widgery CJ. This is an appeal by the Director of Public Prosecutions by way of case stated from a decision of Sir Frank Milton, the chief metropolitan stipendiary magistrate, who on 5th July 1972 acquitted the respondent, one Timothy Mitchell Ellis, on an information which charged him with contravening a requirement to give information pursuant to directions given by the Treasury which was required for the purpose of securing compliance with or detecting evasion of the Exchange Control Act 1947, that offence being contrary to para 1 (1) of Part I and para 1 (1) of Part II of Sch 5 to that Act. g

The factual transactions which constitute the background of this appeal can be shortly recounted. In 1963 the respondent made a payment, with money provided by his sister, to a Mr Alkalid, a resident in the scheduled territories, of £14,000. With the proceeds of that £14,000 French francs were in fact acquired, and with the French francs the respondent's sister, a Mrs Harrisson, purchased a property in France. Subsequently, in 1970, at the suggestion of the respondent, Mrs Harrisson, then herself made a payment to a Mr Yassawi, another gentleman resident somewhere within the scheduled territories, and the ultimate destination of that £3,000 was again to acquire French francs for expenditure on repairs required to the property which Mrs Harrisson had acquired in France. h

The relevant provisions of the Exchange Control Act 1947 are as follows. Section 2 provides: j

a '(1) Every person in or resident in the United Kingdom who is entitled to sell, or to procure the sale of, any gold, or any foreign currency to which this section applies, and is not an authorised dealer, shall offer it, or cause it to be offered, for sale to an authorised dealer, unless the Treasury consent to his retention and use thereof or he disposes thereof to any other person with the permission of the Treasury . . .'

b By s 7 (1):

'Except with the permission of the Treasury, no person shall in the United Kingdom, and no person resident in the United Kingdom shall outside the United Kingdom, make any payment to or for the credit of a person resident in the scheduled territories as consideration for or in association with—(a) the receipt by any person of a payment made outside the scheduled territories, or the acquisition by any person of property which is outside the scheduled territories. . .'

c Provisions for enforcement are contained in Sch 5. Schedule 5, Part I, begins with the power, which is here primarily in question, of the Treasury to require by directions information for the purpose of securing compliance with or detecting evasion of the Act. Paragraph 1 (1) is in very wide terms:

d 'Without prejudice to any other provisions of this Act, the Treasury may give to any person in or resident in the United Kingdom directions requiring him, within such time and in such manner as may be specified in the directions, to furnish to them, or to any person designated in the directions as a person authorised to require it, any information in his possession or control which the Treasury or the person so authorised, as the case may be, may require for the purpose of securing compliance with or detecting evasion of this Act.'

e I can then turn to Part II of the same schedule, which in para 1 (1) contains a comprehensive provision making it a criminal offence to contravene any restriction or requirement of the Act:

f 'Any person in or resident in the United Kingdom who contravenes any restriction or requirement imposed by or under this Act, and any such person who conspires or attempts, or aids, abets, counsels or procures any other person, to contravene any such restriction or requirement as aforesaid, shall be guilty of an offence punishable under this Part of this Schedule . . .'

g In May 1971 a direction in very wide terms under the provisions of para 1 of Part I of Sch 5 was given to the respondent by the Lords Commissioners of Her Majesty's Treasury, requiring him to provide them with a variety of information as to his financial transactions over a number of years. As a result of that direction, the fact of the payment made by the respondent to Mr Alkalid of £14,000, and the fact that he had suggested to his sister that she should make a payment of £3,000 to Mr Yassawi came to light. In November 1971 the respondent's sister and her husband were prosecuted and in due course convicted of offences under the provisions of the Act to which I have already referred in respect of their part in the two transactions arising out of these two payments of £14,000 and £3,000 respectively. It will be recalled that the payment of £14,000 to Mr Alkalid was made by the respondent, not by the sister; the sister provided the money. In respect of that payment, therefore, there could be no prosecution of the sister under s 7. But in respect of what followed from that payment, the sister was prosecuted and convicted under s 2; she was convicted of failing to offer, as s 2 required her to do, the foreign currency, namely the sum of French francs, which had been acquired with the £14,000 paid to Mr Alkalid, to an authorised dealer. In respect of the payment of £3,000 to Mr Yassawi, on the other hand, that payment having been made directly by the sister with the object of furnishing funds, as funds were in due course in fact furnished, for repair of the French property, the sister was prosecuted under s 7 (1) (a), it being clear from the facts of that

case that that had been a payment made by her in association with the acquisition of property outside the scheduled territories, namely the sum of French francs required to expend on the French house. a

In this state of affairs, following the sister's conviction, a Mr Powell, the inspector authorised by the Treasury to receive the information originally demanded from the respondent by the direction given in May, wrote to the respondent on 18th November 1971 asking two specific questions in relation to these two transactions: b

'(1) Did you know that the first payment, i.e., the £14,000 to the Alkalid account was in relation to the acquisition of a property in France? (2) Did you know that the second payment, i.e., the £3,000 to the Yassawi account was in relation to repairs to the property in France?'

Having obtained legal advice, the respondent replied that he was not going to answer, having been advised that the inspector was not entitled to ask him those questions. There then followed on 14th January 1972 the formal direction under para 1 (1) of Part I of Sch 5, non-compliance with which was alleged in the information before the chief magistrate. The questions asked in that letter which the respondent was by the direction required to answer are four in number, but it is in my judgment unnecessary to go beyond the first two. Those questions are: c

'When in 1963 you made a payment of £14,000 to the account of Ahmad Homoud Alkalid, did you know that you were making that payment in association with the acquisition by your brother-in-law Major Peter Damer Harrison and your sister Mrs. Elizabeth Ann Harrison of a property in France? 2. When in 1970 you suggested to your sister, Mrs Elizabeth Ann Harrison, that she should make a payment of £3,000 to the account of Joseph Yassawi (a) did you know that the said Peter Damer and Elizabeth Ann Harrison owned a property in France? (b) did you know that the said Elizabeth Ann Harrison was making a payment in association with the carrying out of repairs to the said property?' d

Again on legal advice the respondent declined to answer those questions and it was that which led to his prosecution. e

The view which was submitted on behalf of the respondent of the proper construction of the provisions of para 1 (1) of Part I of Sch 5 to the 1947 Act, and which commended itself to the chief magistrate, appears from his opinion as stated in para 7 of the case: f

'I was of the opinion that paragraph (1) of Part II of the Fifth Schedule [i.e. the provision creating the offence of contravening the requirements of the Act] was a penal section and that therefore paragraph 1 (1) of Part I of such Schedule [the provision giving the Treasury power to require information] must be strictly construed. The Treasury by their letter of 17th January, 1972, having secured the conviction of the sister and her husband, were asking the respondent in effect whether he was guilty as well. Paragraph 1 (1) envisaged the discovery of a non-compliance with the Act rather than the prosecution of an offender. As the non-compliance had been detected well before the service of the letter dated 17th January 1972, I concluded that the Treasury had no power to require the information sought in the letter. I accordingly dismissed the information and I awarded the respondent £150 on account of his costs.' g

With great respect to the chief magistrate, I am unable to agree with that conclusion on the true construction of these provisions. First, it seems to me clear that the phrase 'evasion of this Act' as used in para 1 of Part I of Sch 5 is, as counsel for the appellant submits, certainly wider than but includes an offence under para 1 of Part II of the schedule. One may, as it seems to me, quite simply test the proposition that the questions asked in the Treasury's letter of 14th January 1972 were directed only to discovering whether the respondent was guilty as well as his sister and her h

a husband of an offence under the Act by reference to the first transaction, the payment of the £14,000. In relation to that payment made by the respondent himself to Mr Alkalid, it is clear, of course, that there had been an offence, and an evasion of the Act when Mrs Harrison, the sister, provided the £14,000 to the respondent. It is clear again that there had been an offence and an evasion of the Act, and for this the sister was duly convicted, when the proceeds of that £14,000 had been converted into French francs which were not offered to an authorised dealer, but what, on the facts presently known to the Treasury, is not clear, is whether there had been any evasion of the Act by the act of paying the £14,000 to Mr Alkalid on the part of the present respondent. If that payment was made by the present respondent knowing that the eventual destination of the money was the acquisition of a property in France for his sister, then clearly that was a payment made in association with the acquisition of that property and accordingly was in contravention of s 7 (1) (a) of the Act, and a contravention rendering the respondent guilty of a criminal offence. If, on the other hand, that payment was made by him in ignorance of the fact that the money would be used to acquire a property in France, then the payment was not made in association with that acquisition; there was no evasion of s 7, and there was no offence committed by the respondent. Accordingly it seems to me that if one tests the basis of the learned magistrate's decision by reference to the question whether the first information sought by the Treasury in this direction was properly required for the purpose of detecting an evasion of the Act, the conclusion is clear that the information was required for the purpose of detecting whether or not there had been an evasion of the Act by the respondent, which was separate and distinct from those evasions on the part of Mrs Harrison and her husband which had already been discovered by and prosecuted by the Treasury. But I would not be content to rest my judgment on the proposition that information can only be required under this paragraph where there is, so to speak, a new evasion as opposed to a new evader to be detected. It seems to me in relation to the second question, where the object of the information sought by the Treasury is to discover whether or not the respondent aided and abetted the evasion of s 7, and therefore the offence committed under s 7 by Mrs Harrison in relation to the £3,000, that it would be quite artificial to say that the detection of an offence, once the fact of the evasion is known, cannot extend to detecting the identity of all the persons participating in that evasion.

If I may say so, for my part I feel considerable sympathy with the chief magistrate's attitude to the case. I think any of us brought up in the tradition of English law almost instinctively reacts against a statutory provision which entrenches on the well established principle of the common law that no person can be required to incriminate himself. However, as soon as one looks at the provisions of para 1 of Part I of this schedule, it is quite clear that, as counsel for the respondent frankly accepts, they are not susceptible of any construction which would hold that information sought in a direction given by the Treasury under this provision must stop short of requiring a man to incriminate himself. In the course of detecting evasion the Treasury may require information from a person who will have to disclose that he has been an evader. Once that conclusion is reached it seems to me that the strict construction which the chief magistrate was seeking, which would enable him to avoid conviction in this case by distinguishing between detection of an evasion and detection of the evader, becomes quite untenable. For those reasons I would allow this appeal and send the case back to the magistrate with a direction to convict.

j ASHWORTH J. I agree.

LORD WIDGERY CJ. I also agree.

Appeal allowed. Case remitted.

Solicitors: *Director of Public Prosecutions; Bull & Bull (for the respondent).*

N P Metcalfe Esq Barrister.

Armstrong v Whitfield

QUEEN'S BENCH DIVISION

LORD WIDGERY CJ, CUSACK AND CROOM-JOHNSON JJ

19th, 20th FEBRUARY 1973

Highway – Dedication – Evidence – Provisional map – Dispute – Determination of quarter sessions – Effect – Issue whether path a public right of way as shown on map – Decision of quarter sessions that path a public path – Decision in rem – Decision binding on court in subsequent litigation – National Parks and Access to the Countryside Act 1949, s 31 (1).

A county council prepared a provisional map under the National Parks and Access to the Countryside Act 1949 which showed a path across the appellant's land as a public path. The appellant applied to quarter sessions under s 31 (1)^a of the 1949 Act for a declaration that there was no public right of way over his land. Quarter sessions refused to make the declaration asked for by the appellant. The necessary consequence of that decision was that, when the county council came to prepare the definitive map under s 32 (1)^b of the 1949 Act, the path would be shown as a public path and, by virtue of s 32 (4)^c, the definitive map was conclusive evidence that it was a public path. After the decision of quarter sessions and before the definitive map had been prepared, the appellant chained and padlocked a gate giving access to the path. He was charged before the justices with wilful obstruction of a highway, contrary to s 121 (1) of the Highways Act 1959. At his trial the earlier decision of quarter sessions was proved and the justices refused to allow the appellant to call evidence to show that the path was not a public path. The appellant was convicted and appealed.

Held – The appeal would be dismissed. Under the provisions of the 1949 Act quarter sessions was the tribunal deliberately set up to determine whether or not a path was a public path. A decision of quarter sessions on that issue was therefore a decision *in rem* which was binding on the justices and which could not be relitigated before them (see p 550 f and p 551 d and e, post).

Mayor, Aldermen and Citizens of the City of Wakefield v Cooke [1900-3] All ER Rep 791 applied.

Notes

For applications to quarter sessions for a declaration concerning public rights of way, see 19 Halsbury's Laws (3rd Edn) 172, 173, para 266.

For the National Parks and Access to the Countryside Act 1949, ss 31, 32, see 15 Halsbury's Statutes (3rd Edn) 42, 44.

For the Highways Act 1959, s 121, see 15 Halsbury's Statutes (3rd Edn) 267.

Cases referred to in judgment

Hailsham Rural District Council v Moran (1966) 64 LGR 367, DC, Digest (Cont Vol B) 694, 116a.

Mayor, Aldermen and Citizens of the City of Wakefield v Cooke [1904] AC 31, [1900-3] All ER Rep 791, 73 LJBK 88, 89 LT 707, 68 JP 225, 2 LGR 270, HL, 26 Digest (Repl) 616, 2690.

Mills v Cooper [1967] 2 All ER 100, [1967] 2 QB 459, [1967] 2 WLR 1343, DC, Digest (Cont Vol C) 337, 4726.

^a Section 31 (1), so far as material, is set out at p 548 f, post

^b Section 32 (1) is set out at p 549 e, post

^c Section 32 (4) is set out at p 549 g, post

Cases also cited

- a* *Connelly v Director of Public Prosecutions* [1964] 2 All ER 401, [1964] AC 1254, HL.
Koenigsberg (decd), Re, Public Trustee v Koenigsberg [1949] 1 All ER 804, [1949] Ch 348, CA.
Petrie v Nuttall (1856) 11 Exch 569.
R v West Sussex Quarter Sessions, ex parte Albert and Maud Johnson Trust Ltd [1972] 3 All ER 468, [1973] 1 QB 188, DC.
- b* *Spens v Inland Revenue Comrs* [1970] 3 All ER 295, [1970] 1 WLR 1173.

Case stated

This was an appeal by way of case stated by justices for the county of Cumberland in respect of their adjudication as a magistrates' court sitting at Carlisle on 1st August 1972.

- c* 1. On 23rd June 1972 an information was preferred by the respondent, Thomas John Roland Whitfield, clerk of Cumberland County Council, against the appellant, George Lionel Wood Armstrong, charging that he on 31st May 1972, at Harker, Stanwix, in the county of Cumberland, without lawful authority or excuse, wilfully obstructed the free passage along Green Lane, Harker, a highway, by chaining and padlocking the gate giving access to Green Lane, contrary to s 121 (1) of the Highways Act 1959.
- d* 2. The following facts were found. Green Lane was a highway. The appellant wilfully obstructed Green Lane as alleged in the information. The following was a short statement of the evidence given on behalf of the respondent on the basis of which the justices found as a fact that Green Lane was a highway. The Cumberland County Council was the responsible authority under Part IV of the National Parks and Access to the Countryside Act 1949 for the preparation of a map showing rights of way within the county of Cumberland and for reviewing the particulars contained in such map from time to time. The county council commenced a review of rights of way within the county on 1st November 1967 and included Green Lane on the draft revised map as a public footpath. Green Lane was also included on the provisional revised map, published on 19th November 1970, as a public footpath. The appellant and Margaret Jane Armstrong applied to the general quarter sessions for the county of Cumberland under s 31 (1) (a) of the 1949 Act for a declaration that at 1st November 1967 there was no public right of way over Green Lane. That application was heard on 14th April 1971 and an order was made dismissing the application. No appeal was lodged against the decision of quarter sessions. A copy of the order of quarter sessions was produced in evidence.
- e* 3. It was contended by the respondent: (a) that under s 31 (3) (a) of the 1949 Act the court of quarter sessions was compelled to make the declaration sought by the appellant and Margaret Jane Armstrong unless it was proved to the satisfaction of the court that there was at the relevant date a public right of way over the land; since the application for a declaration had been dismissed it was a necessary inference that the court of quarter sessions had found proved to its satisfaction that there was, on 1st November 1967, a public right of way over Green Lane; that decision, by a court of record, not having been appealed against, was a final and conclusive finding of fact that a public right of way on foot existed over Green Lane; (b) that the county council had a statutory duty under s 32 of the 1949 Act to prepare a definitive map and statement which must inevitably include Green Lane as a public right of way on foot and as such definitive map (when published) would be conclusive as to the particulars contained therein by virtue of s 32 (4) (a) of the 1949 Act the justices were bound to give effect to that statutory provision.
- f* 4. It was contended by the appellant: (a) that on the true construction of s 31 of the 1949 Act the effect of the order of 5th April 1971 could not be to establish for the purposes of the proceedings before the justices that Green Lane was a highway; (b) that the principle (which the respondent appeared to invoke) that 'Equity looks on that as done which ought to be done' should have no place in a criminal court; (c) that the
- g*
- h*
- j*

burden of proof in civil and criminal cases being so different it was not open to the justices to accept the order of quarter sessions as evidence in a criminal case, particularly in view of the last paragraph of the judgment of quarter sessions which read: 'So the application for a declaration fails, and one might say that it fails at the last ditch . . .'; (d) that in the premises there was no case for the appellant to answer in that the respondent had not established that Green Lane was a highway; (e) that in any event it should be open to the appellant to call further evidence on the issue of whether or not Green Lane was a highway.

5. The justices were of the opinion that the issue whether or not Green Lane was a highway was *res judicata*, that the appellant was estopped from calling evidence on that issue, and that counsel for the appellant should not be allowed to address them further on the question of the admissibility of such evidence on other grounds. Accordingly they ordered that the appellant be fined £15 and that he pay £10 costs.

John Spedding for the appellant.

J C C Blofeld for the respondent.

LORD WIDGERY CJ. This is an appeal by case stated by justices for the county of Cumberland sitting as a magistrates' court in the petty sessional division of Cumberland ward at Carlisle on 1st August 1972. On that day they had before them an information preferred by the respondent, who is the clerk to the Cumberland County Council, against the appellant, who is a local landowner, that the appellant on a date in May without lawful authority or excuse did wilfully obstruct the free passage along Green Lane, Harker, a highway, by the chaining and padlocking of the gate giving access to Green Lane, contrary to s 121 (1) of the Highways Act 1959.

When the matter came before the justices, they found that Green Lane was a highway. Precisely what the significance of that finding is I have some doubt, but of course it is not simply a question of fact but a mixed question of fact and law. However, they found that Green Lane was a highway, and they found what was undoubtedly a fact that the appellant had wilfully obstructed Green Lane as alleged in the information; in other words, he had locked a gate that crossed the way. From those simple beginnings, there comes a somewhat complicated and not altogether easy question of law for the determination of this court, because what had happened was this. Pursuant to their duty under the National Parks and Access to the Countryside Act 1949 the Cumberland County Council were, as far as the case shows, in the process of preparing a footpath map under the terms of that Act. I say 'as far as the case shows' because we have not been told of any previous activity in the form of an earlier map, and we must take this as the case sets the facts out.

It will be remembered that, under the 1949 Act, county councils were required in the first instance to prepare a draft map of the public footpaths in their area. Those who were aggrieved by the insertions of a public footpath over their land which they challenged, had initially a right of appeal to an authority set up by the county council, and if the county council, having heard these objections, was still minded to say that the path in question was a public path, the county council was required by s 30 to move on to the preparation of a provisional map showing the path as a public path. If the landowner had failed at the first round and found that this land was still incumbered by an alleged public footpath in the provisional map, his course was to appeal to quarter sessions under s 31. That provides as follows:

'(1) At any time within twenty-eight days after the publication of a notice under subsection (1) of the last foregoing section, the owner, lessee or occupier of any land shown on the map to which the notice relates, being land on which the map shows a public path, or a road used as a public path, may apply to quarter sessions for a declaration—(a) that at the relevant date mentioned in the provisional statement there was no public right of way over the land . . .'

a It is therefore clear enough so far; the landowner has the right to apply to quarter sessions and ask quarter sessions for a declaration that there is no public footpath along the line alleged on the provisional map. Section 31 (3) provides for what is to be done when such an application comes before quarter sessions; it is in these terms:

b 'If on the hearing of an application under subsection (1) of this section, being an application for a declaration under paragraph (a), (b) or (c) of that subsection, it is not proved to the satisfaction of the court or committee—(a) in the case of an application under the said paragraph (a), that there was at the relevant date a public right of way over the land . . . the court or committee shall make the declaration sought by the applicant.'

I have left out the irrelevant words. So when the matter comes before the quarter sessions, unless the county council can prove that there was at the relevant date a public right of way over the line in question, then the court shall make a declaration to the effect that no such public right of way exists. It is provided by s 31 (8) that:

c 'Subject to the last foregoing subsection and to the next following section, a declaration made under this section shall be conclusive evidence of the matters stated in the declaration'.

d So if the landowner wins at quarter sessions and the declaration is made that there is no public right over the line in question, then that is conclusive evidence of the facts stated.

Finally, by s 32 (1) it is provided that:

e 'As soon as may be after the determination of all applications made under the last foregoing section as respects any map and statement, or if no such applications have been duly made then as soon as may be after the time for making such applications has expired, the surveying authority shall prepare a definitive map and statement, and shall cause notice of the preparation thereof, and of places where copies thereof may be inspected at all reasonable hours, to be published in the London Gazette and in one or more local newspapers circulating in the area of the authority.'

f By s 32 (4):

'A definitive map and statement prepared under subsection (1) of this section shall be conclusive as to the particulars contained therein in accordance with the foregoing provisions of this section [to the extent there set out].'

g So at the end of the day, one sees the scheme of the Act to be as follows, that if the landowner wins at quarter sessions he gets an immediate declaration in his favour, and that is conclusive evidence that there is no public right of way. If he loses at quarter sessions, quarter sessions makes no declaration at all, and the effect under s 32 is that when the definitive map is published, it will show the disputed path as a public right of way, and by virtue of s 32 (4) the definitive map is itself conclusive of statements of that kind.

h What happened in this case was that the earlier steps under the Act having duly taken place and the provisional map having been prepared showing the disputed path a public right of way, the present appellant applied to quarter sessions under s 31; we have the judgment of quarter sessions before us, although we have not had to look at it in detail, and I pause only to say that it is perfectly clear that before quarter sessions both parties were represented by counsel, and the matter was evidently fully debated and examined, as one would expect. In the result the present appellant lost—
i in other words quarter sessions found that there was a public path; they declined to make the declaration in his favour, and all that was left under the Act was for that conclusion to be reflected in the definitive map which on its publication would be conclusive of the particulars there disclosed.

But what happened in fact was that some delay occurred between the hearing of this application before quarter sessions and the publication of the definitive map, and in that interval the appellant locked the gate and obstructed the path, as the justices have found. When he was prosecuted for that offence before the justices, the prosecution, the county council, merely proved the previous decision of the quarter sessions on this question and submitted that that was conclusive of the matter and that the justices were not entitled to go afresh into the question of whether this path was or was not a public path. The appellant submitted that the justices were required to go into the matter again; he sought to open it again and the justices' finding as stated in their opinion is that the appellant was estopped from calling evidence on this issue, the estoppel being based on the earlier decision of quarter sessions under s 31.

It is a nice point as anyone who hears the circumstances will appreciate. The main argument for the respondent below was that this was a case of issue estoppel; this was a case in which the issue, public path or not, having been decided by a competent court, any subsequent court was estopped from rehearing the matter, and indeed the appellant was estopped from calling evidence with a view to hearing the issue afresh.

We have had the assistance of counsel on this question, and counsel for the appellant contends that this is not a case of issue estoppel. It will not, I hope, be thought disrespectful of his argument if I summarise the way in which I understand it to be put. He says first of all that issue estoppel is a topic still largely undeveloped in the law of this country and he has referred us to at least two dicta of Lord Parker CJ¹ indicating that in Lord Parker CJ's view there was little, if any, room for issue estoppel in criminal cases; it is of course to be remembered that the charge of obstructing the highway was a criminal charge, albeit a relatively minor one. For my part, without developing the argument more fully, I accept what counsel submits on this issue, and if this turned solely on the somewhat esoteric principle of issue estoppel, I would have been inclined to say that the justices were wrong, and that issue estoppel would not bar the reconsideration on evidence of the issue whether this path was a public path.

But in my judgment there is a shorter and far more reliable route to the answer which the justices reached, and that is on the submission of counsel for the respondent that the decision of quarter sessions in this case was a decision in rem, a decision which bound the world so far as this issue was concerned, and therefore a decision which prevented the justices from going into the matter again.

His principal authority is *Mayor, Aldermen and Citizens of the City of Wakefield v Cooke*². The headnote accurately illustrates the point then in issue. It says³:

'In proceedings taken by an urban authority under the Private Street Works Act, 1892, ss. 6, 7, 8, to compel owners of premises to do private street works in a street, the determination by a Court of summary jurisdiction that the street is a highway repairable by the inhabitants at large is a judgment in rem and conclusive as to the status of the street, and the question whether it is so repairable is res judicata in any future proceedings under these sections.'

The speech dealing with this matter is that of the Earl of Halsbury LC. His Lordship said⁴:

'... let us turn for a moment to the statute which is before your Lordships, and the distinction will be at once apparent. Instead of its being left to the determination of the local authority to give notice, and when that notice is disobeyed

¹ In *Hailsham Rural District Council v Moran* (1966) 64 LGR 367 at 373, 374 and *Mills v Cooper* [1967] 2 All ER 100 at 102, 103, [1967] 2 QB 459 at 465, 466.

² [1904] AC 31, [1900-3] All ER Rep 791.

³ [1904] AC at 31.

⁴ [1904] AC at 35, [1900-3] All ER Rep at 793.

a to do the work themselves, and thereupon when they have done the work themselves to sue for the amount against the person who disobeyed their order—instead of that, a whole machinery is created by which the question of whether or not the street is repairable by the parish shall be determined by a particular tribunal—a tribunal erected for this express purpose; and when one looks to see what that particular forum erected for that purpose is to determine, it is sufficient to see the number of objections which can be made and what has to be determined: “(a) That an alleged street or part of a street is not or does not form part of a street within the meaning of this Act” (that is a question which relates to a different class of things that the urban authority have got to do). “(b) That a street or part of a street is (in whole or in part) a highway repairable by the inhabitants at large.” So that, instead of being, as it is, under the Public Health Act [1875], something removed from the jurisdiction of the justices, who have only power to issue process and enforce the payment of a sum of money payable under the circumstances stated in the 150th section, in this Act the very question whether or not a particular road is or is not a highway repairable by the parish is remitted to that tribunal, and remitted to that tribunal for the purpose of determination.’

d It seems to me that virtually every word of that passage could be said of the Act with which we are presently concerned, because I have already referred to the Act sufficiently to show quarter sessions here is set up deliberately as a tribunal for the express purpose on application of determining whether the path is a public path or not. If the decision in the *Wakefield Corporation* case¹ was a decision in rem, as it was in the view of their Lordships, then it seems to me abundantly clear that the decision

e of quarter sessions in this case was also a decision in rem.

I must say that I reach that conclusion without regret, because it really would be an extraordinary thing if the situation were otherwise. It would mean that the present appellant could go to the justices and relitigate the whole issue of the status of this path only to find, if he succeeded before the justices, that as soon as the definitive map was published, the definitive map put him back in the position in which he had

f been before he sought to relitigate the issue.

On the face of it there is a lacuna in the Act, because there is nothing which in terms says that the decision of quarter sessions shall be conclusive, pending the publication of the definitive map, but that the support for quarter sessions in the definitive map is inevitable in these circumstances is something which seems entirely clear to me, and accordingly it would be at the least very odd if the decision were not a decision in rem

g and were capable of being relitigated with those unfortunate consequences.

For those reasons I have come to the conclusion that the justices were right, although I base my conclusion on somewhat different grounds, and I would dismiss the appeal.

CUSACK J. I agree.

CROOM-JOHNSON J. I agree.

h *Appeal dismissed.*

Solicitors: *A F & R W Tweedie*, agents for *G L W Armstrong*, Carlisle (for the appellant), *Sherwood & Co*, agents for *T J R Whitfield*, Carlisle (for the respondent).

Jacqueline Charles Barrister.

j

¹ [1904] AC 31, [1900-3] All ER Rep 791

R v Hodgson and others

COURT OF APPEAL, CRIMINAL DIVISION

ROSKILL LJ, THOMPSON AND SHAW JJ

15th FEBRUARY 1973

Criminal law – Verdict – Alternative offence – Allegations in indictment amounting to or including allegation of another offence – Rape – Indecent assault on woman – Count alleging rape – Victim aged 14 – Age irrelevant to charge of rape – Defence of consent – Consent no defence to indecent assault where victim under age of 16 – Acquittal of rape – Whether allegation of rape including allegation of indecent assault – Whether open to jury to convict of indecent assault – Sexual Offences Act 1956, s 14 (1), (2) – Criminal Law Act 1967, s 6 (3).

The accused were charged with rape. At the time of the alleged offence the victim was 14 years old. The defence of each of the accused was that the girl had consented to have sexual intercourse. In his summing-up the judge directed the jury that if they found the accused not guilty of rape, it was open to them under s 6 (3)^a of the Criminal Law Act 1967 to find the accused guilty of indecent assault, contrary to s 14 (1)^b of the Sexual Offences Act 1956. The accused were acquitted of rape but convicted of indecent assault. They appealed contending that the allegations in the indictment could not 'amount to or include' an allegation of indecent assault, within s 6 (3) of the 1967 Act, since age, while not relevant to a charge of rape, was an essential averment in a charge of indecent assault, for the question whether consent was a defence to the charge depended, by virtue of s 14 (2) of the 1956 Act, on whether the victim was under the age of 16.

Held – The accused had been properly convicted and the appeals would be dismissed. Age was not an ingredient of or an essential averment in the framing of a count of indecent assault contrary to s 14 (1) of the 1956 Act. Every charge of rape contained the essential ingredients of indecent assault—an assault and indecency. It followed that where a man was acquitted of rape on the ground of the victim's consent it was nonetheless open to the jury to convict him, where the victim was under 16, of indecent assault because the consent which provided a defence to the charge of rape could not, by virtue of s 14 (2), provide a defence to the charge of indecent assault (see p 556 g to p 557 c, post).

R v Fisher [1969] 1 All ER 265 distinguished.

Dictum of Cusack J in *R v Mochan* [1969] 1 WLR at 1332 disapproved.

Notes

For conviction of other offences on an indictment for rape, see 10 Halsbury's Laws (3rd Edn) 749, para 1444.

For the Sexual Offences Act 1956, s 14, see 8 Halsbury's Statutes (3rd Edn) 425, and for the Criminal Law Act 1967, s 6, see *ibid* 557.

Cases referred to in judgment

R v Fisher, Marshall and Mitchell [1969] 1 All ER 265, sub nom *R v Fisher, R v Marshall, R v Mitchell* [1969] 2 QB 114, [1969] 2 WLR 453, Digest (Cont Vol C) 203, 3510b.

R v Lillis [1972] 2 All ER 1209, [1972] 2 QB 236, [1972] 2 WLR 1409, 56 Cr App Rep 573, CA.

R v Mochan, R v Latham, R v Micallef [1969] 1 WLR 1331, 54 Cr App Rep 5, Digest (Cont Vol C) 203, 3511b.

^a Section 6 (3) is set out at p 555 b and c, post

^b Section 14, so far as material, is set out at p 556 j and p 557 a, post

- a* R v Stephenson [1912] 3 KB 341, 82 LJKB 287, 107 LT 656, 76 JP 408, 13 Cox CC 214, 8 Cr App Rep 36, CCA, 14 Digest (Repl) 245, 2103.

Appeals

- b* The appellants, Roger Harry Watson Hodgson, Roger Johnson Marshall, David Douglas Hadden and Kevin Alan Moon, were charged on an indictment in the Crown Court at Lewes before Thesiger J and a jury, that each appellant, save Hadden, had, on 23rd July 1972, 'had sexual intercourse with [a named girl] without her consent, she being fourteen years of age'; Hadden was charged with attempt to commit the same offence. Each appellant pleaded not guilty on the ground that the girl had consented to have sexual intercourse. On 23rd November 1972 each of the appellants was found not guilty of rape, or attempted rape, but in each case guilty of indecent assault. They were sentenced as follows: (i) Hodgson, six months' imprisonment, three months' imprisonment concurrent for breach of a conditional discharge of two years passed on 30th September 1971 and two months' concurrent for breach of such a sentence suspended for one year imposed on 31st January 1972; (ii) Marshall, six months' imprisonment; (iii) Hadden, six months' detention and three months' detention concurrent for breach of a conditional discharge of two years passed on 30th September 1971; (iv) Moon, three months' detention and three months' detention concurrent for breach of a conditional discharge of 12 months imposed on 1st November 1971. They appealed, by leave of the full court, against their convictions and sentences. The facts are set out in the judgment of the court.

D H Penry-Davey for the appellants.

Christopher Sumner for the Crown.

- e* **ROSKILL LJ** delivered the following judgment of the court. This is an appeal, brought by leave of the full court on 22nd January 1973, by four young men, one of whom one might almost still call a boy, against their respective convictions before Thesiger J at Lewes Crown Court on 23rd November 1972. They are, respectively, Hodgson who was 21 at the time, Marshall who was 20, Hadden who was 18 and Moon who was 15. The first three I have named are now in the dock in this court, having been sentenced by the learned judge in the case of Marshall and Hodgson to sentences totalling six months' imprisonment and in the case of Hadden to six months in a detention centre. Moon has served the three months' detention centre sentence passed on him by the learned judge and is accordingly no longer in custody.

- f* Three of these boys were charged with the rape of the girl concerned and the fourth with attempted rape. Of those charges of rape and attempted rape respectively they were all acquitted. They were convicted of indecent assault in circumstances I shall relate more fully in a moment.

- g* It is not necessary to go into the facts at any great length save to say that the story which was disclosed by the Crown was, by any standards, nauseating—harsher language could legitimately be used—for the girl who was the subject of the charges of rape and the convictions of indecent assault was about 14 at the time. It is true she was not a virgin, and she was referred to by the learned judge, before he passed sentence, as a 'tart', but these boys were 'greasers' and there is no doubt when one looks at the evidence, that they subjected this girl, whatever her part, to a quite horrifying experience. The girl had had, apparently fairly recently, a brain operation. She was simple. When she was found afterwards, she was semi-dazed, covered in dirt, there was gravel in her hair, and her speech was slurred. Her own doctor said at her trial that she had brain weakness and was somewhat vacant. Her mental processes were slow because both of her general condition and the barbiturates she had been taking. She had been drinking that night, and of course it is elementary that alcohol on top of barbiturates can have, and did on that occasion have, a devastating effect.

I only mention these matters because it has been suggested in support of the appeals against sentence that these young men have been convicted and sentenced for purely anti-social behaviour and not for criminal activity. This court, which proposes to uphold the convictions and sentences, wishes emphatically to make it clear that it rejects the arguments that these young men have only been convicted of and sentenced for anti-social behaviour. They have all been convicted of serious indecent assaults against a girl of 14 who, whatever her part, was subjected that evening to a series of sexual assaults by these young men in furtherance of their own lusts.

I now pass to the central point in this case on which leave to appeal was given by the full court. There was in the original indictment against each of these young men, a charge of rape only. The charge was framed in the usual way, that is to say that the three who were charged with rape, had sexual intercourse with the girl without her consent. Hadden was charged only with attempted rape. There was not in the indictment as originally framed (and it was right that there was not) any averment relating to the age of the girl. For a reason which is fairly obvious in the light of what happened later, the learned judge, before the trial started, in the presence of counsel, but not in the presence of counsel actually appearing for the Crown at the trial, gave a direction that the words 'she being 14 years of age' should be added to each of the counts of rape and to the count which charged attempted rape. That was done and the trial proceeded on that basis.

With the greatest respect to a most experienced judge, that addition ought not to have been made. It was an irrelevant averment and it is quite wrong that any difficulties which may arise under s 6 (3) of the Criminal Law Act 1967 should be sought to be overcome in advance by adding to the major charge in the indictment an unnecessary and in fact irrelevant averment. This court agrees with what was said on this point by Cusack J in *R v Fisher*¹ tried by that learned judge at Newcastle in December 1968. In that case the count charging rape included the age of the girl. The learned judge expressed the view that that averment as to age was irrelevant and ought not to have been added. This court agrees and proceeds to deal with the present appeal on the footing that these irrelevant words had not been added.

The critical question is whether, these counts being of rape or in the one case of attempted rape, the judge was right in leaving to the jury the possibility of convicting these men, as ultimately each was convicted, of indecent assault. That is the central point on which leave to appeal was given.

The legal history of this problem is complex and arises in this way. As is well known, under the Sexual Offences Act 1956, Sch 2, Part I, provision was made that on a charge of rape, there were no less than nine other offences of which a jury might find an accused guilty if they acquitted him of rape. It is not necessary to go through all those nine in detail. Suffice it to say that they include in the right-hand column '(v) of intercourse with a girl between thirteen and sixteen' and in (ix) in the right hand column 'of indecent assault on a woman'. When the Criminal Law Act 1967 was passed by Parliament, it was thought necessary, in connection with the enactment of s 6 (3), to repeal parts of the earlier legislation. When one looks at the Criminal Law Act 1967, Sch 2, para 13 (1), one finds:

'The following provisions (under which on a trial on indictment a person may be found guilty of certain offences if found not guilty on a charge of another offence) shall cease to have effect . . . (d) in the Sexual Offences Act 1956, in Schedule 2,—(i) in item 1 (a), paragraphs (iv), (v), (vi) and (viii) in column 4 (conviction of intercourse with girl under 13, or under 16, or with defective, or of incest, on charge of rape) . . .'

When one passes from that provision to the provisions of Sch 3, Part III, to the 1967 Act, one finds against the rubric of the Sexual Offences Act 1956, the repeal 'In

a Schedule 2, in item 1, paragraphs (iv) to (ix) in column 4 together with the word "or" at the end of paragraph (iii) . . .

Therefore, so far as concerns the present convictions of indecent assault, it is clear that they can only be supported if they can be justified under s 6 (3) of the Criminal Law Act 1967. This subsection has been before this court on a number of occasions since it was first enacted and it is well known that it has unfortunately given rise to difficulties. The most recent case is *R v Lillis*¹. Section 6 (3) reads thus:

b 'Where, on a person's trial on indictment for any offence except treason or murder, the jury find him not guilty of the offence specifically charged in the indictment, but the allegations in the indictment amount to or include (expressly or by implication) an allegation of another offence falling within the jurisdiction of the court of trial, the jury may find him guilty of that other offence or of an
c offence of which he could be found guilty on an indictment specifically charging that other offence.'

In *Fisher's case*² Cusack J held, as this court thinks rightly, that where a person was charged with rape, it was not open to a jury to convict him by reason of the provisions of s 6 (3) on a charge of unlawful sexual intercourse with a girl under the age of 16.
d That was all *Fisher's case*² decided. This court respectfully agrees with the learned judge's decision, which in substance anticipated the decision and reasoning in *Lillis's case*¹.

The present point arose for direct decision in *R v Mochan*³ also tried by Cusack J at the Monmouthshire Assizes. The point which had arisen in *Fisher's case*² regarding the possibility of an alternative conviction for unlawful sexual intercourse with a
e girl under 16 also arose. In that latter respect the learned judge followed his previous decision in *Fisher's case*². But he also held that the position was different in the case of indecent assault, and that it was open on a charge of rape, if the jury acquitted of rape, for them to convict a defendant of indecent assault. The learned judge dealt with the matter in this way. When dealing with *Fisher's case*², he said⁴:

f 'This case is weaker than *Fisher's case*² because there there was the averment in the indictment that the girl was under 16, although that is an unnecessary averment for the purposes of rape. In the present indictment the age is rightly omitted. If the absence of consent is the essence of the offence of rape I do not see how it includes an offence distinguished from rape by being capable of being committed with consent. I shall direct the jury that it is not open to convict
g of unlawful sexual intercourse.'

When he dealt with the present point, he said⁵:

h 'The situation with regard to indecent assault is different. Rape implies an assault and that the assault was indecent. I shall direct the jury that indecent assault is an alternative verdict open in this case.'

It is that decision which counsel for the appellants has sought to criticise in this court.

It is interesting to observe what is said about that decision in a note in the Criminal Law Review⁶. The learned judge's decision was not criticised. But the underlying reasoning was criticised by the unnamed writer who said:

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1 [1972] 2 All ER 1209, [1972] 2 QB 236
2 [1969] 1 All ER 265, [1969] 2 QB 114
3 [1969] 1 WLR 1331
4 [1969] 1 WLR at 1332
5 [1969] 1 WLR at 1333
6 [1969] Crim LR 663 at 664

'Where the offence alleged in the indictment consists of, for example, four ingredients, A, B, C and D, it would seem that the accused could properly be convicted on that indictment of any offence compounded solely of these ingredients and no other. Thus he might be convicted of an offence which consisted in ingredients A, B and C or A, B and D or A and B, and so on. He could not, however, be convicted of any offence containing an additional ingredient, E, not being an essential constituent of the offence charged. The victim's being under sixteen is not an essential constituent of rape—i.e., it is ingredient E in the above example. [The writer goes on:] The judge gave an additional reason why the allegation of rape did not include an offence under section 6 of the Sexual Offences Act—"If the absence of consent is the essence of the offence of rape I do not see how it includes an offence distinguished from rape by being capable of being committed with consent". This is more difficult to follow. The absence of consent is an essential ingredient of rape which is not required on a charge under section 6; if fornication or adultery were an offence, surely it would be possible to convict of it on a charge of rape. It is indeed not entirely clear that this additional reason given by the judge is consistent with his decision that indecent assault was an alternative verdict open to the jury. Since the girl was under sixteen, this too was an offence that was capable of being committed with consent. It is respectfully submitted that the second reason given is unsound.'

With great respect to Cusack J, this court agrees with that criticism. The true reason for the distinction is that age, though irrelevant to the charge of rape, is relevant to the charge of unlawful sexual intercourse, and therefore the 'red pencil' test could not be applied to the count charging rape to justify conviction of unlawful sexual intercourse. Counsel for the appellants has sought to persuade us that the count of indecent assault is not, as it were, a 'built in' alternative under s 6(3), because he argues, that age is likewise an essential averment in a charge of indecent assault, since otherwise acquittal on a rape count on the ground of consent would also be a defence to a charge of indecent assault unless the girl was under 16. His argument was in effect that since age is irrelevant to the rape count, there cannot be a conviction on any alternative count to which the age is relevant. He claimed that there ought to have been an alternative count of indecent assault on a girl under the age of 16 if the prosecution wished to seek conviction of that offence as an alternative to the rape charge.

That argument, in the view of this court, is unsound. The offence against s 14 (1) of the Sexual Offences Act 1956, as *R v Stephenson*¹ (decided under earlier legislation) shows, is indecent assault. The position is different in the case of the offence created by s 5 of the 1956 Act, namely unlawful sexual intercourse with a girl under 13. The offence here in question is indecent assault contrary to s 14 (1). It is properly charged without the girl's age being averred. Age is not an essential ingredient of or essential averment in the framing of the count, though sometimes it is included. Age only arises, if at all, when the question of consent is raised on the part of the accused. Then the prosecution have to show that that defence of consent is not open to the accused as a matter of law because of the provisions of s 14 (2) of the Sexual Offences Act 1956 that in a case of a girl under 16 consent cannot be a defence.

There is a marked contrast between the language of s 5 and the language of s 14 of the Sexual Offences Act 1956. The former provides that it is a felony—that no longer exists—for a man to have unlawful sexual intercourse with a girl under the age of 13. Therefore, if a man is charged under s 5, age is an essential averment. But if he is charged with an offence against s 14 (1) the age, as I have already said, is not an essential averment, for the subsection provides:

'It is an offence, subject to the exception mentioned in subsection (3) of this section, for a person to make an indecent assault on a woman.'

a There is nothing about age. Subsection (2) provides:

‘A girl under the age of sixteen cannot in law give any consent which would prevent an act being an assault for the purposes of this section.’

b It is plain, of course, that a charge of rape of necessity involves two of the same constituent elements that are also involved in the charge of indecent assault—an assault and indecency. Every charge of rape therefore as it were contains within itself the essential ingredients of indecent assault. It follows that in a case where a man is acquitted of rape nonetheless it is open to the jury to convict him, in a case where the victim is under 16 years of age, of indecent assault, because the consent which provides a defence to the charge of rape cannot as a matter of law provide a defence to the charge of indecent assault.

c Therefore, in the view of this court, although the learned judge ought not to have added the irrelevant words at the end of the rape count, nonetheless he was entitled to direct the jury that it was open to them on the facts of this case if they acquitted of rape, to convict of indecent assault. It is to be observed that on their own stories, none of the appellants could for one moment have any defence to indecent assault once it was proved that this girl was under 16 years of age.

d It was also said that as a matter of practice it is unjust, where the real charge is rape, to leave to the jury an alternative charge of indecent assault on the ground that the girl concerned was incapable of consent because she was under 16. In the view of this court, it is impossible to generalise. No two cases are precisely alike. In some cases one can imagine circumstances where it might be said to be unfair that if a jury were to acquit on the rape charge on the ground of consent, that the accused should be put in peril on an indecent assault charge. But there are undoubtedly other cases, and in the view of this court the present is without question such a case, in which the overall interests of justice require that a charge of indecent assault should be left to the jury as what is sometimes called a ‘built in’ alternative to the rape charge. That was what the learned judge did in the present case. In the view of this court what he did in this respect was justified.

f We have also been referred to a number of cases. It is not necessary to go through them. They were heard in the Court of Criminal Appeal in the early days following the Criminal Law Amendment Act 1922. All it is necessary to say is that there is nothing in them which assists us towards a solution of the present case. All the appeals against conviction are dismissed.

g So far as sentences are concerned, in the view of this court this was an exceedingly bad case of indecent assault by all these boys on a girl of whom, although they were acquitted of her rape, they unquestionably took advantage in the condition in which she was that night. This court sees nothing wrong in the sentences of six months’ imprisonment or detention passed in the case of the three boys in the dock or in the three months’ sentence passed on Moon which has already been referred to. In the view of this court these sentences were in no way severe. Furthermore each of these young men was not only guilty of criminal conduct that night, but each of them has a variety of previous convictions. Their records are lamentable. Their conduct that night was criminal. What injury they inflicted on that girl only they know. There is no ground for extending any leniency towards them and all their appeals against sentence are dismissed.

j *Appeals dismissed.*

Solicitors: Registrar of Criminal Appeals (for the appellants); Director of Public Prosecutions.

S A Hatteea Esq. Barrister.

Cory Lighterage Ltd v Transport and General Workers Union and others a

COURT OF APPEAL, CIVIL DIVISION

LORD DENNING MR, BUCKLEY AND ORR LJJ

26th 27th, 28th, 29th MARCH, 17th APRIL 1973

Industrial relations – Industrial dispute – Act done in contemplation or furtherance of an industrial dispute – Act not actionable in tort – Dispute between workmen and workmen – Workman allowing membership of trade union to lapse – Fellow workers refusing to work with him – Union threatening employers with strike action if workman not withdrawn – Employers supporting union's membership policy – Employers unable to dismiss workman without consent of statutory board – Consent refused – Worker suspended on full pay – Whether a dispute between employers and union – Whether union's threats made in contemplation or furtherance of industrial dispute – Industrial Relations Act 1971, ss 132 (1), (2), 167 (1). b

Industrial relations – Industrial dispute – Meaning – Dispute between employers and workmen – Dispute relating wholly or mainly to specified matters – Terms and conditions of employment – Suspension of employment – Dispute between workmen and workmen not an industrial dispute – Whether 'terms and conditions of employment' confined to contractual terms and conditions – Whether 'suspension of employment' including suspension on full pay – Industrial Relations Act 1971, s 167 (1). c

Industrial relations – Industrial dispute – Act done in contemplation or furtherance of an industrial dispute – Act not actionable in tort – Act not actionable although consisting of inducement or threat of breach of contract – Act also constituting unfair industrial practice – Whether fact that act an unfair industrial practice capable of rendering it actionable in tort – Industrial Relations Act 1971, s 132. d

S was a lighterman employed by the plaintiffs on one of their barges in the Port of London. Like his fellow employees S was a member of the defendant trade union; it was a long tradition in the London docks that every man should belong to a union. However, for reasons of his own, S decided to leave the union and, in June 1972, he stopped paying his dues. In consequence his membership lapsed. On Thursday, 28th September he informed the skipper of his tug, who was also a shop steward of the union, that he was in arrears with his contributions. In consequence the crew refused to work with S unless his union dues were fully paid up by the following Monday. The skipper also reported the matter to the union which endorsed the crew's decision. An official of the union told the plaintiffs' manager what had happened and said that if S was not withdrawn from the tug she 'will not sail on Monday, nor will any of the rest of the [plaintiffs'] tugs'. The plaintiffs had no quarrel with the union about their policy; they accepted the principle of 100 per cent union membership. In consequence of the attitude adopted by the union and the men the plaintiffs sent S home on full pay. Under the Dock Workers Employment Scheme 1967^a, however, they were unable to dismiss S without the consent of the National Dock Labour Board. The board refused an application by the plaintiffs for consent to his dismissal. Accordingly S remained at home on full pay. Thereafter the plaintiffs issued a writ against the union and certain officials of the union claiming a declaration that their conduct was unlawful and by notice of motion sought an interim order restraining the union and two other defendants from instructing, directing or recommending to any union member in the plaintiffs' employment that he should withhold his labour because of the employment of S as a lighterman. Brightman J^b dismissed the motion on the grounds e

^a See the Dock Workers (Regulation of Employment) (Amendment) Order 1967 (SI 1967 No 1252), Sch 2

^b Page 341, ante f

a that, under s 132 (1), (2)^c, of the Industrial Relations Act 1971, the defendants' acts were not actionable in tort since they had been done in contemplation or furtherance of an 'industrial dispute' within s 167 (1)^d of the 1971 Act. On appeal,

Held – (i) The acts of the defendants had not been done 'in furtherance of an industrial dispute', since the only dispute which existed at the time the acts were done was a dispute between S and the defendants, i.e. a dispute between workmen and workmen, which did not fall within the definition of 'industrial dispute' in s 167 (1). Furthermore the defendants had failed to establish that the acts done by them had been done 'in contemplation of' a dispute between the defendants and the plaintiffs; the plaintiffs were not concerned to espouse the cause of S and the threats of strike action had been made by the defendants in the expectation that they would be successful and that the plaintiffs would agree to comply with the defendants' demands.

c Accordingly the defendants' acts were actionable in tort (see p 562 e and j to p 563 a, p 565 e f and h to p 566 b, p 570 c, p 571 f to p 572 a and p 572 j to p 573 b, post).

(ii) The plaintiffs were not, however, entitled to the interlocutory relief sought, and the appeal would be dismissed, because (per Lord Denning MR) their action was doubtful of success in that it appeared likely that S had been actuated so much by ill-will that the defendants had sufficient justification or excuse for their conduct (see p 567 b to g and p 569 c, post); (per Buckley and Orr LJ) the loss flowing from the allegedly wrongful acts was wholly financial, precisely quantifiable, modest in amount and well within the financial competence of the union to recoup; there was no evidence that any of the respondents to the motion intended to do any of the things mentioned in the notice of motion or that the status quo would be disturbed pending the trial of the action; in the circumstances the balance of convenience lay decisively against the grant of interlocutory relief (see p 572 f to h and p 573 d, post).

Semle. The words 'terms and conditions' in para (a) of the definition of 'industrial dispute' in s 167 (1) of the 1971 Act relate to contractual terms and conditions and the words 'suspension of employment' in para (b) do not refer to a mere suspension from duty but to temporary discontinuance of both work and pay under a contract which permits such discontinuance whilst the contract of employment remains in force. Accordingly a dispute between employers and workers relating wholly or mainly to the suspension of a worker from duty on full pay would not be an 'industrial dispute' within s 167 (1) (see p 566 c to e, p 572 b to d and p 573 c, post).

Per Lord Denning MR. Where, by virtue of s 132 of the 1971 Act, conduct would not otherwise be actionable in tort, the fact that that conduct constitutes an unfair industrial practice cannot have the effect of making it actionable in tort (see p 568 h to p 569 a, post).

Decision of Brightman J, p 341, ante, affirmed on other grounds.

Notes

For industrial disputes, see Supplement to 38 Halsbury's Laws (3rd Edn), para 677E, 2.

For restrictions on proceedings in tort, see *ibid*, para 677G, 2.

h c Section 132, so far as material, provides:

'(1) An act done by a person in contemplation or furtherance of an industrial dispute shall not be actionable in tort on the ground only—(a) that it induces another person to break a contract to which that other person is a party or prevents another person from performing such a contract, or (b) that it consists in his threatening that a contract (whether one to which he is a party or not) will be broken or will be prevented from being performed, or that he will induce another person to break a contract to which that other person is a party or will prevent another person from performing such a contract.

'(2) For the avoidance of doubt it is hereby declared that an act done by a person in contemplation or furtherance of an industrial dispute is not actionable in tort on the ground only that it is an interference with the trade, business or employment of another person, or with the right of another person to dispose of his capital or his labour as he wills ...'

d Section 167 (1), so far as material, is set out at p 570 a and b, post

For the Industrial Relations Act 1971, ss 132, 167, see 41 Halsbury's Statutes (3rd Edn) 2155, 2181.

Cases referred to in judgment

Acrow (Automation) Ltd v Rex Chainbelt Inc [1971] 3 All ER 1175, [1971] 1 WLR 1676, CA.
Brekkes Ltd v Cattel [1971] 1 All ER 1031, [1972] Ch 105, [1971] 2 WLR 647.

Conway v Wade [1909] AC 506, [1908-10] All ER Rep 344, 78 LJKB 1025, 101 LT 248, HL, 45 Digest (Repl) 572, 1436.

Crofter Hand Woven Harris Tweed Co Ltd v Veitch [1942] 1 All ER 142, [1942] AC 435, 111 LJPC 17, 166 LT 172, HL, 45 Digest (Repl) 534, 1175.

Cunard v Stacey [1955] 2 Lloyd's Rep 247, CA.

Cutler v Wandsworth Stadium Ltd [1949] 1 All ER 544, [1949] AC 398, [1949] LJ 824, HL, 25 Digest (Repl) 504, 582.

Daily Mirror Newspapers Ltd v Gardner [1968] 2 All ER 163, [1968] 2 QB 762, [1968] 2 WLR 1239, CA, Digest (Cont Vol C) 559, 117A.

Mulcahy v R (1868) LR 3 HL 306, HL, 45 Digest (Repl) 299, 162.

Morgan v Fry [1968] 3 All ER 452, [1968] 2 QB 710, [1968] 3 WLR 506, [1968] 2 Lloyd's Rep 82, CA, Digest (Cont Vol C) 1011, 1468A.

Quinn v Leatham [1901] AC 495, [1900-3] All ER Rep 1, 70 LJPC 76, 85 LT 289, 65 JP 708, HL, 45 Digest (Repl) 280, 33.

Rookes v Barnard [1964] 1 All ER 367, [1964] AC 1129, [1964] 2 WLR 269, [1964] 1 Lloyd's Rep 28, HL, 45 Digest (Repl) 308, 227.

Stratford (J T) & Son Ltd v Lindley [1964] 3 All ER 102, [1965] AC 269, [1964] 3 WLR 541, [1964] 2 Lloyd's Rep 133, HL, 45 Digest (Repl) 309, 228.

Taff Vale Railway Co v Amalgamated Society of Railway Servants [1901] AC 426, 70 LJKB 905, 83 LT 474, HL, 45 Digest (Repl) 528, 1125.

White v Riley [1921] 1 Ch 1, [1920] All ER Rep 371, 89 LJCh 628, 124 LT 168, CA, 45 Digest (Repl) 573, 1441.

Cases also cited

Attorney-General v Adelaide Steamship Co Ltd [1923] AC 292, [1923] All ER Rep 31, HL.
Bird v British Celanese Ltd [1945] 1 All ER 488, [1945] KB 336, CA.

Eastham v Newcastle United Football Club Ltd [1963] 3 All ER 139, [1964] Ch 413.

Edwards v Society of Graphical and Allied Trades [1970] 3 All ER 689, [1971] Ch 354, CA.

Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd [1967] 1 All ER 699, [1968] AC 269, HL.

Faramus v Film Artistes' Association [1964] 1 All ER 25, [1964] AC 925, HL.

Hodges v Webb [1920] 2 Ch 70, [1920] All ER Rep 447.

Huntley v Thornton [1957] 1 All ER 234, [1957] 1 WLR 321.

Midland Cold Storage Ltd v Steer [1972] 3 All ER 941, [1972] Ch 630.

Nagle v Feilden [1966] 1 All ER 689, [1966] 2 QB 633, CA.

R v Bunn (1872) 12 Cox CC 316.

R v Kamara [1972] 3 All ER 999, [1973] 2 WLR 126, CA.

R v Rowlands (1851) 17 QB 671, 117 ER 1439, CCR.

Reynolds v Shipping Federation Ltd [1924] 1 Ch 28, [1923] All ER Rep 383.

Temperton v Russell [1893] 1 QB 715, [1891-94] All ER Rep 724, CA.

Torquay Hotel Co Ltd v Cousins [1969] 1 All ER 522, [1969] 2 Ch 106, CA.

Valentine v Hyde [1919] 2 Ch 129.

Interlocutory appeal

By a writ issued on 5th January 1973 Cory Lighterage Ltd brought an action against (1) the Transport and General Workers Union ('the union'), (2) Jack Larkin Jones, (3) William A J Lindley, (4) Henry John Medhurst, (5) George James Spragg and (6) Frederick T Evans, claiming a declaration that certain threats alleged to have been

- a* made by the defendants were unlawful and an injunction restraining the first three defendants and each of them by themselves, their servants or agents, from giving any instructions, directions or recommendations to any member of the union in the plaintiffs' employ to withdraw or withhold his labour by reason of the employment by the plaintiffs of one Andrew Shute to work as a lighterman. The second defendant was at all material times the general secretary of the union; the third defendant was at all material times the secretary of the waterways section of the union; the fourth defendant was at all material times the captain of the motor tug Swiftstone, one of the plaintiffs' tugs, and a shop steward of the union; the fifth and sixth defendants were at all material times shop stewards of the union. By notice of motion, also dated 5th January 1973, the plaintiffs sought an injunction, until judgment or further order, against the first three defendants ('the respondents') in the same terms as that claimed in the writ. On 22nd February 1973 Brightman J¹ dismissed the motion and the plaintiffs appealed.

Alan Campbell QC and Marcus Edwards for the plaintiffs.

Ralph Gibson QC, K W Wedderburn and Ian Hunter for the respondents.

- d* *Cur adv vult*
17th April. The following judgments were read.

LORD DENNING MR. In this action the leading actor is Andrew Shute, but he is the only one on the stage who has not given evidence. To some he is the hero. To others the villain of the piece. To his union he is 'something of an eccentric'. He is a lighterman on the London river. In June 1972 he was one of the crew of the tug Swiftstone. She was one of a fleet of five tugs belonging to the plaintiffs, Cory Lighterage Ltd ('the employers'). The tugs go to wharves on the river, pick up loads of refuse, and take them off for deposit. They do this under contract between the employers and the Greater London Council.

- f* Mr Shute was earning good money. His fixed basic weekly wage was £42.50. In addition he earned overtime. Yet he decided to leave his union. In June 1972 he stopped paying his dues. In consequence, after 13 weeks, his membership lapsed. He was no longer a member. He immediately took steps to make it known. On Thursday, 28th September 1972, he went aboard the tug at 6 a.m. He did his work with the others. Then at 1 p.m. he went to the bridge of the tug. He was quite calm. He told skipper Henry Medhurst: 'I am 13 weeks in arrear with my union contributions'. The skipper told the crew about it. They were very angry with Mr Shute. It is a long tradition in the London docks that every man should be a member of a union. The crew all said: 'We won't work with him unless he pays up his dues'. The skipper went back to Mr Shute and told him: 'The crew will not work with you unless you have a fully-paid up union card by Monday morning.' Mr Shute replied: 'That's what I wanted you to say. There will be a writ for you on Monday morning, for you personally.'

- h* The skipper was himself a shop steward of the union. So he got into touch with Mr Lindley, the secretary of the waterways section of the union. Mr Lindley said to the skipper: 'I agree with you and the crew. Your action is in line with union policy. Don't sail with Shute next Monday unless his union dues are fully paid up by then'.

- j* Both the skipper and the union secretary then telephoned the manager of the employers, Mr Crozier, and told him what had happened. They said: 'If Mr Shute is not withdrawn from the tug, the Swiftstone will not sail on Monday, nor will the rest of the Cory tugs.' Now the employers have no quarrel with the union about their policy. They know full well that the principle of 100 per cent union membership has long been practised in dockland. It has been informally recognised and accepted

by the employers and the National Dock Labour Board. So Mr Crozier, the manager, did not resist the demand made by the skipper and the union secretary. He acceded to it. He felt he had no alternative. So at zero hour, early on Monday, 2nd October, at 6 a.m., he went to the base where the tugs were lying. All the crew were standing on the quay. None of them had boarded his tug except Mr Shute. He was in the Swiftstone. Mr Crozier, the manager, went aboard her. He ordered Mr Shute off. After some hesitation he came off. The manager told him: 'The men refuse to sail with you. I must safeguard the company's contract and the jobs of the other men—so I must send you home. There is no work for you to do.'

So Mr Shute went home. The employers paid his wages. Two months later the incident repeated itself. On Monday morning, 4th December 1972, Mr Shute telephoned the manager, and said: 'On counsel's instructions I am turning up for work tomorrow morning at six o'clock.' Without waiting for an answer, he slammed down the receiver. So on Tuesday morning at 5.30 a.m. the manager, Mr Crozier, went again to the base. Again Mr Shute was aboard the tug. Again the men were ashore. Mr Crozier asked the men: 'Will you sail with Shute?' They made it clear that they would not. They used words which I will not try to repeat. Mr Crozier told Mr Shute that the men would not sail with him. Mr Shute said: 'Are you ordering me off?' Mr Crozier said: 'That is my intention.' Mr Shute said: 'That is what I wanted you to say'. He left the tug remarking: 'I will not rest until I have Mr Lindley's head on a platter.' A few days later he gave an interview to a newspaper. It reported him as saying: 'I am prepared to bring London's dockland to a halt. . . I will do anything in my power to bring this union to its knees . . . I can and will raise hell if I have to.'

At that stage there was a burning dispute between Mr Shute and the union and its officials, but none, so far as I can see, between him and his employers. He was only too pleased to be sent home on paid leave. The employers would have liked to have dismissed Mr Shute. But, under the national dock labour scheme¹, they were unable to do so without the permission of the dock board. On 15th December 1972 the employers' chairman asked for permission to terminate Mr Shute's employment. But the board declined. They said that Mr Shute had not broken any of the provisions of the scheme. They have since been asked to agree to his being transferred. But no other employer on the river will accept him. So the employers have been obliged to pay Mr Shute his basic weekly wage of £42.50 a week, whilst he has been doing no work for them. Meanwhile he has been making hay while the sun shines. He has obtained casual employment in the government explosives branch at £21.85 a week for a 40 hour week, plus any overtime that he does.

The employers now bring an action against the union and its officials claiming a declaration that their conduct was unlawful. They seek an injunction to restrain the union from instructing its members to withhold their labour.

The law

The dispute in this case is a typical dispute about union membership. The great majority of the men wish every one of them to be a member of a union. One or two stand out. The great majority then refuse to work with the non-union men. The employer, for the sake of his business, dismisses or suspends the non-union men. Before the Industrial Relations Act 1971 the union and its members would not be liable to an action either at the suit of the non-union men or the employers: see *Morgan v Fry*². Since the 1971 Act the position is different, at any rate in a case like the present, where the trade union is not registered under the Act. Being unregistered, it does not qualify for the protection afforded by an 'agency-shop agreement' or an 'approved closed-shop agreement'. It has also to reckon with a striking change

¹ See the Dock Workers Employment Scheme 1967 set out in the Dock Workers (Regulation of Employment) (Amendment) Order 1967 (SI 1967 No 1252), Sch 2

² [1968] 3 All ER 452, [1968] 2 QB 710

a which has been little noticed hitherto. It is this: a dispute 'between workmen and workmen' is no longer protected by statute law. Typical is a dispute as to union membership or a demarcation dispute. The parties to such a dispute are no longer exempt from liability for acts done in contemplation or furtherance of such a dispute. They are subject to the common law as to conspiracy, both in its criminal and civil aspects, as explained in *Quinn v Leatham*¹. They are subject to the common law as to intimidation, as explained in *Rookes v Barnard*². If the parties to such a dispute do anything which amounts to a conspiracy or intimidation, or any other wrong, the proceedings against them must be taken in the High Court. The National Industrial Relations Court has no jurisdiction in the matter.

b But this is subject to this important qualification: in some cases the employers may themselves become parties to the dispute. A dispute which starts as a dispute 'between workmen and workmen' may evolve into a dispute between 'employers and workmen'. From that time onwards, the dispute will be protected by statute. The parties to it will be exempt from liability in tort for many acts done in contemplation or furtherance of it. If they are liable at all, it will be for unfair industrial practices cognisable by the Industrial Court.

c So it is of the first importance to decide the nature of the dispute: was it a dispute 'between workmen and workmen'? Did it evolve into a dispute 'between employers and workmen'? This depends very much on the facts, remembering that the burden of proof is on those who claim that it is an industrial dispute: see *J T Stratford & Son Ltd v Lindley*³. But, before applying the law to the facts, I feel that I must make good my assertion that a dispute 'between workmen and workmen' is no longer protected by statute law.

d *The definition of an 'industrial dispute'*

e Section 167 (1) of the 1971 Act defines an 'industrial dispute' as 'a dispute between one or more employers or organisations of employers and one or more workers or organisations of workers, where the dispute relates wholly or mainly to any one or more' of several matters which are set out. This definition differs in an important respect from the Trade Disputes Act 1906, s 5 (3), which defined 'trade dispute' as 'any dispute between employers and workmen, or between workmen and workmen' which is connected with various matters there set out. The important difference is that the 1971 Act omits a dispute between 'workmen and workmen'. The significance of this difference can only be seen by tracing the history.

f In 1875 Parliament passed an Act which took strikes out of the reach of the criminal law of conspiracy. Section 3 of the Conspiracy and Protection of Property Act 1875 was in these words:

g 'An agreement or combination by two or more persons to do or procure to be done any act in contemplation or furtherance of a trade dispute between employers and workmen shall not be indictable as a conspiracy if such act committed by one person would not be punishable as a crime ...'

h This section was obviously confined to disputes between employers and workmen. It did not extend to disputes between workmen and workmen. It was considered by the House of Lords in the leading case of *Quinn v Leatham*¹. Leatham was a wholesale butcher who employed non-union men. Quinn was an officer of a trade union of butchers' men. They objected to Leatham employing non-union men. They threatened Leatham that they would stop his customers from dealing with him unless he dismissed his non-union men. Leatham refused to put them out on the street. He

i 1 [1901] AC 495, [1900-3] All ER Rep 1

2 [1964] 1 All ER 367, [1964] AC 1129

3 [1964] 3 All ER 102, [1965] AC 269

brought an action for damages for conspiracy against the officers of the union. The jury awarded him damages of £200 and their verdict was upheld in every court up to the highest. In the House of Lords Lord Lindley said¹:

'I cannot myself see that there was in this case any trade dispute between employers and workmen within the meaning of s. 3. I am not at present prepared to say that the officers of a trade union who create strife by calling out members of the union working for an employer with whom none of them have any dispute can invoke the benefit of this section even on an indictment for a conspiracy.'

The trade unions were much disturbed by the decision in *Quinn v Leatham*², just as they were with *Taff Vale Railway Co v Amalgamated Society of Railway Servants*³ a fortnight earlier. In 1906, when Parliament gave them a charter of immunity—I refer, of course, to the Trade Disputes Act 1906—Parliament deliberately widened the definition of 'trade dispute'. It was extended so as to include any dispute 'between workmen and workmen'. The ambit of immunity was also extended. No longer was the immunity confined to an indictment for criminal conspiracy. It was extended to a civil action for damages for conspiracy.

The effect of this widening of the definition is seen by *White v Riley*⁴. White was a member of the Workmen's Union. Riley was an official of a rival union, the Curriers' Union. White refused to join the Curriers' Union. Riley gave notice to the employers that the men would cease work unless White joined the Curriers' Union. In consequence, the employers suspended White and afterwards discharged him. White sued Riley and the officers of the union for conspiracy. He lost. Lord Sterndale MR considered the definition of 'trade dispute' in the 1906 Act, and said in effect⁵:

'The words "between workmen and workmen" are an addition to the earlier Act of 1875, and were probably added in view of what was said in *Quinn v. Leatham*² and other cases, that a dispute of this description would not be a dispute between employers and workmen, which was the only dispute protected by that Act . . . if union and non-union men are working in the same employment and the union men say, "We will no longer work with the non-union men unless they join our union," that is . . . a . . . dispute between workmen and workmen connected with the employment or non-employment of any person . . . I think the case comes within the words "a dispute between workmen and workmen," . . .'

Since that case there have been many cases in which union men have refused to work with a non-union man. They have threatened the employers that unless the non-union man is dismissed, they will stop work. It has always been accepted that a dispute on those lines as to union membership is a 'trade dispute'. Such was *Rookes v Barnard*⁶ and *Morgan v Fry*⁷. The reason is plain. It was because the dispute fell exactly within the words of the 1906 Act as a dispute 'between workmen and workmen' which is connected with the employment or non-employment of any person.

Now amongst the many changes made by the Industrial Relations Act 1971 there is one very significant one. It omits the words 'between workmen and workmen'. So all the cases which rested on those words since *White v Riley*⁴ onwards must be put on one side. A dispute as to union membership is a typical dispute between workmen and workmen. It does not fall within the new definition of industrial dispute.

¹ [1901] AC at 541, 542, [1900-3] All ER Rep at 19

² [1901] AC 495, [1900-3] All ER Rep 1

³ [1901] AC 426

⁴ [1921] 1 Ch 1, [1920] All ER Rep 371

⁵ [1921] 1 Ch at 18, 20, 21, [1920] All ER Rep at 379, 380

⁶ [1964] 1 All ER 367, [1964] AC 1129

⁷ [1968] 3 All ER 452, [1968] 2 QB 710

a A parallel can be drawn from a demarcation dispute. This, too, in its inception is a dispute between workmen and workmen. The employers may afterwards get involved in it, much against their will. But that does not make them parties to the dispute. The point was specially considered by the Royal Commission on Trade Unions, presided over by Lord Donovan. Their report¹ says:

b 'The following members of the Commission, namely, Lord Robens, Sir George Pollock and Mr. John Thomson, are of the opinion that demarcation disputes between trade unions in which the employer is neutral (that is, is indifferent as to which of the contending parties' members do the particular job) should be excluded from the statutory definition of trade dispute, and that this should be achieved by deleting the words "or between workmen and workmen". They point out that the dispute they have in mind is not of the employer's making, c that he can do nothing to resolve it and that in these circumstances it is unjust that he should be debarred from exercising legal remedies which might otherwise be open to him.'

The remaining members of the Royal Commission did not agree with the deletion of the words. 'To do so' they said 'would, in any event, not solve the dispute: it would merely leave the employer free to sue for damages in certain cases where he cannot d sue now'.

Yet Parliament, with the report before them, did delete the words 'or between workmen and workmen'. The omission must have been deliberate. Parliament must have intended that a dispute between workmen and workmen should be subject to the ordinary law unless the employer was, or became, a party to it on his own account.

e *Applying the law to the facts*

Counsel for the union was constrained to admit that the dispute in this case was, at its inception, a dispute 'between workmen and workmen' which was not protected by the 1971 Act. But he submitted that the employers afterwards got involved in it, so that it became a dispute between employers and workmen. I cannot f accept this submission. The employers never were in dispute with the union or its officers. The employers recognised their desire for 100 per cent membership. So the employers did not resist the demands of the union or its officers. They acceded to them. They ordered Mr Shute off the tug. They told him to go home. The employers were just at the 'receiving' end of the dispute. They took the only course open to them. They had no option. The tugs had to sail. The refuse had to be collected. So Mr Shute had to stay ashore. It is rather like passengers in a railway strike. If the g trains do not run, the passengers have to walk or get a lift. The passengers may sympathise with one side or the other. They may get very annoyed with the disputants, but they are not themselves parties to the dispute.

I realise, of course, that in this very case the employers have since brought an action at law against the union and its officers. So there is now a dispute between the employers and the organisation of workers. And Mr Shute has himself brought proceedings against the employers in the industrial tribunal. So there is now a dispute h between Mr Shute and the employers. But neither of those disputes was in the mind of anyone on 2nd October 1972 and 5th December 1972. The acts done on those days were not done 'in contemplation of' these later disputes. An act is not done 'in contemplation of' a trade dispute unless it is done in expectation of and with a view to it: see *Conway v Wade*².

i On the evidence so far, it seems to me that there has only been one dispute in the present case, and that is the dispute between Mr Shute on the one hand and the union

1 Report of the Royal Commission on Trade Unions and Employers' Associations 1965-1968, Cmnd 3623, p 220, para 820

2 [1909] AC 506, [1908-10] All ER Rep 344

and its officers and members on the other hand. It was a dispute between workmen and workmen relating to his membership of the union. All the acts done on 2nd October and 5th December 1972, were done in contemplation or in furtherance of that dispute or in consequence of that dispute, and not in contemplation or in furtherance of any other dispute.

The nature of the dispute

Even if, contrary to my view, there was a dispute between employers and workers, there is yet another requisite before it comes within the definition of an 'industrial dispute'. It must relate wholly or mainly to one of the matters set out in paras (a), (b), (c) or (d) of the definition. The relevant matters for us are those in paras (a) and (b). Paragraph (a) relates to the 'terms and conditions on which one or more workmen are, or are to be, required to work for their employers'. Those words seem to me to relate to the contractual terms and conditions. There was no dispute as to those in Mr Shute's case. Paragraph (b) relates to the 'termination or suspension of employment, of one or more workers.' This dispute did not relate to the 'termination' of Mr Shute's employment. But did it relate to the 'suspension' of his employment? 'Suspension from employment' indicates a suspension from both work and pay. This paragraph contemplates a case where a man is dismissed by his employers or is suspended by them with the consequence that he is off work with no pay. It does not seem appropriate to this case where he is off work on full pay.

I recognise, however, that this is a debatable point. I prefer to put my decision on the ground that there was no dispute between employers and workmen at all.

This action

If there was no industrial dispute

If I am right in thinking that there was no industrial dispute, it has important consequences. The union and its officials are not entitled to the immunity given by s 3 of the Conspiracy and Protection of Property Act 1875. Nor to the immunity given by s 132 of the 1971 Act (replacing the immunity given by s 3 of the 1906 Act and s 1 of the Trade Disputes Act 1965). The union and its officers are exposed to the full effect of the common law as to conspiracy and intimidation. They can be sued in the High Court for those torts and in the High Court only. They cannot be sued in the Industrial Court: see s 136 (a).

At common law conspiracy is a combination of two or more persons to do an unlawful act, or to do a lawful act by unlawful means: see *Mulcahy v R*¹ and *Crofter Hand Woven Harris Tweed Co Ltd v Veitch*². Here it will be said at the trial that the trade union and its officials combined to do an unlawful act, namely, to deter Mr Shute from exercising his statutory right not to belong to a union; and they combined to do it by unlawful means, namely, by inducing men to break their contract of employment.

At common law intimidation is intentionally to compel a person, by means of a threat of an illegal act, to do some act whereby loss accrues to him or to another: see *Rookes v Barnard*³. Here it will be said at the trial that the trade union and its officials threatened the employers that they would do an illegal act, namely, induce the men to break their contracts of employment. By that means they compelled the employers to send Mr Shute off the tug.

In both conspiracy and intimidation damage is the gist of the action. Here Mr Shute was damnified. He lost his overtime. The employers were damnified. They had to pay him wages for nothing.

Although those suggestions, and others like them, will be made at the trial, I can well see that a further issue may arise. I raise it because of the views expressed by

¹ (1868) LR 3 HL 306 at 317

² [1942] 1 All ER 142 at 157, [1942] AC 435 at 461

³ [1964] 1 All ER at 397, [1964] AC at 1205

a Lord Donovan and his colleagues in their report¹. If Mr Shute's conduct was justifiable—as, for instance, if he conscientiously objected to joining the union, or was dissatisfied with it—then he should, of course, recover compensation for any damage done to him. But, if his conduct was not justifiable as, for instance, if he did it out of malice and with intent to injure—then he should not recover compensation. In such a case, the union and its members may plead that their own conduct—in refusing to work with him—may be justified or excused.

b On this footing, the union may well say that Mr Shute provoked the action of which he now complains. True it is that he has a right not to belong to the union. True it is that he has a right to work. But he abused those rights beyond measure. So far as we know, he joined the union quite willingly. He knew that it was a condition of his employment. He had no possible justification for withholding his dues to the union. All that he did was done maliciously with intent to injure the union and its officers. His own words show it: 'I will not rest until I have Mr Lindley's head on a platter'—'I will do anything in my power to bring this union to its knees'—and so forth.

c Suppose that Mr Shute had himself sued the union and its officers for conspiracy and intimidation, causing him to lose overtime. Would he succeed? He wanted the employers to do what they did. He wanted to be sent off work. He wanted to get full wages for doing no work. And he has made much profit out of it. Would any jury give him a verdict? I doubt it. He may have been a troublemaker just as those in *Morgan v Fry*². I said there³:

e '... if Mr. Hammond and his friends were really troublemakers who fomented discord in the docks, without lawful cause or excuse, then the defendant Mr. Fry and his colleagues might well be justified in saying the men would not work with them any longer.'

So here, Mr Shute may be said to have brought everything on himself by his own eccentric conduct.

f Now, if Mr Shute could not sue the union and its officials, I doubt whether his employers can. After all, the conspiracy and intimidation was aimed at him, not at the employers. If he cannot sue, how can they? The loss to the employers (in paying wages for nothing) was caused by the conduct of the National Dock Labour Board in refusing to give the employers permission to dismiss Mr Shute. I would hope that the board would reconsider their decision in this matter. Mr Shute was threatening to bring dockland to a halt by his own unjustifiable conduct. The employers should g not be compelled to employ such a man, or to pay wages to him.

If there was an industrial dispute

In case I am wrong in thinking there was no industrial dispute, I will go on to consider the legal points if there was an industrial dispute and the union and its officers h acted in contemplation or furtherance of it. In that case Mr Shute had a statutory right, as between himself and his employers, not to be a member of the union: see s 5 (1) (b) of the 1971 Act. He had a right to work without being a member of the union. Anyone who knowingly interfered with that right was acting unlawfully. The union and its officials acted unlawfully when they interfered with it. They told the employers that the men would not sail with Mr Shute unless he paid up his dues. j That pressure was an unfair industrial practice: see s 33 (3) (a) of the 1971 Act. The

1 Report of the Royal Commission on Trade Unions and Employers' Associations 1965-1968, Cmnd 3623, paras 563, 564, 567, 614, 615 and 616

2 [1968] 3 All ER 452, [1968] 2 QB 710

3 [1968] 3 All ER at 459, [1968] 2 QB at 729

employers could at once have applied to the Industrial Court for an order directing the union and its officials not to interfere: see s 101 (3) (c). But the employers did not do so. Instead they submitted to the pressure. They ordered Mr Shute off the tug. They sent him home. By doing so they were discriminating against him by reason of his exercising his statutory right. That was an unfair industrial practice by the employers: see s 5 (2) (b). It is true that the employers were forced to do this because of the pressure which the union and its officials brought to bear on the employers. But this pressure afforded the employers no defence: see s 33 (1) (a), (b); and no ground for decreasing his compensation: see s 116 (5). Mr Shute would be entitled to go to an industrial tribunal and get compensation from his employers for the discrimination against him: see s 106 (1) (b). But the employers would be entitled to bring in the union and its officials and claim from them contribution or indemnity for the sums it had to pay Mr Shute: see s 119. In addition to this right, however, the employers would be entitled to take proceedings in the Industrial Court against the union and its officers and claim compensation because of the pressure they had brought on the employers: see ss 33 (3) (a), 101 (1) (a), (b), (c), 101 (3) (b), 105 (1). Such compensation would be such amount as the Industrial Court considered just and equitable in all the circumstances: see s 116 of the Act.

Those provisions seem to me to provide adequate remedies for Mr Shute and for the employers in respect of the conduct of the union and its officials. Those remedies are, however, only in the Industrial Court; and only when there is an industrial dispute. Section 33 only applies when the action is taken in contemplation or furtherance of an industrial dispute.

Counsel for the employers submitted that, apart from those remedies, it was open to the employers to bring an action in the High Court in tort against the union and its officials, even if their acts were done in contemplation or furtherance of a trade dispute. He had to admit that the employers could not bring an action in the High Court for conspiracy. That was excluded by s 132 (3) and (4). Nor could employers bring an action in tort for inducing breach of contract: see s 132 (1) (a); nor for intimidation by threats of the nature mentioned in s 132 (1) (b). But he submitted that the employers could bring an action in the High Court for any other extraneous wrongdoing. He submitted that the employers could bring an action for direct intimidation in that the union and its officers directly intimidated the employers by threats of an illegal act (*Rookes v Barnard*¹), such illegal act being the interference with Mr Shute's right to work. He also submitted that the employers could bring an action for interfering with the business of the employers by unlawful means: see *Daily Mirror Newspapers Ltd v Gardner*²; *Acrow (Automation) Ltd v Rex Chainbelt Inc*³ and *Brekkes Ltd v Cattell*⁴. When pressed to say what unlawful means were used in this case, counsel for the employers seemed to me to have to come back every time to the Industrial Relations Act 1971. As the argument proceeded, it seemed to me that ultimately the question was whether wrongful conduct, which offended against the 1971 Act as being unfair industrial practice, could also be actionable in tort. This is a question of construction of the Act: see *Cutler v Wandsworth Stadium Ltd*⁵ and *Cunard v Stacey*⁶. I am of opinion that when the conduct is an unfair industrial practice, the complainant must ordinarily seek his remedy before an industrial tribunal or the Industrial Court, as the Act provides. He cannot bring an action in tort for the selfsame conduct unless such conduct is, of its own force, actionable in tort apart from the 1971 Act. If

1 [1964] 1 All ER at 397, [1964] AC at 1205

2 [1968] 2 All ER 163, [1968] 2 QB 762

3 [1971] 3 All ER 1175, [1971] 1 WLR 1676

4 [1971] 1 All ER 1031, [1972] Ch 105

5 [1949] 1 All ER 544, [1949] AC 398

6 [1955] 2 Lloyd's Rep 247

a there was an industrial dispute in this case, I cannot find any tortious conduct by the union or its officers which is actionable in the High Court.

Conclusion

b The judge proceeded on the basis that there was an 'industrial dispute'. On that basis I would agree with him that no action lies in the High Court. But, I would differ from him in that, on the evidence as it stands, I do not think there was an 'industrial dispute' within the 1971 Act. On this basis, if anyone has a cause of action in tort against the trade union or its officers, it must be brought in the High Court, and not in the Industrial Court. So I think this action was properly brought here. Nevertheless, I doubt very much if it is well founded. Mr Shute may have been actuated so much by ill-will that the other men and the union may have sufficient justification or excuse for what they did. The action is so doubtful of success that I do not think any interlocutory relief should be granted. Counsel for the employers said that the employers were put in an intolerable position—by having to pay wages to Mr Shute for no work. But I think the solution lies with the dock labour board. It is their duty under the scheme to take into account all relevant circumstances obtaining in the port at the relevant time. On further consideration they may well think it right to give permission for Mr Shute to be dismissed. I do not see why employers should be made to keep paying a man for no work, if he is, as it would appear on the evidence he is, a man who is determined to make trouble and to disrupt the work in the docks—out of malice and with intent to injure. I would, therefore, dismiss the appeal, but for reasons which are different from those of the judge.

e **BUCKLEY LJ.** In this action the plaintiff company sues the defendants in tort. The tort alleged in the statement of claim is pleaded as a continuing one, namely, that since 28th September 1972 the defendants have threatened to instruct, direct or recommend all members of the first defendant (which, although it is not registered as a trade union under the Industrial Relations Act 1971, and so is not a trade union within the meaning of that Act, I will for simplicity call 'the union') in the plaintiffs' employment to withdraw or withhold their labour, if the plaintiffs were to employ Mr Shute to work as a lighterman. The allegedly tortious nature of the threat or threats is elaborated in the statement of claim, but I need not refer to this in any detail.

f Section 132 (1) of the Act provides:

g 'An act done by a person in contemplation or furtherance of an industrial dispute shall not be actionable in tort on the ground only—(a) that it induces another person to break a contract to which that other person is a party or prevents another person from performing such a contract, or (b) that it consists in his threatening that a contract (whether one to which he is a party or not) will be broken or will be prevented from being performed, or that he will induce another person to break a contract to which that other person is a party or will prevent another person from performing such a contract.'

h If the alleged tort sued on in this action was an act done in contemplation or furtherance of an industrial dispute, a question arises whether s 132 (1) is a bar to the action. If, on the other hand, the alleged tort was not such an act, the defendants have not suggested on this appeal that the action will not lie nor, indeed, that it will not succeed.

i In the forefront of the case, therefore, there stands the question whether the threat or threats (for I will so call them without prejudice to the question whether they are properly so described) was or is being or were or are being made in contemplation or in furtherance of an industrial dispute within the meaning of the Act.

An industrial dispute is defined in s 167 (1) of the Act thus:

“‘industrial dispute’ (subject to subsection (5) of this section) means a dispute between one or more employers or organisations of employers and one or more workers or organisations of workers, where the dispute relates wholly or mainly to any one or more of the following, that is to say—(a) terms and conditions of employment, or the physical conditions in which any workers are required to work; (b) engagement or non-engagement, or termination or suspension of employment, of one or more workers; (c) allocation of work as between workers or groups of workers; (d) a procedure agreement, or any matter to which in accordance with section 166 of this Act a procedure agreement can relate’.

Subsection (5) of this section has no relevance to the present case. It should be noted that, unlike the definition of ‘trade dispute’ in the Trade Disputes Act 1906, s 5 (3) (which was repealed by the 1971 Act), this definition of the term ‘industrial dispute’ does not embrace any dispute which is only between workmen and workmen.

All the registered dockworkers in the Port of London, now with the exception of Mr Shute, are members either of the defendant union or of the National Amalgamated Stevedores and Dockers, and in practice it is impossible for a man to become a registered dock worker in the port without his belonging to a union. This situation according to the evidence before the court is not the consequence of any agreement between the employers and the men or the unions; it is a state of affairs which has existed for 50 years or so, and has been and is acquiesced in by both sides in the industry. The men are a close-knit community and according to the evidence they would in practice always refuse to work with a non-unionist. This is what has happened in this case. Mr Shute, who appears to hold strongly individualistic views on union membership, purposely allowed his membership of the union to lapse and on 28th September 1972, he so informed Captain Medhurst, who was not only the skipper in command of the tug, of the crew of which Mr Shute was a member, but also a shop steward of the union. The other members of the crew collectively decided that they would not work with Mr Shute after the following Monday, if his union dues were not by then paid up. Captain Medhurst then telephoned Mr Lindley, the union’s regional secretary of its waterways section, who confirmed the decision. Captain Medhurst later telephoned the plaintiff company’s manager, Mr Crozier, and informed him of the decision and of the fact that Mr Lindley agreed with it. Mr Lindley himself also telephoned Mr Crozier to say that he endorsed the action of the crew and officially supported them in their refusal to work with Mr Shute. Mr Lindley also told Mr Crozier that the rest of the plaintiff company’s tugs would not be sailing on the Monday unless Mr Shute was withdrawn from work. At this stage, I think, it is perfectly clear that the dispute was between Mr Shute on the one hand and his workmates and the union on the other. Indeed, this is common ground.

On the following day Mr Spragg, a shop stewards’ convenor of the union, and Mr Evans, one of its shop stewards, visited Mr Crozier at his office, confirmed what Mr Lindley had said, and stated that the whole of the plaintiff company’s labour force would be withdrawn unless Mr Crozier withdrew Mr Shute from the crew of the tug.

Early on the Monday morning, 2nd October, Mr Crozier went to the tug, ordered Mr Shute off her and sent him home. Since then Mr Shute has done no work for the plaintiff company but the plaintiff company has continued to pay him. Mr Shute has found other employment for which also he is being paid. On 5th December Mr Shute presented himself aboard the tug early in the morning, having previously told Mr Crozier that he would be turning up for work. Mr Crozier asked the crew whether they were prepared to sail with Mr Shute. They refused. Mr Crozier again ordered Mr Shute off the tug and he left.

The question for decision falls into two parts. First, was any of the threats sued on made in contemplation or furtherance of any dispute to which the plaintiff company was a party? If so, was that dispute an industrial dispute within the statutory definition?

a The plaintiff company cannot dismiss Mr Shute without the consent of the National Dock Labour Board. This they have twice attempted to obtain but have been unsuccessful. Mr Shute is costing the plaintiff company £42.50 a week for his wages, but the plaintiff company has preferred to make these payments without requiring or permitting Mr Shute to work rather than to come into conflict with its other employees and the union. The plaintiff company favours the policy of all its employees being b has done all that its other employees and the union have required it to do in relation to Mr Shute; it has withdrawn him from his duties as a lighterman and has not required any of its employees to work with him. I cannot see how it could have pursued a more acquiescent course.

c On the evidence before the court it seems clear that Captain Medhurst and his crew, Mr Lindley and Messrs Spragg and Evans, all exerted pressure on the plaintiff company to remove Mr Shute from working with any employees of the company who were union members, which amounts to suspending him from work altogether. The plaintiff company proved to be entirely amenable to this pressure. It capitulated. Having done so, it is not now seeking to reinstate Mr Shute as an active member of its staff; it is, however, asserting that the threat or threats to which it capitulated was d accordingly.

The plaintiff company asserts that its only remedy is in the High Court under the common law, because on the facts there is no industrial dispute, and so the National Industrial Relations Court lacks jurisdiction. The defendants say that it would be very advantageous to have the matter dealt with by the Industrial Court, where they say there is valuable machinery for conciliation. They assert that the e plaintiff company has had to resort to a complicated argument and a distorted view of the facts to demonstrate that there is no industrial dispute.

In these circumstances can it be properly said that (apart from the present action) there is or has ever been in the course of this history a dispute between the plaintiff company and any of the defendants? I think not. The plaintiff company had not, f when the threats were made, and has not since, espoused Mr Shute's cause. It has remained wholly aloof from it; or, if it has favoured any side in Mr Shute's differences with the union and its members, this has been the side of the union and its members. If someone threatens me with physical injury unless I hand over my wallet and I hand it over without demur, no one could, in my opinion, sensibly say that there had been any dispute about my handing over the wallet. I do not think that the threats to the plaintiff company can properly be said to have been made in furtherance of any g dispute between it and the union or any of its members.

Can it, then, be said that the threats were made in contemplation of a dispute between the plaintiff company and the union or any of its members? No dispute has emerged in contemplation of which the threats can be said to have been made. If therefore the threats were made in contemplation of a dispute, it must have been one which the threateners believed would arise but which, contrary to that belief, h has not eventuated.

In my judgment, this has not been established. The evidence, in my opinion, indicates that the parties who made the threats made them because they believed that they would be successful and that the plaintiff company would agree to do what it was required to do. An act done in the belief that no dispute will in any event arise cannot, in my judgment, properly be described as an act done in contemplation of a dispute. I i very much doubt whether an act done in the belief that, if it is done, no dispute will arise can properly be so described. In the present case no one on the men's side seems to have troubled to ask before any threats were made whether the employers would suspend Mr Shute from duty without the pressure of any threat. On the evidence at present before the court it seems to me to be very probable that the plaintiff company would have done so. It is conceded that the burden rests on the defendants to estab-

lish, if they can, that the threats were made in contemplation or furtherance of an industrial dispute. In my judgment they have not discharged this onus. a

Of course, this action constitutes a dispute between the plaintiff company and the defendants, but it cannot be supposed that any of the threats was made in contemplation or furtherance of that dispute.

If the act or acts complained of as constituting the alleged tort or torts was or were not done in contemplation or furtherance of any dispute between the plaintiff company and any of the defendants, it is unnecessary to consider whether any alleged dispute falls within the definition in s 167 of an 'industrial dispute'. We heard some interesting argument about the meaning of the expression 'suspension of employment' in this context. On the view which I take of this case it is unnecessary to arrive at any conclusion about this, but I may perhaps say that, as at present advised, I am of opinion that what is here referred to is not mere suspension from duty, as in the case of Mr Shute, but temporary discontinuance of both work and pay under a contract which permits of this while the contract of employment remains in force. If this is right, I feel great difficulty in holding that any dispute which might, contrary to my view, exist between the plaintiff company and the union or any of its members would fall within the terms of any of the paragraphs of the definition of 'industrial dispute' contained in s 167. b

Brightman J took the view that, when the defendants threatened the plaintiff company, assuming that their acts amounted to threats, an industrial dispute existed or was in prospect. For the reasons which I have endeavoured to express I feel unable to agree with the learned judge about this. But even if the learned judge had taken a different view on that question, he would not have been disposed to grant the relief sought on the motion. He said¹: c

'Even if the plaintiffs had both the law and the facts on their side, there would be the added question where the balance of convenience lay. This is a case where, as I see it, the loss flowing from the wrongful acts of the [defendants], assuming them to be wrongful, is wholly financial, is precisely quantifiable, is modest in amount and admittedly within the financial competence of the union to recoup to the plaintiffs. I doubt whether, in such unusual circumstances, interlocutory relief is appropriate. So, even if I felt that the plaintiffs were correct on the law and the facts, I would be much disposed to leave matters to be resolved at the trial of the action rather than unnecessarily impose on the plaintiffs' labour force the stresses which might result from an interlocutory order.' d

With this I agree. In my judgment the present case is not one for interlocutory relief. There is no indication that, while things remain as they are, any of the first three defendants (who are the only respondents to the motion) threaten or intend to do any of the things mentioned in the notice of motion. Nor is there any indication that things will not remain as they are until the trial of the action. If the plaintiff company succeeds in the action, there is no reason to suppose that the defendant union will not be fully able to meet any damages which may be awarded. e

I would dismiss this appeal. f

ORR LJ. I agree that this appeal should be dismissed and only wish to add a few words. g

On the first of the two issues which arise as to the definition of 'industrial dispute' contained in s 167 (1) of the Industrial Relations Act 1971, I agree that, for the reasons h

a given by Lord Denning MR and Buckley LJ, the plaintiffs, on whom the burden rests, have failed to establish that there was at the material time any dispute other than between Mr Shute on the one hand and his fellow workers and the union on the other. That dispute, being 'between workmen and workmen', would have fallen within the definition of a 'trade dispute' contained in the Trade Disputes Act 1906, but clearly does not fall within the definition of 'industrial dispute' contained in s 167 (1) of the Industrial Relations Act 1971, in which the words quoted do not appear and from which I agree with Lord Denning MR they must have been deliberately omitted.

b Having reached that conclusion on the first issue I too do not find it necessary to decide the second issue, whether the alleged dispute relates wholly or mainly to one or other of the matters set out in paras (a) and (b) of the definition; but if it had been necessary to decide that issue I would have held that 'terms and conditions' in para (a) is a reference only to contractual terms and conditions, and I should have found it very difficult to read 'suspension of employment' in para (b) as applying to a mere suspension from duty as distinct from a suspension of both pay and duty pursuant to a provision of the contract.

c On the basis of the conclusion, which this court has reached, that the respondents have not established an 'industrial dispute' it was accepted for the respondents that the present action lies, and the sole remaining question is whether the plaintiffs should be granted interlocutory relief. In my judgment the balance on this issue falls heavily against the grant of such relief and I am content to rest this conclusion on the reasons given by Brightman J¹ in the passage quoted by Buckley LJ.

d *Appeal dismissed. Leave to appeal to the House of Lords refused.*

e Solicitors: *Alsop, Stevens, Batesons & Co* (for the plaintiffs); *W H Thompson* (for the respondents).

L J Kovats Esq Barrister.

f

¹ At p 354, ante

Y v Y (child: surname)

PROBATE, DIVORCE AND ADMIRALTY DIVISION

LATEY J

10th, 11th MARCH 1969

Infant – Name – Change of surname – Divorce of parents – Mother having custody – Re-marriage of mother – Rights of mother as custodian – Rights of father as natural guardian – Interests of child – Whether mother or father having unilateral right to change surname of child.

The father and mother, Mr and Mrs Y, had two children, A and G, both girls. The mother obtained a decree nisi on the ground of the father's adultery, which was made absolute in August 1964, and custody of the children was granted to her. In January 1965 the mother married a Mr D and in February 1967 the father married the woman with whom he had been living. In the summer of 1964 the mother stopped all staying access of the children with the father on the ground that it upset them and in July 1965, without consulting the father and unknown to him, she arranged for the children to be known at school by the surname of D, instead of Y. When much later the father discovered what had happened, he issued a summons asking, *inter alia*, that the children should assume their former name of Y. At the date of the hearing in 1969 A and G were aged 13 and nine respectively.

Held – (i) Where a mother had been given custody of children she was not entitled to change their surname unilaterally for that would infringe the father's rights as their natural guardian; nor, in those circumstances, was the father entitled to do so for that would infringe the mother's rights as custodian. Their surname could only be changed by agreement between the parties or, in the absence of agreement, by a decision of the court. Accordingly the mother had been gravely in error in changing the children's surname without the consent of the father, as that infringed his rights as the children's natural guardian (see p 578 g and h, post); dictum of Buckley J in *Re T (otherwise H) (an infant)* [1962] 3 All ER at 972 explained.

(ii) Whatever the court's decision might have been in 1965, the matter had, after the lapse of four years, to be decided in a way which best served the interests of the children. Although at 13 A was not in any real sense a young woman, she was old enough to be sensitive about her name and all the evidence pointed to a feeling of acute social embarrassment in yet a further change of surname. That did not apply to G, but it was plain that both girls had to bear the same name; accordingly, in the circumstances it was best to leave the children's surname as D (see p 578 j and p 580 g and j, post).

Notes

For the rights of the father as to custody and upbringing, see 21 Halsbury's Laws (3rd Edn) 191-193, paras 425-427, and for his position as natural guardian, see *ibid* 204, 205, paras 452-454, and for cases on the subject, see 27 (2) Digest (Reissue) 949, 7677, and 28 (2) Digest (Reissue) 855, 856, 1528-1536.

Case referred to in judgment

T (otherwise H) (an infant), *Re* [1962] 3 All ER 970, [1963] Ch 238, [1962] 3 WLR 1477, 27 (2) Digest (Reissue) 949, 7677.

Adjourned summonses

By a summons dated 21st February 1968, the father applied for an order that the mother change the surname of the children of the family, A and G, back to the father's surname, Y, the mother having previously, without his knowledge or consent, changed

- a their surname to that of D, her second husband's surname. By a summons dated 20th February 1968 the mother applied for general directions as to the future welfare and upbringing of the children. The summonses came before Karminski J on 28th February 1968 who adjourned them with a direction that the children be represented by the Official Solicitor and made an interim order that A use the surname of D as she was about to attend a new school. The judgment was delivered in chambers and is reported by permission of Latey J. The facts are set out in the judgment.

b *H S Law* for the mother.

G D Lovegrove for the father.

D J Hyamson for the children.

- c **LATEY J.** There are two issues in this case, the first being by what surname should the children be known, and the second, whether their father, Mr Y, should have them to stay with him from time to time. This summons is in chambers, but the issues raised are of real importance to the children, and to their parents and I think it right that I should state in outline the reasons for the conclusions I have reached. At the same time, it would be the reverse of helpful to add to the friction—the very considerable friction—between the parents, and I do not propose to review all the detail
- d which has been canvassed in evidence, both written and oral.

- The two children concerned are A, born in February 1956, so that she is now just 13, and G, born in July 1959, who is rising ten. The marriage finally broke up, I think, fairly early in 1963. The mother was granted a decree nisi on the ground of the father's adultery, which was made absolute in August 1964, and the custody of the children was committed to her. The father and mother had been to the National
- e Marriage Guidance Council, who had referred them to doctors, and the father began a course of deep analysis which is still continuing. At the moment he is having analysis, he told me, three times a week; and he told me that the purpose of it, as he summed it up, is 'to know thyself'; that is, to come to terms with oneself.

- f The mother married Mr D in January 1965. In February 1967 the father married the lady with whom he had been living, her previous marriage having been dissolved by decree absolute in August 1966, and she, that is to say, Mrs Y, is expecting a baby, by the father, in May of this year. Both families are in comfortable circumstances financially. Mr D and the children get on very well indeed and are very fond of each other. Mr D's son, aged 17, also lives with them. It is a very happy family and home. They live in North London. Mrs Y gets on very well with the children, as they do with her.

- g The children stayed with their father at weekends until the summer of 1964, when the mother stopped this form of access, saying that it upset the children. Since then, access has been for a day or part of a day, with periods when there has been none. Both the father and mother are Jewish, as is Mr D; Mrs Y is not. The father and mother belong to the Reform Synagogue, whose rules of observance and ritual are much less inflexible and rigid than in the Orthodox Synagogue. The father is an agnostic
- h and Mrs Y a humanist, and accordingly they themselves have no religious beliefs or observances.

- i In July 1965, without consulting the father and unbeknown to him, the mother arranged that A and G should be known at school by the surname of D. Nothing was said to the father, either by the mother or by the children's headmistress, and the copies of the school reports sent to the father gave the children's name as Y. It was not until very much later that the father found out what had been done and, not surprisingly, he was greatly upset and resentful. He issued a summons asking for directions that the children should resume the name of Y, and at the same time asking that, as part of the access, the children should come and stay with him from time to time. The mother also issued a summons at the same time, asking for directions about the children in general terms.

Those summonses came before Karminski J in February 1968—a little over a year ago. At that time, A was about to go to a new school. Karminski J, taking the view—as, indeed, I take the view—that this was a difficult problem—a difficult case—directed that the children be separately represented by the Official Solicitor, and for that purpose he adjourned the summonses generally, directing that A should go to her new school under the name of D, but stressing that that interim direction was entirely without prejudice to the ultimate decision of the court. He also gave interim directions for access covering March and April 1968, and he evidently anticipated that that should give everybody sufficient time to restore the summonses for hearing.

It is, in my view, unfortunate for all concerned that so long has elapsed. I have to deal with the issues in the circumstances prevailing today and to decide them in the way which seems best for the children. Lapse of time itself can become an important factor in children's cases, and the procedure and practice of this court, together with the availability of several judges, have been tailored to reduce delay to a minimum. Any question affecting children can be brought before the court immediately, and I repeat that for reasons which I do not propose to go into—because I am not sure that I know them in detail—that it is most unfortunate that so many months have elapsed before this case was brought back.

That is the broad history of the matter, and what are the right conclusions on the two issues? Each is very far from easy, as is often the case when a family has broken up and new families have formed. There is a good deal of written evidence in the form of affidavits and exhibited correspondence. In this case it is difficult, if not impossible, to resolve some of the conflicts on matters of fact on the basis of the written evidence. More importantly, even though one had the opportunity of seeing them sitting behind counsel and identifying them, that and no more left the parents and the step-parents, who are the four people most closely concerned with these children, as no more than paper figures.

Accordingly, I was responsible for the invitation to counsel that the parents and step-parents should give evidence and be cross-examined. That has happened. Where does it all lead one? There was, on paper, the stoppage by the mother of the staying access, the changing of the children's name without a word to the father, the fact that without any discouragement the children were allowed to call Mr D 'daddy', the fact that when A went into hospital for an operation for appendicitis her father was not informed; all this, especially when viewed in writing, suggested that there might well have been a deliberate plan, by stages, to cut the father out of the children's lives.

I am bound to say, and I have thought it important to bear in the forefront of my mind, that he, as it seems to me, cannot be blamed for entertaining that view in his mind. But after the evidence which has been given in the witness box, the matter is very far from being so simple. There is no doubt in my mind, and in my judgment, that the mother and Mr D, so far as he came into it, were gravely in error, not necessarily in changing the children's name in 1965, but in doing so without first consulting the father. And this weighs heavily against her.

Before coming to other factors, it is convenient to state my view of the approach to the change of surname of young children. Counsel have referred me to *Re T (otherwise H) (an infant)*¹ as the only reported case on the matter. Until that decision this question of the changing of the surname of infants where their parents were estranged was devoid of any authority. The facts were these. There was a divorce on the petition of the mother in December 1959. That petition was undefended. The mother applied for and obtained the custody of the child, a ten year old girl. The father had access by agreement. In July 1960 the father remarried. In October 1960 the mother remarried, acquiring the surname of her second husband. On 24th August 1961 the mother, without any previous communication with the father, executed a deed poll whereby she, purporting to act as legal

¹ [1962] 3 All ER 970, [1963] Ch 238

a guardian of the infant, renounced and abandoned the use of the infant's surname and declared that, as from the date of the deed poll, the infant had assumed the mother's new surname. That, as I say, was on 24th August 1961. The father was first informed of this change of name in September 1961. On 31st January 1962 he issued a summons, asking that the child be made a ward of court and that the deed poll be cancelled, or that there be a further deed poll to be registered, which would change the infant's surname back to the former one.

b Those being the facts, the matter came before Buckley J and his decision is accurately summarised in the headnote¹. He held—

c '(1) that a child of a tender age could not, of its own motion, change his or her surname since it involved a conscious decision and the power or right to make such a decision primarily resided with the father as the natural guardian, but where the father was not living or was not available for some other reason such power might reside in the legal guardian; that where there had been a divorce in which the father was the person against whom the decree was granted and an order for custody was made in favour of the mother the order did not deprive the father of all his rights and obligations in respect of the child but he remained the natural guardian of the person of the child.

d '(2) That in the case of a divided family it was always one of the aims of the court to maintain the child's contact, respect and affection for both of its parents so far as the circumstances would permit, and to deprive the child of its father's surname was not in the best interests of the child because it was injurious to the link between the father and the child to suggest to the child that there was some reason why it was desirable that it should be called by some name other than the father's name.

e 'Accordingly, the infant's mother had no status which entitled her to take any step on behalf of the infant which would result in the infant being known by a surname other than the father's surname.'

f Though not binding, any decision from so eminent and experienced a judge as Buckley J must, and does, command the greatest respect. It was argued that the effect of the decision was not only that an order for custody in favour of the mother does not vest in her the unilateral right to change the children's surname, but the rights of the father to do so, as the natural guardian, remain unimpaired or unrestricted by the custody order.

g I do not read the judgment as going as far as that. Buckley J² points out that the point is not covered at all by authority. He refers to the *Encyclopaedia of Forms and Precedents*³. He points out that there is a precedent for changing an infant's name by deed poll to be executed by the guardian of the infant, and he refers to the *Enrolment of Deeds (Change of Name) Regulations 1949*⁴, as amended by the 1951 regulations⁵, which are regulations made by the Master of the Rolls under the *Supreme Court of Judicature (Consolidation) Act 1925*, s 218. Then he goes on as follows⁶:

h 'As I understand it, these rules have no statutory force. They are merely practice rules of the registration department in respect of deeds poll for changing names. But that fact does give some support to the view that it may be competent for a parent or legal guardian to change the name of an infant. If there is such a right or power it is one which, in my judgment, resides primarily in the infant's

1 [1963] Ch at 238, 239.

2 [1962] 3 All ER at 971, [1963] Ch at 241.

3 3rd Edn, vol 11, p 8, Form 4700.

4 SI 1949 No 316.

5 SI 1951 No 377.

6 [1963] Ch at 241, 242, cf [1962] 3 All ER at 972.

father as the natural guardian of the person of the infant. It may be that if an infant has no father living or if for some reason the father is not available such power may reside in whoever is the legal guardian of the infant. In the present case the deed was executed without the consent of the infant's father and indeed without his knowledge at all; it was executed by the mother of the infant who was the person to whom the custody of the infant had been given by the order of the Divorce Court. An order for custody is as its name implies, an order which gives the person in whose favour it is made the right to the custody of the child and the right to bring up the child subject, of course, to any direction which the court may think right to make from time to time under its jurisdiction in relation to any matter. It does not deprive the father, who is not given the custody of the child, of all his rights and obligations in respect of his child. He remains, subject to the rights conferred upon the person to whom custody is given by the court, the natural guardian of the child and among the residual rights which remain to him are any rights which he may have at law with regard to the name of the child. In my judgment, the deed which the mother has executed with regard to the child is one which she had no power to execute so as to have any effect on the infant. a

Then the learned judge points out that the most effective way in which this child's name has actually been changed is in the school register. In my opinion, what Buckley J is saying is this: that an order for custody to a mother does not deprive the father of all rights and obligations in respect of the child, a view, if I may say so, with which I wholly and respectfully agree. Secondly, in particular, such an order does not entitle the mother to take steps unilaterally to change the child's surname. Again, I agree. And thirdly, that if there is a right or power in a parent, where parents are estranged and custody has been committed to the mother, the right is in the father, and remains so, though custody is vested in the mother. b

But I do not think that Buckley J was expressing a final view on this point, which indeed it was not necessary for him to decide, and I think that he has left the point open. I asked counsel at an early stage whether they or any of them could tell me that, in this context, the powers of this court differed from those of the Chancery Court, acting for the Sovereign as *parens patriae* in its wardship jurisdiction. Counsel were agreed that in this context both courts had similar powers. c

That being so, in my opinion, the matter being *res integra*, unregulated by statute and undecided at common law, the correct view is this. As Buckley J said, an order for custody in a mother does not entitle her unilaterally to cause a child's surname to be changed, as to do so would infringe the father's rights as natural guardian. But, in my opinion, where the mother has been given custody, the father is no longer entitled unilaterally to cause a child's name to be changed, as to do so would be to infringe the mother's rights as custodian. Where the court has become seised of matters affecting children, and at least unless and until parents are in agreement, a parent who wishes to take some step importantly affecting a child, such as a change of surname, should seek the decision of the court. d

This is in line with the development of the law by the courts, which nowadays pay much less attention to technical rights and a great deal more to realities. Those realities are to encourage parents to consult, and agree when they can, on matters importantly affecting their children, and, if they cannot agree, for the court to make the decision which seems best to serve the welfare of the children, whether or not such decision may override some technical and often illusory right of a parent. e

If I am right that this is the proper approach, the mother did something she was not entitled to in 1965, and she was, from any sensible and human point of view, gravely in error in doing so. But does it follow that now, in 1969, the right direction should be that the children should reassume the name of Y? In my opinion that has to be decided in the way which will best serve the children, as things now are, and as they are likely to be in the future. f

a Both this question of the name and the question of whether there should be staying access have to be considered in the light of all the available evidence. For the reasons that I have already given, I shall not—deliberately not—review it in detail. Seeing the four people most concerned giving their evidence in the witness box has been of much help to me, and from that and the written evidence the following has emerged in my judgment.

b First, the father. It has to be borne in mind that the father has been in the difficult position throughout of having access only, a situation which does not make it as easy to develop the best relationship with one's children as it is for the parent with whom they are living and by whom they are being brought up, and I have borne that in mind throughout. The father is a complicated person. He is highly intelligent. He is a proud man and has a strong streak of arrogance, and it is very difficult for him to change his mind once he has made it up, or to accept that he may be mistaken.

c This is not to say that his approach to the children has been a selfish one, or a wholly selfish one; as witness, for example, in 1964 he accepted the medical view that he should not insist on staying access. At the same time he has not been wholly selfless or always wise about the children; as witness, merely for example, his refusal to accept the mother's very reasonable and sensible suggestion that he should have the children for the whole day at a weekend instead of for two very unsatisfactory hours on Wednesday evenings. To accept that would have disrupted his weekends in Sussex, and this he was not prepared to do, but preferred to take a course which, in fact, resulted in his cutting himself off from contact with the children for some eight or nine months. This, I must say straightly, was selfish and stiff-necked, and this cannot in any way be mitigated by his very natural feeling of resentment about the change of name, because at that time he did not know anything about it.

e Again I was left with the strong impression that he was, sometimes at any rate, far from wise or understanding in his handling of the children. A special illustration was in July 1968, when he told the children that it was his intention to take steps to have their name changed, and to see that they came to stay with him. Of course, in this kind of situation, children themselves often ask questions about what is happening or going to happen, and parents have to do their best in what they say and how they deal with it. But that is not what happened here. The father started it by asking them whether they wanted to go on seeing him. I am not at all sure whether that was a very wise topic to broach. Happily, they both said that they did. Having received that reply, why did the father not leave it there? Instead, he went on to volunteer what his further intentions were, though he knew that at the very least those intentions might not be welcome—indeed, much more probably, would not be welcome—at that time. As he himself said, he did not raise it in any way to discuss with the children, but it was his pronunciamiento—his edict—that he was laying down. The result was to distress these children very seriously in the way which a doctor described in his affidavit, and which the mother has described.

f The mother is a very different kind of person. She, too, is intelligent, but she is a much more straightforward, uncomplicated person, a much warmer, more easy and natural kind of person, and I thought her most impressive, not merely as an honest witness but as a person and as a mother. I do not overlook that she acted quite wrongly in changing the children's names for school purposes without consulting their father, but that has to be looked at in conjunction with the equally undoubted fact, as I am satisfied, that she had a difficult man to deal with, as she knew from long experience.

j Having heard the mother and the father and Mr D, I no longer think, as I was inclined to think on the written evidence, that she had set out to cut him off from the children so far as she could, though she did make that serious error. She has done, with that exception, what she has done, wisely, in the interests of the children, and not to oust their father.

Mrs Y and Mr D are, neither of them, in at all easy positions. I think that both have been doing their best. It might be said against Mrs Y that she has, herself, perhaps a somewhat over-elaborate and introspective approach, but I do not see anything to suggest that that has any unfavourable impact on the children. She is a school-teacher by profession; and ever since A mentioned that there were some things that she preferred not to eat because it was against the dietary laws, I am sure that Mrs Y has not served food which does conflict with the dietary laws and will so continue.

Mr D made no bones about his view that, in one way and another, the father had let down the mother and the children. I do not propose to go into that part of fairly ancient history at all, but Mr D was entirely honest and frank in his evidence. He said that his view was that the father had greatly failed the children as a father but, he said, 'they are not my children, they are my wife's children, and I have always left it to her to decide what is the right course to take'.

There is no doubt at all that, although there has been friction between the mother and father, the mother has never for a moment forgotten that the father is the children's father, and she has done what she can to foster a normal affectionate relationship between father and daughters. Moreover, both the mother and Mr D told me that, to their way of thinking, a very important factor is what A and G themselves feel about visits to their father, and that unless it seems that to impose visits is going seriously to disturb the children—as I am afraid, on occasions, it undoubtedly has in the past—they will do all they can to co-operate in gently nudging A, at first, and then one hopes G, towards a frame of mind when she is, at least, not averse to going to or staying with her father from time to time; something which, once it begins, one hopes will develop into a regular pattern.

Now what are the right decisions—if indeed, 'right' is the proper word in a situation like this—on these two questions, which remain very difficult? As to the problem of the name, whatever might have been the decision of the court in 1965, had the matter come before it then, as it probably would have done had the mother done what she should have done, and consulted the father, I have to reach a decision now in 1969. Counsel for the father argued that a mother should not benefit now from her wrong action then. That contention has force and attraction but, of course, more important is what is best for the children.

Today, A is the main problem on this topic, though plainly both children must have the same name, and therefore the decision will affect them both. Accepting, as I do, that the initial decision was the mother's, it is plain on all the evidence that A does now feel, deeply and acutely, the social embarrassment of a further change of name back to Y. She is 13 years of age, and though I do not agree at all that she is, in any real sense of the word, a young woman, she is old enough to be sensitive on questions about her name and the circumstances in which it is changed, if it be changed. The father acknowledged that to force a change on her might well set her against him, but he feels this is a risk he should run, and that he is prepared to run.

He, himself, put the arguments on the other side thoughtfully and very sensibly, I thought. He says that when A is older, say 17 or 18, she may want to bear her own father's name—her patronym, as it is—but it will then be a good deal more difficult for her and more embarrassing for her to resume it, and I think there is a good deal of force in that view. But it does, of course, presuppose that A—or, indeed, both the children—are likely, later on, to want to resume the name of Y.

No one can foretell the future, but to my mind, in this case, having seen the grown-ups, I am far from sure that the children will want to change their name again. They may. If they do, and they feel strongly about it, they will be able to do so, though I agree entirely with the father that it will not be so easy for them to do so.

Weighing it all up as best I can—and without anything approaching certainty, I am afraid, that I am right—I have reached the conclusion that the scales do come down in favour of leaving the name as it is for the time being.

a [His Lordship then considered the question of staying access and considered that the time was not ripe for such an order; the summons would be adjourned generally should it be found necessary to bring the matter before the court; meanwhile the father would be granted access for one day every fortnight.]

Summons adjourned; directions accordingly.

b Solicitors: *Bulcraig & Davis* (for the mother); *Gordon, Dadds & Co* (for the father); *Official Solicitor* (for the children).

R C T Habesch Esq Barrister.

Herring v Templeman and others

d CHANCERY DIVISION

BRIGHTMAN J

19th, 22nd, 24th JANUARY, 15th FEBRUARY 1973

e *Education – College – Governing body – Power of Minister to prevent unreasonable exercise of functions – Governing body of teacher-training college – Governing body passing resolution accepting recommendation of college's academic board that student be dismissed – Student alleging breach of rules of natural justice – Student bringing action against governing body – Whether student precluded by statute from resort to courts – Education Act 1944, s 68.*

f *Education – College – Visitor – Jurisdiction – Teacher-training college – College governed by trust deed – Appointment of visitor under trust deed – Governing body of college passing resolution accepting recommendation of academic board that student be dismissed – Student alleging resolution contrary to terms of trust deed and in breach of rules of natural justice – Student bringing action against governing body – Whether complaint within exclusive jurisdiction of visitor.*

g H was a student at a teacher-training college which was governed by a trust deed. Clause 3 of the deed appointed the Archbishop of Canterbury to be the visitor of the college. Clause 17 (ii) provided that the college should be conducted so as to comply with the Education Acts 1944 to 1967, as amended by any subsequent enactment, and with any regulations for the training of teachers made thereunder. Clause 27 provided, inter alia: 'Within the limits prescribed by this Trust Deed and subject to any Regulations made by the Secretary of State for Education and Science . . . (iv) subject to the general responsibility and control of the Governing Body the Academic Board of the College shall . . . (d) make recommendations to the Principal for the suspension or dismissal of students whose standard of work is unsatisfactory . . .'. By h cl 24, it was provided that the principal of the college should have power to recommend the dismissal of a student from the college, and that every such recommendation should require to be confirmed by resolution of the college's governing body after it had considered such representations in writing or in person as the student might wish to make. After H had completed his third teaching practice the academic board met and recommended to the governing body that H should be required to withdraw forthwith from the college on academic grounds. H was not accorded a hearing by the academic board before the recommendation was made but he was present when the matter came before the governing body and was given, prior to the meeting, a copy of the academic board's report, which was the only document that i

the governing body had before it at the meeting. The governing body resolved unanimously to accept the academic board's recommendation. H claimed, *inter alia*, that the resolution was contrary to the terms of the trust deed and in breach of the rules of natural justice in that he had not had an opportunity to challenge the evidence against him or to meet the details of the case made. He brought an action against three members of the governing body in which he sought, *inter alia*, (i) a declaration that the resolution was *ultra vires*, null and void and (ii) an injunction ordering the college to readmit him. The defendants moved for an order that H's statement of claim be struck out under RSC Ord 18, r 19, as disclosing no reasonable cause of action on the grounds (i) that, by virtue of s 68^a of the Education Act 1944, which was applied to teacher-training colleges by the Training of Teachers Regulations 1967^b, the action was outside the jurisdiction of the court and that by reason of s 68 H's only proper remedy was a reference to the Secretary of State; and (ii) alternatively, that the matter was within the exclusive jurisdiction of the Archbishop of Canterbury as visitor.

Held – (i) The plaintiff was not precluded by s 68 of the Act from resorting to the courts, for, although such resort was prohibited where the alleged impropriety was a wrong exercise of discretion, it was not prohibited where the allegation was that an educational body was acting *ultra vires*, and the allegations against the defendants were such that they were being charged with a breach of the law in a more fundamental manner than a faulty exercise of discretion (see p 588 h to p 589 a, post); *Cumings v Birkenhead Corpn* [1971] 2 All ER 881 applied.

(ii) The statement of claim would however be struck out for the matters of which H complained, although they raised the issue of natural justice, touched the internal affairs of the college, and the construction of the regulations of the college and the carrying into effect of those regulations in relation to persons who subjected themselves to them came within the exclusive jurisdiction of the visitor (see p 589 b and c, and p 591 d post); *Attorney-General v Talbot* (1747) 3 Atk 662, *R v Dunsheath, ex parte Meredith* [1950] 2 All ER 741 and *Thorne v University of London* [1966] 2 All ER 338 applied.

Notes

For ministerial control by directions, see 13 Halsbury's Laws (3rd Edn) 572, 573, para 1212.

For non-interference by the High Court in matters within the province of the visitor of a university, see 13 Halsbury's Laws (3rd Edn) 709, 710, para 1445, and for cases on the subject, see 19 Digest (Repl) 655, 320, 321.

For the Education Act 1944, s 68, as amended, see 11 Halsbury's Statutes (3rd Edn) 226.

Cases referred to in judgment

Attorney-General v Talbot (1747) 3 Atk 662, 1 Ves Sen 78, 26 ER 1181, LC, 8 Digest (Repl) 506, 2278.

Cumings v Birkenhead Corpn [1971] 2 All ER 881, [1972] Ch 12, [1971] 2 WLR 1458, 135 JP 422, 69 LGR 444, CA.

R v Dunsheath, ex parte Meredith [1950] 2 All ER 741. [1951] 1 KB 127, DC, 19 Digest (Repl) 655, 321.

Thomson v London University (1864) 33 LJCh 625, 10 LT 403, 10 Jur NS 669, 19 Digest (Repl) 655, 320.

Thorne v University of London [1966] 2 All ER 338, [1966] 2 QB 237, [1966] 2 WLR 1080 CA, Digest (Cont Vol B) 79, 2265a.

^a Section 68, as amended, and so far as material, is set out at p 597 c and d, post

^b SI 1967 No 792, as amended by SI 1969 No 848

Cases and authorities also cited

- a* *Anisminic Ltd v Foreign Compensation Commission* [1969] 1 All ER 208, [1969] 2 AC 147, HL.
- Barnard v National Dock Labour Board* [1953] 1 All ER 1113, [1953] 2 QB 18, CA.
- Breen v Amalgamated Engineering Union (now Amalgamated Engineering and Foundry Workers Union)* [1971] 1 All ER 1148, [1971] 2 QB 175, CA.
- b* *Carl-Zeiss-Stiftung v Rayner and Keeler Ltd (No 3)* [1969] 3 All ER 897, [1970] Ch 506.
- Drummond-Jackson v British Medical Association* [1970] 1 All ER 1094, [1970] 1 WLR 688, CA.
- Gilmore's Application, Re* [1957] 1 All ER 796, sub nom *R v Medical Appeal Tribunal, ex parte Gilmore* [1957] 1 QB 574, CA.
- Glynn v Keele University* [1971] 2 All ER 89, [1971] WLR 487.
- Kanda v Government of Malaya* [1962] AC 322, [1962] 2 WLR 1153, PC.
- c* *Leary v National Union of Vehicle Builders* [1970] 2 All ER 713, [1971] Ch 34.
- Nagle v Feilden* [1966] 1 All ER 689, [1966] 2 QB 633, CA.
- R v Senate of University of Aston, ex parte Roffey* [1969] 2 All ER 964, sub nom *R v Aston University Senate, ex parte Roffey* [1969] 2 QB 538, DC.
- Radford v National Society of Operative Printers, Graphical and Media Personnel* [1972] ICR 484.
- d* *Rondel v Worsley* [1967] 3 All ER 993, [1969] 1 AC 191, HL.
- S (a barrister), Re* [1969] 1 All ER 949, [1970] 1 QB 160.
- University of Ceylon v Fernando* [1960] 1 All ER 631, [1960] 1 WLR 223, PC.
- Ward v Bradford Corp'n* (1971) 70 LGR 27, CA.
- White v Kuzych* [1951] 2 All ER 435, [1951] AC 585, PC.
- Wood v Woad* (1874) LR 9 Exch 190.
- e* *Burn's Ecclesiastical Law* (4th Edn, 1781), vol 1, pp 407, 411.
- Halsbury's Laws of England* (3rd Edn), vol 4, p 409, para 852.
- Tudor on Charities* (6th Edn, 1967), pp 317, 322, 324, 328.

Motion

- f* Ivan Wynford Herring brought an action against Geoffrey Templeman, Leonard George Appleton and Frederic Mason as members of and representatives of the governing body of Christ Church College, Canterbury ('the college'), claiming (i) a declaration that a resolution of the governing body of the college made on 31st January 1972, whereby the governing body accepted a recommendation of the college's academic board to the effect that the plaintiff be required to leave the college forthwith, and the recommendation of the academic board itself, and each of them, was ultra vires, null and void; (ii) an injunction ordering the college to readmit the plaintiff to it as a student in time for him to pursue the third year course of study in the academic year 1972-73 or 1973-74; (iii) damages; (iv) further or other relief. The defendants moved for an order (i) that the statement of claim be struck out under RSC Ord 18, r 19, and (ii) that the action be dismissed. The facts are set out in the judgment.
- g*
- h*

C A Settle QC and John Waite for the defendants.

David Turner-Samuels QC and Stephen Sedley for the plaintiff.

Cur adv vult

- j* 15th February. **BRIGHTMAN J** read the following judgment. This is an action by Ivan Wynford Herring against three members of the governing body of an educational charity known as Christ Church College, Canterbury. The plaintiff seeks a declaration that a resolution of the governing body passed on 31st January 1972 was ultra vires and therefore null and void. The resolution that is challenged is one which unanimously accepted a recommendation of the academic board of the college

that the plaintiff be required to withdraw from the college on academic grounds. This motion before me is an application by the defendants under RSC Ord 18, r 19, to strike out the amended statement of claim on the ground that it discloses no reasonable cause of action. a

It appears from the statement of claim and the documents referred to therein that the college is a teacher-training college originally set up pursuant to charitable trusts declared by the Central Board of Finance of the Church of England by a trust deed dated 5th April 1961. The governing body of the college were given certain powers to vary the terms of the trust deed, as also was the visitor. These powers were exercised. The college is currently governed by what is called a revised trust deed, signed on 9th July 1968 signed by the chairman of the governing body. b

Clause 2 of the revised trust deed provides that the college and its endowments (of which the Central Board of Finance is custodian trustee) shall be administered by the governing body as the administering trustees thereof. Clause 3 appoints the Archbishop of Canterbury to be the visitor of the college. Clause 5 regulates the constitution of the governing body. The governing body consists of not more than 25 persons, that is to say, seven representative members of the Church of England appointed by the Archbishop of Canterbury and certain Church of England bodies, six representatives of educational authorities, the principal and deputy-principal of the college and a few other members. Clause 17 (ii) provides that the college shall be conducted so as to comply with the Education Acts 1944 to 1967 as amended by any subsequent enactment, and with any regulations for the training of teachers made thereunder. Clause 23 sets up an academic board consisting of the principal, who is the chairman of the board, the deputy-principal and members of the academic staff. Clause 27 is headed 'Curriculum and Teaching'. So far as material for present purposes it provides: c

'Within the limits prescribed by this Trust Deed and subject to any Regulations made by the Secretary of State for Education and Science . . . (iv) subject to the general responsibility and control of the Governing Body the Academic Board of the College shall . . . (d) make recommendations to the Principal for the suspension or dismissal of students whose standard of work is unsatisfactory . . . ' d

Turning back in the trust deed, one finds cl 24, which is of prime importance, and I will read it in full: e

'The Principal shall have power to recommend the dismissal of a student from the College. Every such recommendation shall require to be confirmed by resolution of the Governing Body after considering such representations in writing or in person as the student may wish to make except that in emergency the Chairman or in his absence the Vice-Chairman shall have power to act on behalf of the Governing Body and shall report his action to the next meeting of the Governing Body. Every such dismissal, after confirmation by the Governing Body or by the Chairman or Vice-Chairman acting on behalf of the Governing Body, shall at once be reported to the Secretary of State for Education and Science. The Principal, for any reason he may judge adequate, shall have power to suspend any student from his studies in the College and to exclude him from the premises of the College. The Principal shall at once report any such suspension or exclusion to the Chairman or in his absence the Vice-Chairman of the Governing Body.' f

I will also mention cl 39. This provides that any question as to the construction of the trust deed or as to the validity of any act done or about to be done thereunder shall be determined conclusively by the Secretary of State for Education and Science on application made to him for that purpose by the governing body. The defendants do not rely on this clause as by itself removing this action from the jurisdiction of this court. g

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a It also appears from the statement of claim and the documents referred to therein, and from certain explanations given to me during the hearing of the motion, that the college conducts a three-year training course for teachers. The course includes periodical examinations, and also practical exercises in teaching at other schools which are called 'teaching practices'. The plaintiff took part in three teaching practices: the first in 1970 during his third term; the second in 1971 during his fifth term; the third also in 1971 during his seventh term. Had all gone well the plaintiff would have remained at the college for nine terms, leaving in the middle of 1972.

b On some date after the plaintiff's third teaching practice, the academic board held a meeting. It made a recommendation to the governing body that the plaintiff should be required to withdraw forthwith from the college on academic grounds. In its report, it stated that it had reached this decision because it was of the opinion that the plaintiff had shown himself unfit on teaching practice to be a teacher. The board stated in its report that the decision was based on the unanimous judgment of all those involved in assessing the plaintiff's final teaching practice, i.e. the external examiner, the college tutors and the head of the school, together with supporting evidence from reports of the plaintiff's first and second teaching practices. I understand 'the Head of the School' means the head of the school at which the plaintiff took his final teaching practice. For the purposes of the first teaching practice, students were assessed according to three grades, the lowest being 'weak'. That is the grade which the plaintiff attained. For the purposes of the second teaching practice there were five lettered grades, A to E. After his second teaching practice, the plaintiff was assessed as grade D/E, grade D being the lowest pass grade and grade E signifying failure; an assessment of D/E presumably signifies that the assessing body was uncertain whether the plaintiff should be graded as a failure, or should be passed at the lowest grade. The plaintiff's grade assessment after the third teaching practice is not set out in the report of the academic board. The report concluded with this statement:

f 'In the present case [the plaintiff] unhappily seems to be unaware of or unable to understand his deficiencies and to be lacking in that capacity for self-criticism which might have given hope that he would one day be able to equip himself satisfactorily for the teaching profession. Consequently, it is the Academic Board's view that there is no justification for continuing [the plaintiff's] course at the college.'

g It is common ground that the plaintiff was not accorded a hearing by the academic board itself before the board recommended his dismissal. He was, however, offered a sort of *ex gratia* hearing before a committee of the academic board by way of informal appeal, but this was not acceptable to him.

h The matter came before the governing body on 31st January 1972. The proceedings of the governing body are the subject-matter of lengthy minutes, which counsel agreed that I should read; their accuracy was not challenged. There were present the chairman of the governing body and 11 other members. The plaintiff appeared before the governing body, as also did his solicitor who acted in part as his spokesman. The governing body spelt out its duties as follows, according to the minutes (minute 535 (e)):

j '... the Governing Body must make a decision either to accept the recommendation of the Academic Board or to reject it. It was not the business of the Governing Body to interfere with the Academic Board's assessment of [the plaintiff's] academic and professional competence, but an opportunity must be given to [the plaintiff] to offer reasons why he should be allowed to complete his course.'

The governing body had before it one document only, namely, the report of the academic board to which I have already referred. The plaintiff had been given a

copy of this report prior to the meeting. In answering questions from the governing body, the plaintiff said that he found it difficult to make a case because the academic board had not told him why he was unfit to be a teacher. There is then this passage in the minutes, recorded as an answer by the plaintiff to a question put to him: a

‘the final teaching practice assessment as an examination result was not being contested, but [the plaintiff] should have been warned he was in danger of failing and given an opportunity to make representations.’ b

Many other points were urged on his behalf which it is not necessary for me to recite. In conclusion, as I have already mentioned, the governing body resolved unanimously to accept the recommendation of the academic board.

The writ in this action was issued in September 1972 and the statement of claim was served shortly thereafter. The first defendant, Dr Templeman, is the chairman of the governing body. The second defendant, Canon Appleton, is a member of the governing body. The third defendant, the Rev Frederic Mason, is the principal of the college and the chairman of the academic board. He is an ex officio member of the governing body but did not in fact sit with his fellow governors when the plaintiff's case was reviewed. c

The statement of claim is a document of considerable length. I will endeavour to summarise the plaintiff's contentions briefly. (1) The academic board acted contrary to the terms of the revised trust deed, ultra vires and in breach of natural justice. The allegations in support of this contention are: (a) the academic board had no power to make a recommendation to the governing body; under cl 27 (iv) (d) a recommendation for the dismissal of the plaintiff had to be made to the principal, who was then empowered but not obliged under cl 24 to make his own recommendation to the governing body; (b) the academic board ought to have given the plaintiff a hearing before recommending dismissal, because other matters than his examination marks and teaching practice were taken into consideration by the academic board; (c) if, which was not admitted, the recommendation made to the governing body ought to be treated as a recommendation by the principal of the college, the principal acted in breach of natural justice, for four reasons: he did not accord the plaintiff a hearing; he adopted the recommendation of the academic board without reconsidering it; he relied on the recommendation of the academic board although arrived at wrongfully; the principal had himself sat on the academic board. (2) The resolution of the governing body was contrary to the terms of the trust deed and in breach of natural justice. The reasons put forward are broadly as follows. So far as the governing body had before it a recommendation of the principal, that recommendation was a nullity for reasons explained. The recommendation of the academic board was also a nullity. The academic board reported to the governing body opinions it had arrived at or accepted from the teaching staff, but did not report the evidence on which such opinions were founded. The plaintiff had no opportunity to challenge the evidence against him, or to meet the details of the case made. The governing body treated the report of the academic board as a binding assessment of his competence, and as subject only to what was called in argument a ‘plea in mitigation’ on the part of the plaintiff. The governing body ought to have had before it the evidence which was before the academic board, and should have called as witnesses the authors of the reports on which the academic board acted. Generally, the plaintiff did not have an opportunity of appreciating and answering the case which was sought to be made against him. d
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Counsel for the defendants submits that the statement of claim should be struck out on three grounds. First, that the action is outside the jurisdiction of the court having regard to the Education Act 1944, by reason whereof the only proper remedy of the plaintiff, it is said, is a reference to the Secretary of State for Education and Science and not to this court. Secondly, it was submitted that, if the Education Act

a 1944 is not applicable in the manner contended for, the matter is within the jurisdiction of the Archbishop of Canterbury as visitor and therefore not within the jurisdiction of this court. Thirdly, if, contrary to these submissions, this matter is justiciable, the statement of claim discloses no cause of action which has any foreseeable chance of succeeding, and should therefore be struck out in limine.

b The first two points, therefore, go to jurisdiction. It was agreed and indeed asserted by both counsel that the issue of jurisdiction, being a pure question of law, was proper to be decided on this motion; counsel for the plaintiff did not seek to oppose the motion merely on the ground that there was an arguable case in favour of the court's jurisdiction.

Section 68 of the Education Act 1944, as amended, provides:

c 'If the Secretary of State is satisfied, either on complaint by any person or otherwise, that any local education authority or the managers or governors of any county or voluntary school have acted or are proposing to act unreasonably with respect to the exercise of any power conferred or the performance of any duty imposed by or under this Act, he may, notwithstanding any enactment rendering the exercise of the power or the performance of the duty contingent upon the opinion of the authority or of the managers or governors, give such directions as to the exercise of the power or the performance of the duty as appear to him to be expedient . . .'

d

Christ Church College is not, of course, a local education authority, but s 68 is applied to it by certain provisions of a statutory instrument, the Training of Teachers Regulations 1967¹. There are two regulations which are relevant. Regulation 12:

e 'Every college shall be conducted in accordance with articles of government made with the approval of the Secretary of State, which shall in particular determine the functions to be exercised in relation to the college by the body providing the college, the governing body, the academic board and the principal.'

f The word 'college' has been changed by the Training of Teachers (Amendment) Regulations 1969² to read 'voluntary college', and this means a college not maintained by a local education authority.

The other regulation of 1967 which is relevant is reg 15; this reads, so far as material, as follows:

g 'The provisions relating to the reasonable exercise of functions and the making of reports and returns respectively contained in sections 68 and 92 of the Education Act 1944 shall apply to the governing bodies of voluntary colleges as they apply to authorities . . .'

h The argument on behalf of the defendants, based on these provisions, is that the only remedy open to a person who wishes to complain of a wrongful exercise by the college of the powers given to it, is an application to the Secretary of State. Both sides relied on *Cumings v Birkenhead Corp*³. In that case a local authority with a duty to allocate particular pupils in their area to particular schools was said to have acted wrongfully in telling parents that pupils who attended Roman Catholic primary schools would be considered only for Roman Catholic secondary schools and not for maintained county secondary schools. The important passages for present purposes appear in the judgment of Lord Denning MR, and are these⁴:

j '... in case of a wrong exercise of their discretion, the only remedy is that given by statute. If the education authority fail to discharge a duty which is

1 SI 1967 No 792

2 SI 1969 No 848

3 [1971] 2 All ER 881, [1972] Ch 12

4 [1971] 2 All ER at 884, [1972] Ch at 36

imposed on them by the Act, a remedy is given by s 99 of the Act. If the education authority are acting or proposing to act unreasonably in regard to the execution of their duties, then again a remedy is given by s 68 of the Act. In either case the person aggrieved can apply to the Minister. Counsel for the parents realises the force of the argument in those sections. So he puts forward the proposition that in this case the education authority are not merely exercising their discretion wrongly. They are acting beyond their powers, or, in Latin, *ultra vires*. If that were the case, then this court would interfere. The courts will always interfere if a Minister or county borough or any other body is acting beyond the powers conferred on it by law.' a
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Then later Lord Denning MR said¹:

'So, here, if this education authority were to allocate boys to particular schools according to the colour of their hair or, for that matter, the colour of their skin, it would be so unreasonable, so capricious, so irrelevant to any proper system of education that it would be *ultra vires* altogether, and this court would strike it down at once. But, if there were valid educational reasons for a policy, as, for instance, in an area where immigrant children were backward in the English tongue and needed special teaching, then it would be perfectly right to allocate those in need to special schools where they would be given extra facilities for learning English. In short, if the policy is one which could reasonably be upheld for good educational reasons, it is valid. But, if it is so unreasonable that no reasonable authority could entertain it, it is invalid...'

Counsel for the plaintiff submitted that the case before me did not fall within s 68, because the section is expressed to apply to 'the exercise of any power conferred or the performance of any duty imposed by or under this Act'. The power of dismissal is not, it was submitted, a power conferred by the 1944 Act, nor was the duty of the governing body to dismiss an unsuitable pupil one which was imposed under the Act; this power and this duty arose under the revised trust deed. In my judgment, this submission of the plaintiff is not correct. Regulation 12 of the 1967 regulations, which I have already read, requires that Christ Church College shall be conducted in accordance with articles of government made with the approval of the Secretary of State. I assume that the revised trust deed was in fact so approved; there was no suggestion made to me by counsel that it had not been approved; and I observe that seven clauses of the trust deed involve action on the part of the Secretary of State; such clauses would scarcely have been included in the revised trust deed without the approval of the Secretary of State. As the college has a statutory duty to conduct its affairs in accordance with the revised trust deed, it seems to me that s 68 of the Act and reg 15 must be interpreted as providing a means of complaining of an unreasonable performance of the college's functions, without creating an exception for powers or duties which owe their primary origin to a trust deed. Such an exception would not in my view be a reasonable interpretation of the Act and the regulations. c
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It does not, however, follow from the *Cumings* case² that an aggrieved party is necessarily precluded from resort to the courts in every case of alleged malperformance by an educational body of its functions. Clearly such resort is prohibited, on the authority of the *Cumings* case², where the alleged impropriety is a wrong exercise of a discretion. Equally clearly, resort to the courts is not prohibited, on the authority of that case, where the educational body is said to be acting *ultra vires*. It seems to me that an educational body which is said to be acting contrary to natural justice is not being charged with the faulty exercise of a discretion. The charge runs j

¹ [1971] 2 All ER at 885, [1972] Ch at 37, 38

² [1971] 2 All ER 881, [1972] Ch 12

a much deeper and is a charge of a breach of the law in a more fundamental manner. In my view, the *Cummings* case¹ would not prevent resort to the court in such circumstances. I therefore reach the conclusion that the plaintiff is not precluded by s 68 of the 1944 Act and the regulations from resorting to the courts in the present case.

b That is not, however, the end of the matter. The defendants further submitted that the subject-matter of the plaintiff's complaint lay within the jurisdiction of the visitor, namely the Archbishop of Canterbury, and that the jurisdiction of this court was therefore ousted. Before I refer to the cases cited in support of this proposition, it would be convenient to adumbrate the plaintiff's reply thereto. The plaintiff's counsel conceded during the later part of his argument that the relief claimed by the plaintiff was within the jurisdiction of the visitor. He submitted, however, that in a case where the party aggrieved asserted that the defendant had acted in breach of natural justice the court had a concurrent jurisdiction. If, as submitted, there was c concurrent jurisdiction, it was proper to allow the action to proceed in this court. In none of the reported cases on the jurisdiction of the visitor, it was said, did the issue of natural justice arise.

d An early case in which the exclusive jurisdiction of the visitor was asserted was *Attorney-General v Talbot*². This was decided by Lord Hardwicke LC in 1747. The relator was Robert Mapletoft, a native of the county of Northampton. He claimed that the election of the defendant, William Talbot, to a vacant fellowship at Clare College was null and void because the election disregarded the founder's rule that a native of Northampton (possessing the appropriate qualifications) should have preference. Having decided that the chancellor of the university was visitor of Clare College, Lord Hardwicke LC continued as follows³:

e 'If the Chancellor of this University then is visitor, the general powers of a visitor are well known; no court of law or equity can anticipate their judgment, or take away their jurisdiction, but their determinations are final and conclusive. And it is a more convenient method of determination of controversies of this nature, it is at home, *forum domesticum*, and final in the first instance, and they f should be adjudged in a short way *secundum arbitrium boni viri*: it is true this power may be abused, but if it is exercised in a discreet manner, it is a much less expence than suits at law, or in equity; and in general, I believe, such appeals have been equitably determined.'

g In *R v Dunsheath, ex parte Meredith*⁴ the suitor was a graduate and a member of convocation of London University. The statutes of the university enabled members of convocation to requisition a meeting. Convocation was empowered to discuss any matter relating to the university and to declare its opinion thereon to the senate of the university. A sufficient number of members of convocation put their signatures to a requisition for a meeting to consider a motion challenging the propriety of the dismissal of a lecturer who, it was said, was being dismissed as a result of discrimination on political grounds. The chairman of convocation declined to implement the requisition on the ground that the motion did not relate to the university and did not raise a matter on which convocation was entitled to declare its opinion to the senate. An application was made for an order of mandamus directing the chairman of convocation to summon a meeting. Under the statutes of the university, the King in Council was the visitor. Lord Goddard CJ, delivering the judgment of the Divisional Court, said⁵:

1 [1971] 2 All ER 881, [1972] Ch 12

2 (1747) 3 Atk 662

3 (1747) 3 Atk at 674

4 [1950] 2 All ER 741, [1951] 1 KB 127

5 [1950] 2 All ER at 743, [1951] 1 KB at 131, 132

'It is important to remember that *mandamus* is neither a writ of course nor a writ of right, but that it will be granted if the duty is in the nature of a public duty and specially affects the rights of an individual, provided there is no more appropriate remedy. This court has always refused to issue a *mandamus* if there is another remedy open to the party seeking it. This is one of the reasons, no doubt, why, where there is a visitor of a corporate body, the court will not interfere in a matter within the province of the visitor, and especially this is so in matters relating to educational bodies such as colleges. I see no difference for this purpose between a college and a university. Any question that arises of a domestic nature is essentially one for a domestic forum, and this is supported by all the authorities which deal with visitatorial powers and duties, and, although the question has generally arisen with regard to election to fellowships, I see no difference in principle between the question whether a particular person ought to be elected to a fellowship or whether a particular person is a fit and proper person to be appointed or retained as a teacher at a university or a school.'

Lord Goddard CJ concluded¹:

'The case, then, is that an officer of the university is alleged to have refused to perform a duty placed on him by the statutes of the university, and that seems to me to be essentially a matter for the visitor, because it is a domestic question. The officer objects to calling this meeting on the ground that the matter sought to be discussed is not a matter relating to the university. Whether it is such a matter is essentially a question for the visitor, who is also presumed to understand the statutes generally relating to the university, and will have knowledge of the status of these particular schools, which we have not gone into at any length, and which do not seem to be entirely clear.'

There is only one other case to which I think it is useful to refer. That is *Thorne v University of London*². This was a case in which a law student, who was also a doctor of philosophy and no doubt a person of some academic attainments, failed two out of the five examination papers which he took for the purposes of an LLB degree at London University. He sued the University of London for damages for negligently misjudging his examination papers, and also sought an order of *mandamus* requiring the university to award him an appropriate grade. The university applied to a Queen's Bench master to strike out the statement of claim as disclosing no reasonable cause of action. This the master did. His decision was affirmed by the judge in chambers. Dr Thorne then took the matter to the Court of Appeal. He conducted his case in person. Although he did not satisfy the examiners of London University in trusts and criminal law, he seems to have been no mean advocate. In the course of the appellant's argument Diplock LJ said³:

'In disputes of this kind the sole jurisdiction vests with the Visitor to the university, not with the courts. The authority for that is *Thomson v. London University*⁴, where it was held that the Visitor to the university had the sole exclusive jurisdiction to deal with such issues.'

A little later, he said³:

'The principle is that at common law the court had no jurisdiction to deal with the internal affairs or government of the university, for those have been confided by the law to the exclusive province of the Visitor.'

¹ [1950] 2 All ER at 744, [1951] 1 KB at 134

² [1966] 2 All ER 338, [1966] 2 QB 237

³ [1966] 2 QB at 240

⁴ (1864) 33 LJCh 625

a In his judgment, which was in fact the judgment of the court, Diplock LJ¹ quoted with approval the words of Kindersley V-C spoken a century earlier in *Thomson v London University*². The words bear repetition:

b 'The holding of examinations and the conferring of degrees being one, if not the main or only object of this University, all the regulations, that is, the construction of all the regulations and the carrying into effect of all those regulations as among persons who are either actually members of the University or who come in and subject themselves to be at least *pro hac vice* members of the University—I mean with respect to the degrees which they seek to have conferred upon them—all those are regulations of the domus: they are regulations clearly in my mind coming within the jurisdiction, and the exclusive jurisdiction, of the Visitor.'

c Diplock LJ's comment on the words of Kindersley V-C was this³:

The High Court does not act as a Court of Appeal from university examiners; and, speaking for my own part, I am very glad that it declines this jurisdiction. Clearly it does decline the jurisdiction.'

d In the action with which I am concerned, the plaintiff's case is that he did not have a hearing before the academic board, that he did not have a fair hearing before the governing body and that the procedure of his dismissal was defective. In my judgment, these are essentially matters which touch the internal affairs or government of the college and are therefore matters confined by law to the exclusive province of the visitor. The dismissal of a student teacher for failing, in the opinion of those charged with the task of forming an opinion, to match up to the standard required of a teacher is the inevitable duty of an educational establishment which holds examinations and passes out students whom it considers fit to be teachers. The training of a student teacher and the assessment of his competence is the main and indeed the only object of a teacher-training college. The construction of the regulations of the college and the carrying into effect of those regulations in relation to persons who subject themselves to those regulations are, in my view, matters e which the decided authorities have committed to the exclusive jurisdiction of the visitor. This is, of course, subject to the jurisdiction conferred on the Secretary of State under s 68 of the 1944 Act where the subject-matter is appropriate to that section. As Diplock LJ said³, the High Court does not act as a Court of Appeal from educational examiners; likewise the court will not interfere with a decision taken by the governing body of an educational charity, such as Christ Church College, Canterbury, as to the fitness of a student to continue his academic studies at that establishment, and will not conduct a critical inquiry into the manner in which that decision f was reached; that is for the visitor or, where appropriate, the Secretary of State.

g For the reasons which I have given, I propose to strike out the statement of claim as disclosing no reasonable cause of action.

h Judgment accordingly.

Solicitors: *Asshetons*, agents for *Girling, Wilson & Harvie*, Herne Bay (for the plaintiff); *Lee, Bolton & Lee*, Canterbury (for the defendants).

Susan Corbett Barrister.

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1 [1966] 2 All ER at 339, [1966] 2 QB at 242
2 (1864) 33 LJCh at 634
3 [1966] 2 All ER at 339, [1966] 2 QB at 243

Practice Note

QUEEN'S BENCH DIVISION

LORD WIDGERY CJ, CUSACK AND MARS-JONES JJ

5th JUNE 1973

Criminal law – Costs – Acquittal – Discretion – Costs of successful defendant – Costs out of central funds unless positive reasons for making different order – Reasons for making different order.

Notes

For payment of costs in criminal proceedings, see 10 Halsbury's Laws (3rd Edn) 546, paras 1004, 1005.

For the previous practice in relation to the costs of successful defendants, see *Practice Direction* [1959] 3 All ER 471.

LORD WIDGERY CJ. I have a practice direction to make on the subject of costs of successful defendants. This direction is given after consultation with the judges of the Queen's Bench and Family Divisions.

Although the award of costs must always remain a matter for the court's discretion, in the light of the circumstances of the particular case, it should be accepted as normal practice that when the court has power to award costs out of central funds it should do so in favour of a successful defendant, unless there are positive reasons for making a different order. Examples of such reasons are: (a) Where the prosecution has acted spitefully or without reasonable cause. Here the defendant's costs should be paid by the prosecutor. (b) Where the defendant's own conduct has brought suspicion on himself and has misled the prosecution into thinking that the case against him is stronger than it really is. In such circumstances the defendant can properly be left to pay his own costs. (c) Where there is ample evidence to support a verdict of guilty but the defendant is entitled to an acquittal on account of some procedural irregularity. Here again, the defendant can properly be left to pay his own costs. (d) Where the defendant is acquitted on one charge but convicted on another. Here the court should make whatever order seems just having regard to the relative importance of the two charges, and to the defendant's conduct generally

N P Metcalfe Esq Barrister.

Harnett v Harnett

FAMILY DIVISION

BAGNALL J

21st, 22nd FEBRUARY, 5TH MARCH 1973

Divorce – Financial provision – Matters to be considered by court when making order – Duty to place parties in financial position in which they would have been in absence of breakdown – Allocation of family assets – Matrimonial home only asset – Home owned by husband – Ascertainment of wife's beneficial interest in asset – Estimate of value of beneficial interest – Matrimonial Proceedings and Property Act 1970, s 5 (1).

Divorce – Financial provision – Conduct of parties – Duty of court to have regard to conduct – Circumstances in which regard should be had to conduct – Conduct obvious and gross – Substantial disparity in conduct of parties to be shown – Meaning of 'obvious and gross' – Matrimonial Proceedings and Property Act 1970, s 5 (1).

Husband and wife – Property – Improvement – Contribution by spouse in money or money's worth to improvement of property – Contribution of substantial nature – Acquisition of beneficial interest by virtue of contribution – Need for contribution to be identifiable with relevant improvement – More general contributions not sufficient – Matrimonial Proceedings and Property Act 1970, s 37.

The husband and wife were married in 1954, each of them then being 25 years old. They had two daughters, one born in 1961 and the other in 1964. The husband was a builder and, apart from short periods in employment, carried on business on his own account; the highest net profit was about £1,250; there were some fringe benefits. In the course of his business the husband acquired successively five houses each of which became the matrimonial home. The first was built by himself with the help of outside contractors. There was evidence that the wife had helped in the physical work of building although her contribution was no more than any wife might give. The wife was a trained school teacher but gave up teaching in 1958 to start a family. In 1967 the husband suffered a serious illness and, although he resumed light building work in the late summer of 1968, he was not fully fit for work until June 1969. During his illness he received sickness benefit of £10 a week. In consequence of the illness the husband's father advanced him sums amounting to £5,000, repayment of which was secured by a mortgage of the matrimonial home. During the marriage all the profits and earnings of each spouse were applied for the benefit of the family. Except for the asset represented by the matrimonial home, neither spouse had any savings; each had debts. Each had made full contribution to the welfare of the family according to their respective capabilities. In June 1969 the husband discovered the wife committing adultery with a youth half her age. The husband reacted violently ordering the wife out of the home; she left with the children. Her association with the youth did not survive. The husband thereafter treated the marriage as at an end because of the wife's disloyalty. In October 1969 he instituted proceedings for divorce. In May 1970 he obtained a decree nisi on the ground of the wife's adultery, the wife not proceeding with a cross-petition alleging cruelty. The husband was granted custody of the children with care and control to the wife. From January 1970 until January 1971 the husband worked as a salesman at a salary of £1,600 per annum and since September 1972 he had been employed as a sales representative earning £1,880 per annum. Following the separation the wife worked as a clerk at £900 per annum. In January 1970 she obtained full-time employment as a teacher, her salary being £2,124. The husband paid the wife £5 a week for the children. In November 1971 the registrar ordered the husband to pay £4 a week to each of the children and to settle a sum of £8,000 to be invested in the purchase of

a home for the benefit and occupation of the children until the younger attained 25 or they both married or left home under that age, the wife being responsible for the outgoings, other than structural repairs whilst in occupation. The wife subsequently bought a house for £10,850, which was subject to a building society mortgage for £6,150 and a second mortgage to her bank for £3,500. She had to borrow from friends in order to maintain the mortgage payments. The wife appealed against the registrar's orders and applied, *inter alia*, for (i) a declaration under s 17 of the Married Women's Property Act 1882 that she was beneficially entitled to a half share in the matrimonial home; (ii) a declaration that she had acquired a share in the matrimonial home by reason of her contribution to the building of the first home, by virtue of s 37^a of the Matrimonial Proceedings and Property Act 1970; (iii) orders under ss 2 and 4 of the 1970 Act for lump sum or transfer of property orders to her or the settlement of property for her benefit. The agreed value of the matrimonial home was £27,000 subject to the mortgage of £5,000. In addition to the periodical payment for the children, the husband was making certain other payments for them, e.g. school fees, his total outgoings for the children being about £1,000 per annum.

Held – (i) In order to establish that the wife had contributed in money or money's worth to the improvement of real property owned by the husband, within s 37 of the 1970 Act, the contribution had to be identifiable with the relevant improvement, as well as substantial; mere general contributions, that would be taken into account by the court under s 5 (1) (f)^b for the purpose of exercising its powers to make orders for financial provision, were not sufficient. On the evidence the wife had failed to establish anything which amounted to a substantial contribution under s 37 (see p 603 j and p 604 a to c, post).

(ii) In considering whether the conduct of one of the parties was so 'obvious and gross' that it would be just to take it into account under s 5 (1) of the 1970 Act for the purpose of determining the appropriate orders for financial provision, the conduct of both parties had to be considered. If the conduct of one was substantially as bad as that of

^a Section 37 provides: 'It is hereby declared that where a husband or wife contributes in money or money's worth to the improvement of real or personal property in which or in the proceeds of sale of which either or both of them has or have a beneficial interest, the husband or wife so contributing shall, if the contribution is of a substantial nature and subject to any agreement between them to the contrary express or implied, be treated as having then acquired by virtue of his or her contribution a share or an enlarged share, as the case may be, in that beneficial interest of such an extent as may have been then agreed or, in default of such agreement, as may seem in all the circumstances just to any court before which the question of the existence or extent of the beneficial interest of the husband or wife arises (whether in proceedings between them or in any other proceedings).'

^b Section 5 (1) provides: 'It shall be the duty of the court in deciding whether to exercise its powers under section 2 or 4 of this Act in relation to a party to the marriage and, if so, in what manner, to have regard to all the circumstances of the case including the following matters, that is to say—(a) the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future; (b) the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future; (c) the standard of living enjoyed by the family before the breakdown of the marriage; (d) the age of each party to the marriage and the duration of the marriage; (e) any physical or mental disability of either of the parties to the marriage; (f) the contributions made by each of the parties to the welfare of the family, including any contribution made by looking after the home or caring for the family; (g) in the case of proceedings for divorce or nullity of marriage, the value to either of the parties to the marriage of any benefit (for example, a pension) which by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring; and so to exercise those powers as to place the parties, so far as it is practicable and, having regard to their conduct, just to do so, in the financial position in which they would have been if the marriage had not broken down and each had properly discharged his or her financial obligations and responsibilities towards the other.'

a the other then it mattered not how gross that conduct was; they would weigh evenly in the balance. In the circumstances the conduct of the wife fell far short of being 'obvious and gross', at least in comparison with that of the husband, and accordingly it would not be just to have regard to the conduct of the parties (see p 601 g, and p 603 h, post).

b (iii) It followed therefore that it was the duty of the court under s 5 (1) of the 1970 Act so to exercise its powers as to place the parties, so far as practicable, in the financial position in which they would have been had the marriage not broken down. For that purpose the financial position of a wife had to be treated as being more than a right to live in a house; she was to be treated as potentially entitled to benefit at some time from her husband's capital assets; where the time and nature of that benefit could not be predicated some estimate had to be made; for that purpose, at least where the husband's capital was comparatively small in value, a reasonable starting point was to regard the wife as entitled at some time to about a third of that value, although the time at which she would receive free spendable capital would often depend on whether there were young children to be cared for (see p 601 c to f, post).

d (iv) In the circumstances a capital payment to the wife immediately of £12,500, for which she had asked, would be to put her in a far better financial position, and the husband in a far worse position, than they would have been had the marriage not broken down. The proper course would be to discharge the registrar's orders, to order the wife to convey her new house to trustees, to order the husband to pay to the wife £12,500 out of the proceeds of the sale of the matrimonial home on terms that the payment of sufficient sums to the wife's bankers and the building society to discharge her indebtedness to them would be a good discharge pro tanto of the husband's liability. The wife's house should be held by the trustees on trust for sale, with her consent or at her request, and on beneficial trusts of income for her and such of the children as were living during the trust period, which should end on her death or earlier so soon as neither of the children was under 25 and unmarried; thereafter the capital should be held on trust for the husband and wife in equal shares. The wife should be allowed to live in the house or any substituted house during the trust period, she paying all outgoings other than structural repairs (see p 605 b to g, post).

Wachtel v Wachtel [1973] 1 All ER 829 and *Trippas v Trippas* p 1, ante, applied.

g Per Bagnall J. To be taken into account under s 5 (1) of the 1970 Act conduct must be 'obvious and gross' in the sense that the party concerned must be plainly seen to have wilfully persisted in conduct, or a course of conduct, calculated to destroy the marriage in circumstances in which the other party is substantially blameless (see p 601 h, post).

Notes

For financial provision after granting a decree of divorce and the powers of the court in relation thereto, see Supplement to 12 Halsbury's Laws (3rd Edn) para 987A, 1-5.

h For the Married Women's Property Act 1882, s 17, see 17 Halsbury's Statutes (3rd Edn) 120, and for the Matrimonial Proceedings and Property Act 1970, ss 2, 4, 5, 37, see 40 Halsbury's Statutes (3rd Edn) 800, 802, 803, 833.

Cases referred to in judgment

Cowcher v Cowcher [1972] 1 All ER 943, [1972] 1 WLR 425.

i *Gissing v Gissing* [1970] 2 All ER 780, [1971] AC 886, [1970] 3 WLR 255, 21 P & CR 702, HL, 27 (1) Digest (Reissue) 312, 2303.

Mesher v Mesher (1973) The Times, 13th February, [1973] Bar Library transcript 59, CA.

Pettitt v Pettitt [1969] 2 All ER 385, [1970] AC 777, [1969] 2 WLR 966, 20 P & CR 991, HL, 27 (1) Digest (Reissue) 102, 707.

Trippas v Trippas p 1, ante, [1973] 2 WLR 585, CA.

Wachtel v Wachtel [1973] 1 All ER 829, [1973] 2 WLR 366, CA; *varying* [1973] 1 All ER 113, [1973] 2 WLR 84. a

Appeal and summons

The wife, Aileen Patricia Harnett, appealed against the order of Mr Registrar Compton-Miller made on 8th November 1971 under s 4 of the Matrimonial Proceedings and Property Act 1970 whereby he ordered the husband, John Michael Dominic Harnett, to settle £8,000 to be invested in the purchase of property for the benefit and occupation of the two children of the family on certain declared trusts and to pay £4 a week to each of them. By a summons dated 15th May 1972 the wife further applied, *inter alia*, for (a) a declaration under s 17 of the Married Women's Property Act 1882 that she was beneficially entitled to an equitable half share in the former matrimonial home in Butts Hill Road, Woodley, Berkshire, and (b) a declaration that, by virtue of s 37 of the Matrimonial Proceedings and Property Act 1970, she be treated as having acquired a share in the matrimonial home by reason of her contributions for the improvement thereof. The proceedings were heard in chambers but judgment was given in open court. b

B S Green for the wife.

A J J Gompertz for the husband. c

Cur adv vult d

5th March. **BAGNALL J** read the following judgment. The parties in this case were married on 31st July 1954, each of them being then 25 years old. They have had two children, Siobhan born on 4th August 1961 and Rebecca born on 20th April 1964. On 20th October 1969 the husband filed a petition for divorce under the Matrimonial Causes Act 1965, on the ground of the wife's adultery with a Mr Atton. By her answer the wife admitted the alleged adultery, alleged conduct conducing and sought a divorce on the ground of cruelty; she also sought ancillary relief by way of maintenance for herself and the children and secured provision and payment of a lump sum. The suit was heard on 26th May 1970 when Faulks J granted a decree nisi to the husband on the ground of the wife's admitted adultery. The wife did not defend and did not proceed with her allegations of cruelty and there was no adjudication on those allegations. Custody of the two daughters was given to the husband and care and control to the wife with directions for access. The marriage was dissolved by decree absolute on 3rd September 1970. e

I now have to deal with the wife's applications for ancillary relief partly on original jurisdiction and partly on appeal from two orders made by the learned Senior Registrar on 8th November 1971. The wife's claim as finally formulated (leave having been given where necessary) is as follows. 1. A declaration under s 17 of the Married Women's Property Act 1882 that she is beneficially entitled to an equitable half share in the final matrimonial home. Counsel on her behalf conceded that on the principles established by the House of Lords in *Pettitt v Pettitt*¹ and *Gissing v Gissing*², as applied in *Cowcher v Cowcher*³, he could not establish this claim but reserved the right to submit in the Court of Appeal that the last mentioned case was wrongly decided. I need say no more on this claim. 2. A claim to be treated as having acquired a share in certain real property finally represented by the matrimonial home by reason of contributions made by her to the improvement of that real property. 3. An order for periodical payments which, however, was eventually abandoned. 4. Orders for the payment of a lump sum or transfer of property to her or the settlement of property for her benefit. 5. An order for periodical payments to or for the benefit of each of her daughters. f

¹ [1969] 2 All ER 385, [1970] AC 777

² [1970] 2 All ER 780, [1971] AC 886

³ [1972] 1 All ER 943, [1972] 1 WLR 425 g

a The husband opposes all those claims except that he supports the very limited order for a settlement of property and periodical payments to the children made by the learned registrar. In particular he submits that the provision to be made for the wife should be very substantially reduced having regard to her conduct.

b It is established that these claims have to be determined under the Matrimonial Proceedings and Property Act 1970 which, with the Divorce Reform Act 1969, came into force on 1st January 1971. A number of difficult questions arise on the construction and application of the 1970 Act. On some of them guidance has been given by three recent decisions of the Court of Appeal to which I shall have to refer. I propose first to seek to construe the relevant sections and then, with the guidance afforded by the Court of Appeal, to apply them to the facts of this case.

c Since conduct is here in issue I must first refer to the 1969 Act which, adopting a compromise between two extreme philosophies, radically changed the basis of the court's jurisdiction to grant a divorce. Previously divorce could only be obtained on the ground of what was called a matrimonial offence. By the 1969 Act the only ground for divorce is the irretrievable breakdown of the marriage. But that breakdown can only be established if the court is satisfied of one or more of five facts or combinations of facts set out in paras (a) to (e) of s 2 (1) of the 1969 Act.

d Paragraphs (a), (b) and (c) preserve the concept of the matrimonial offence; paras (d) and (e) respectively introduce for the first time divorce by consent on a condition and divorce against the will, or without the consent, of a spouse who has or may have committed no matrimonial offence. By s 2 (3) all the former absolute or discretionary bars to a decree, which depended on conduct of the petitioner or to which the petitioner was a party, are, in effect, abolished and replaced by a single discretionary bar if, in spite of proof of facts set out in s 2 (1), the court is nevertheless satisfied that the marriage has not broken down irretrievably.

e Thus if irretrievable breakdown is established by proof of facts under paras (a), (b) or (c) the respondent's conduct will have been investigated; if it is established by proof of facts under paras (b) or (c) the conduct of the petitioner also may, but not necessarily will, have been investigated. Under paras (d) and (e) there will have been no investigation of the conduct of either party. In these circumstances it has frequently been stated judicially, and is generally accepted, that it is now unimportant, or much less important than it was previously, who obtains a decree. Questions of conduct are appropriately left to be determined on applications for ancillary relief where either party may ventilate any relevant matter subject only to the principles of *res judicata* or issue estoppel.

g Under the old law the basis of ancillary provision was the maintenance, usually by periodical payments, of the former wife, and broadly speaking a so-called guilty wife forfeited her right to be maintained unless a sympathetic order was made in her favour or provision for the children also involved provision for her. The extreme example of this Draconian view was a section of the Matrimonial Causes Act 1857 which remained in force until 1925 and enabled the court to order an adulterous wife, but not a husband, to settle her property for the benefit of her husband and children.

h A power to vary settlements was introduced in 1859 and to order a lump sum payment to a wife in 1963. There was no power to compel a husband to make a transfer of property, other than a payment of money, or to make a settlement. Apart from the provision of the 1857 Act that I have noted and the power to vary settlements there was no power to make permanent provision for a husband or children at the expense of a wife. In all these matters conduct, and particularly the conduct of the wife, was crucial.

i It is against that background, I think, that the construction of the 1970 Act must be approached. The relevant sections are 2, 4 and 5. Section 37 stands by itself and may be considered separately. By s 2 either party may be ordered to pay or secure periodical payments or to pay a lump sum to the other. By s 4 provision may be made under paras (a) and (b) for either party or for children by ordering either party to transfer or

settle property or under paras (c) and (d) by varying, or extinguishing or reducing interests under, a nuptial settlement. a

In my view ss 2 and 4 (a) and (b) contemplate a payment or disposition by a person of money or property of which he or she is the beneficial owner. They do not contemplate a sharing of assets and I think recognise, as the House of Lords has more than once decided, that the somewhat clumsy continental concept of community of goods has no place in English property law, no doubt because for centuries the peculiarly English doctrine of trusts has enabled provision to be made for spouses and children by the more sophisticated weapon of the marriage settlement. This is, I think, confirmed by s 4 (c) and (d) which enable property in which two or more persons have beneficial interests, interests which in English law can only subsist under a trust, to be dealt with by varying, or disposing of, interests under a settlement. That said, it can no doubt also be said, using non-technical language, that when all appropriate orders have been made the result, though not the method, has been to distribute all the property owned by either of the parties among them and their children. b

Section 5 (1) governs the manner in which the powers conferred by ss 2 and 4 are to be exercised. First the court is to have regard to all the circumstances of the case including specific matters set out in paras (a) to (g), many of which by virtue of decisions of the court were taken into account under the old law, but which do not expressly include conduct, except insofar as conduct is inherent in the duration of the marriage (para (d)) and in para (f). c

At that stage the legislature might well have directed the court in quite general terms to exercise its power so as to achieve a fair, or equitable, or just (or any other synonymous epithet) division of the capital and income resources of the parties. It did not do so; it set up a specific target. The court is— d

‘so to exercise those powers as to place the parties, so far as it is practicable and, having regard to their conduct, just to do so, in the financial position in which they would have been if the marriage had not broken down and each had properly discharged his or her financial obligations and responsibilities towards the other.’ e

The same form of words is used, *mutatis mutandis*, in sub-s (2) dealing with orders in relation to a child, though in the vast majority of cases the financial position of a child of a subsisting marriage is simply to be afforded shelter, food and education, according to the means of his parents. f

This is indeed an elusive concept based on a difficult hypothesis. It poses three questions to be answered in relation to each party. First, what would that party's financial position have been if the marriage had not broken down, on the stated assumption? Secondly, how far is it practicable to place that party in that financial position? Thirdly, how far is it just to do so? g

In seeking to answer those questions, several considerations arise. The first two must, I think, be answered not only as at the date of decision, but looking into the foreseeable future. In almost every case it will not be practicable to place both parties in the hypothetical financial position. But it may be practicable to place one party in that position if the other is placed in an inferior position and it may be just to achieve that result. h

Some of the matters in the lettered paragraphs appear to relate to practicability, some to justice, some to both. One at least may operate both ways. A large contribution to the welfare of the family may operate favourably as a matter of conduct. But if during the marriage a wife enjoyed a beneficial financial position only by making large contributions from her own capital and/or income, the benefits she could expect, under the section, from her husband would be reduced. Conduct is mentioned, *eo nomine*, only in relation to the last question; but there are elements of conduct in paras (d) and (f) of the section. During the hearing a superficially attractive argument was canvassed that ‘conduct’ in its context was restricted to those elements, and did i

a not embrace other aspects of matrimonial behaviour. In the end, neither counsel pressed me to adopt that view; I think rightly. But in my judgment, simply as a matter of construction, the section must mean that if a wife's conduct was found to a given extent to be worse than her husband's she would be placed in a financial position, compared with the hypothetical position, to that extent lower than his position, similarly compared. Similarly with a husband, and in such a case the husband might in the end be left worse off, in absolute terms, than his wife.

b I now turn to the three authorities. In *Wachtel v Wachtel*¹ Ormrod J, after cross-decrees under s 2 (1) (b) of the 1969 Act, had ordered a husband to pay to his wife (i) £10,000 or half the value of the matrimonial home whichever should be the less; (ii) £1,500 per annum; (iii) £500 per annum for their child. The case in the Court of Appeal² was hailed in the press as a triumph for the cause of divorced wives. By the decision of that court the husband's appeal was allowed and the wife emerged with c £6,000, £1,500 per annum and £300 per annum for the child. If, therefore, it was a triumph, it was at least tinged with Pyrrhic characteristics.

Ormrod J¹ had found as a fact that responsibility for the breakdown of the marriage rested equally on both parties and that finding was not, I think, challenged on appeal. The issues in the appeal were: (1) should the amounts ordered to be paid d to the wife, notwithstanding the finding of equal responsibility, be reduced below what would have been paid to a blameless wife because she had not been free from blame? (2) even if the order should not be so reduced, had Ormrod J¹ in all the circumstances given the wife and child too much? The Court of Appeal² answered the first question in the negative, holding that where there was equal responsibility no regard should be paid to conduct, and the second question in the affirmative e with the result that I have stated.

On the first question Lord Denning MR, reading the judgment of the court, said³:

f 'It has been suggested that there should be a "discount" or "reduction" in what the wife is to receive because of her supposed misconduct, guilt or blame (whatever word is used). We cannot accept this argument. In the vast majority of cases it is repugnant to the principles underlying the new legislation, and in particular the 1969 Act. There will be many cases in which a wife (although once considered guilty or blameworthy) will have cared for the home and looked after the family for very many years. Is she to be deprived of the benefit otherwise to be accorded to her by s 5 (1) (f) because she may share responsibility for the breakdown with her husband? There will no doubt be a residue of cases where the conduct of one of the parties is in the judge's words⁴ "both obvious and gross", so much so that to order one party to support another whose conduct g falls into this category is repugnant to anyone's sense of justice. In such a case the court remains free to decline to afford financial support or to reduce the support which it would otherwise have ordered. But, short of cases falling into this category, the court should not reduce its order for financial provision merely because of what was formerly regarded as guilt or blame.'

h On the second question Lord Denning MR said⁵:

i 'If we were only concerned with the capital assets of the family, and particularly with the matrimonial home, it would be tempting to divide them half and half, as the judge did. That would be fair enough if the wife afterwards went her own way, making no further demands on the husband. It would be simply a division of the assets of the partnership. That may come in the future. But at present

1 [1973] 1 All ER 113, [1973] 2 WLR 84

2 [1973] 1 All ER 829, [1972] 2 WLR 366

3 [1973] 1 All ER at 835, 836, [1973] 2 WLR at 372

4 [1973] 1 All ER at 119, [1973] 2 WLR at 90

5 [1973] 1 All ER at 839, 840, [1973] 2 WLR at 377, 378

few wives are content with a share of the capital assets. Most wives want their former husband to make periodical payments as well to support them; because, after the divorce, he will be earning far more than she; and she can only keep up her standard of living with his help. He also has to make payments for the children out of his earnings, even if they are with her. In view of these calls on his future earnings, we do not think she can have both—half the capital assets, and half the earnings. Under the new dispensation, she will usually get a share of each...

‘... when the husband has available capital assets sufficient for the purpose, the court should not hesitate to order a lump sum. The wife will then be able to invest it and use the income to live on. This will reduce any periodical payments, or make them unnecessary. It will also help to remove the bitterness which is so often attendant on periodical payments. Once made, the parties can regard the book as closed. The third thing is that, if a lump sum is awarded, it should be made outright. It should not be made subject to conditions except when there are children. Then it may be desirable to let it be the subject of a settlement. In case she remarries, the children will be assured of some part of the family assets which were built up for them.’

Finally, in a paragraph headed ‘*Looking at it broadly*’ and summarising the effect of the court’s decision, Lord Denning MR said¹:

‘It will mean that each will have to cut down their standard of living: but it is as much as can be done in the circumstances.’

The Court of Appeal did not expressly compare the financial position of each with his and her hypothetical position had the marriage not broken down, though some such comparison may have been implicit in the reference to their standard of living in the last sentence that I have quoted.

In *Mesher v Mesher*² the Court of Appeal reversed a decision whereby Latey J had ordered the husband to transfer the matrimonial home, which was owned beneficially in equal shares, to the wife, and ordered that it should be held on trust for sale to hold the proceeds of sale and rents and profits until sale for the husband and wife in equal shares with provisions designed to enable the wife to live in the house with the daughter until the latter should be 17. This, it seems to me, reproduced as nearly as possible the respective financial positions before the marriage ended. The husband owned half of the house subject to the right of the wife and daughter to live in it; the wife had the right to live in a house of which she owned a half share. The income positions were evenly balanced. The court rejected an argument that regard should be paid to the fact that it was the husband who broke up the marriage.

In *Trippas v Trippas*³ the matrimonial home had been owned beneficially in equal shares and effect had been given to those rights of property by the husband buying the wife’s share at a valuation. The furniture was divided between them by agreement; I do not know on what terms. The husband had received a lump sum and shares on the purchase under a take-over of his shares in the family business. He was ordered to pay £10,000 to his wife. The basis of the decision was that, if the marriage had not broken down, as a matter of probability the husband would have given his wife an amount of that order, and particular reference was made to s 5(1)(g) of the 1970 Act. Lord Denning MR⁴ held that a lump sum should be provided for her benefit having regard to the sale of the business. Scarman LJ⁵ said that if the parties had been living together the wife could have expected in cash or kind some sort of benefit

1 [1973] 1 All ER at 843, [1973] 2 WLR at 380

2 (1973) The Times, 13th February

3 Page 1, ante, [1973] 2 WLR 585

4 At p 5, ante, [1973] 2 WLR at 591

5 At p 8, ante, [1973] 2 WLR at 594

a from the sale. The husband was stated by Lord Denning MR to have clear capital of £35,000 apart, I think, from his house, furniture and motor car. The £10,000 was just below one-third of that, but I think that it must have been substantially below one-third of his total capital assets. Further, if there had been no take-over the husband would still have had capital of very substantial value, but tied up in shares in the family company. It may be a fair inference that, but for the take-over and the £80,000 in cash that it made available to the husband, a lump sum payment would not have been ordered. But I am conscious of the danger of drawing such inferences. In that case there was nothing to choose between the conduct of the parties which, therefore, did not affect the financial disposition made.

In my judgment the following principles are to be extracted from those decisions.

c 1. Where the property rights of the parties are clearly ascertainable effect is to be given to them as they would have existed had there been no breakdown of the marriage.

d 2. The financial position of a wife, assuming no breakdown of the marriage, referred to in s 5 (1) of the 1970 Act, must be treated as being more than a right to live in a house, in which as a matter of property she had a limited share or even no share at all and to be maintained out of her husband's income supplemented by her own income if she has any. She must be treated as potentially entitled to benefit at some time from her husband's capital assets. Where, as a matter of probability, the time and nature of that benefit can be predicated, as in *Trippas v Trippas*¹, effect will be given to it. Where it cannot be so predicated some estimate must be made, and where the wife has no capital assets and the husband's capital is of comparatively small value, a reasonable starting point is to regard the wife as entitled at some time to about a third of that value—though as the total value increases the proportion is likely to be lower. Where the wife has some capital, that must be taken into account in determining what she should be given by the husband. It would be unlikely that she would be required to transfer capital to the husband unless her assets were substantially greater than his. On that approach the final decision on time and amount must depend on all the circumstances prescribed by the 1970 Act, in particular the time at which a wife is to receive free spendable capital will often depend on whether there are young children to be cared for.

3. Income and capital provision must be interrelated and interdependent.

g 4. It will not be just to have regard to conduct unless there is a very substantial disparity between the parties on that score. Ormrod J and the Court of Appeal in *Wachtel v Wachtel*² used the phrase 'obvious and gross'. In this phrase I think that 'gross' describes the conduct; 'obvious' describes the clarity or certainty with which it is seen to be gross. But the conduct of both parties must be considered. If the conduct of one is substantially as bad as that of the other then it matters not how gross that conduct is; they will weigh equally in the balance. In my view to satisfy the test the conduct must be obvious and gross in the sense that the party concerned must be plainly seen to have wilfully persisted in conduct, or a course of conduct, calculated to destroy the marriage in circumstances in which the other party is substantially blameless. I think that there will be very few cases in which these conditions will be satisfied.

j In the present case the husband was basically a builder, following his father's trade, though for two short periods he was employed as a schoolmaster and from September 1963 to October 1967 he was employed by Grateheat Ltd. He had a substantial claim against that company for damages for wrongful dismissal which unfortunately has proved worthless owing to the company's insolvency. Apart from that he carried on his business as a builder sometimes in his spare time and sometimes as his only occupation. I have seen the accounts of this business: the highest net profit was about £1,250; there were some fringe benefits.

¹ Page 1, ante, [1973] 2 WLR 585.

² [1973] 1 All ER 113, [1973] 2 WLR 84; on appeal [1973] 1 All ER 829, [1973] 2 WLR 366.

In the course of his business between December 1955 and the present time the husband acquired successively five houses, the first being Queen's Ryde, Marlow, Buckinghamshire, and the last being 4 Butts Hill Road, Woodley, Berkshire, each of which became the matrimonial home. In the case of four of them, including the first and the last, he bought the land and himself, with some work done by outside contractors, built the house. Sometimes there were mortgages: each one, except 4 Butts Hill Road, of which the husband retains the freehold, was sold at a profit. 4 Butts Hill Road, the last matrimonial home, was finally completed as recently as August 1972. It is subject to a mortgage in favour of the husband's father for £5,000; its value, free from incumbrances, has been agreed at £27,000.

In November 1967 the husband was admitted to hospital to be operated on for a serious spinal complaint. He was discharged in January 1968, and for a long time afterwards was encased in plaster, which severely restricted his movements and was only gradually removed. He resumed light building work on the house in the late summer of 1968 but was not announced to be available for work until June 1969. During that period and until January 1970 he received sickness benefit of £10 per week. He was also entitled to £10 per week under an insurance policy, but there was a dispute as to the duration of his entitlement which was eventually compromised by a payment of £534.

While the husband was unfit, and also because the claim against Grateheat failed to materialise, his father paid moneys to him and on his behalf which, he said and I accept, amounted to £5,000. It is the repayment of this amount which is secured by the mortgage on 4 Butts Hill Road. It carries interest at $7\frac{1}{4}$ per cent per annum but no interest has been paid.

From January 1970 to January 1971 the husband worked as a freelance salesman at a salary of £1,600 per annum. Since September 1972 he has been employed as a sales representative and his present earnings are £1,800 per annum.

The wife is a fully trained schoolteacher. She was employed as such until 1958, when she left to start a family. For six months in 1963 she did part-time work; after the separation, from September 1969 to January 1970 she earned £900 per annum as a clerk and since then she has been in full-time employment as a teacher. Her present salary is £2,124 per annum. During the marriage she compounded her pension rights for a lump sum. These rights could be reinstated by the payment of a sum of about £600. She would then, if she continues to work until she is 60, be entitled to a pension and a lump sum payment both calculated by reference to her average salary. It is not possible to compute either the present or future value of these benefits.

During the marriage all the profits and earnings of each of the spouses were applied for the benefit of the family. Except for the asset represented by 4 Butts Hill Road neither has any savings: each of them has debts. Each of them made full contribution to the welfare of the family according to their respective resources and capabilities. I do not accept the wife's criticism that at times the husband failed to work when he was able to do so.

The final separation was sudden and tempestuous. For some eight months before June 1969 the wife (as she later admitted) had been having a ridiculous affair with a youth half her age to whom the parties had given occasional hospitality when he was a schoolboy and his parents were abroad, and who was then staying with them because his work was near. In the late evening of 27th June 1969 they were caught virtually in the act by the husband returning home unexpectedly early. He reacted understandably. He threw the boy out of the house and, after some violence, the wife also. She managed to return and stayed uneasily until 30th June 1969 when she left with the children and went to her parents. She never returned, and apart from the last five months of 1969, the children have been with her. Her association with the boy did not survive. The husband also criticised the wife for getting drunk and making herself look cheap at a new year's eve party in 1968 and as an afterthought made some unspecified criticism (which I reject) of her housekeeping. He told me that he

a had some doubts as to the stability of the marriage in early 1969 but did not suspect his wife of infidelity. After the episode in June 1969 he treated the marriage as at an end because his wife had been disloyal and he could not tolerate disloyalty. Those are the husband's complaints relating to conduct.

b By her answer in the suit the wife alleged cruelty including a number of incidents of physical violence as well as the incident (admitted by the husband) of 27th June 1969. She relied on those allegations and the husband's neglect of her as conduct conducting to her adultery and in support of her cross-prayer for divorce. She gave evidence in support of those allegations before me and was cross-examined on them. Before adjudicating on this I must say a few words about the character of the parties and the impression they made on me.

c The husband has a dominant and dominating personality; yet in contrast I think that he had periods of depression and moodiness which his illness and operation intensified and which he inflicted on others. He is a perfectionist and expected high standards; but he undoubtedly lacked the gentle touch. He saw situations in clear terms of black or white with no grey. Clearly he was capable of violence, at any rate under provocation. My impression was that, quite apart from the incident of June 1969, he would be easily provoked. With some reservations I thought him a witness of truth.

d The wife is a softer personality but not lacking in determination. She knew what she wanted and how to adopt effective means of getting it. She is a master of the quietly biting retort and I have no doubt that in argument, or even in discussion, she would be exasperating. Though I have some sympathy with her, having regard to the character that I have painted of the husband, I am satisfied that her allegations against him are substantially exaggerated. I am confirmed in this because I thought e that as a witness she was generally less than frank, prone to prevarication and, as the saying goes, to swear by the book. I have great hesitation in accepting her evidence, except where it is admitted or corroborated.

f In deciding the question of conduct I do not think it necessary to make findings on the specific allegations made by the wife. I think that before 1969 the marriage was foundering, and, if any serious crisis occurred, liable to break. This was due partly to misfortune in the husband's illness, mainly to the temperaments of the parties, partly even to the passage of time. The husband conceded that he was in part responsible for the breakdown. The wife clearly behaved foolishly and reprehensibly; I think that the need she sought to satisfy was solely physical, with no intention of destroying the marriage; she simply thought—if she thought at all—that she would not be found out. This behaviour was, in my view, susceptible of forgiveness by a reasonable and loving husband, who thought his marriage worth preserving and who wanted to maintain the unity of his family. This husband did not preserve and maintain them because, in the circumstances I have mentioned, he did not think them worth it and because of his wounded pride and self esteem. I am satisfied that the conduct of the wife fell far short of being gross and obvious, certainly in comparison with that of the husband, and probably also absolutely.

g I turn to the wife's claim under s 37 of the 1970 Act. As applicable to this case, s 37 requires it to be established that the wife contributed in money or money's worth to the improvement of real property owned by the husband and that the contribution was of a substantial nature; if so, she is to be treated as having then, that is at the time of the contribution, acquired a share in the property of such an extent as seems in all the circumstances just to this court in these proceedings. In my judgment, i to satisfy the test, the contribution must be identifiable with the relevant improvement as well as substantial; mere general contributions that are brought into the reckoning under s 5 (1) (f) do not suffice; and care must be taken that the same contributions are not counted twice, once under s 5 (1) (f) and once under s 37.

The wife's case is that the relevant improvement was the building of the first house, Queen's Ryde, on freehold property and that she worked physically on the building,

that she drove the builder's van, dealt with contractors, and contributed to office work connected with the building business generally. A neighbour and one of the sub-contractors gave evidence of having seen her give assistance on occasions. The husband said that she helped occasionally 'as any wife would'. On this aspect, insofar as the versions differ, I prefer that of the husband. The wife once paid £100 for building materials, but it must be remembered that all the resources of each were devoted to general family purposes; and she prayed in aid a loan of £400 from her friend, which, however, was clearly a loan to, and repaid by, the husband. The husband's cousin corrected the first version of her affidavit by deleting a reference to the wife's assistance in building. The cost of Queen's Ryde was over £2,000. I am not satisfied that the wife made a substantial contribution. I anticipate by adding that even had I taken a different view, having regard to the present financial situation, my ultimate conclusion would have been the same.

The present position is as follows. The husband owns 4 Butts Hill Road, valued at £27,000 subject to the mortgage for £5,000. It was submitted for the wife that that incumbrance should be set aside under s 16 (1) (b) of the 1970 Act; alternatively that such part of the debt as represented payments by the husband's father after the separation should be disregarded. I reject both submissions. I think that the transaction was perfectly genuine; and that if the father had not paid, in order to live the husband would have had to incur indebtedness from other sources, probably the bank, which would properly have been taken into account on a final assessment. His other debt is an overdraft of about £900. It is agreed that the house must be sold but the costs of that must be taken into account. The husband has his present salary of £1,880 per annum. He has some idea of acquiring and running a shop selling, principally, children's shoes which he thinks would bring in a larger income, but would require a substantial capital outlay even taking account of any loan he could negotiate. This scheme is very embryonic.

The wife has recently bought the house in which she is living with the children. The purchase price was £10,850. There is a first mortgage to a building society for £6,150 and a second mortgage to the bank for £3,500. The wife's mother contributed £1,000 probably as a gift. The mortgage payments are about £90 per month. The wife's salary of £2,124 per annum, even with the aid of some part-time teaching, has not been sufficient to pay those payments and keep her going and she has had to borrow from friends.

Until the date of the registrar's order the husband paid £5 per week for the children (except when they were with him); since then he has paid £8 per week. He has also paid school fees and for school clothes. His present outgoings for the children, comprising all those items, are about £1,000 per annum.

On 8th November 1971 the learned registrar ordered the husband to pay £4 a week to each of the children and also ordered the husband to settle a sum of up to £8,000 to be invested in the purchase of a suitable property to be agreed between the parties for the benefit and occupation of the children until the younger child attains 25 or both children shall have married or left home under that age, the wife to be responsible for all outgoings other than structural repairs during any period when she is occupying the property and looking after the children. Those orders were made before the wife bought her present house.

The husband submits that those orders should be affirmed, save that he offers and has always offered to increase the capital sum to the actual cost of the wife's house and, on that footing, to increase the payments to the children to £1,200 per annum, so as to include all fees and payments essential to their schooling. There would be some tax advantage in that course. The wife asks for a capital sum of £12,500 to be paid to her unconditionally. Each party submits, in the alternative, that a capital sum should be settled on the wife so that part of that sum becomes payable to her at a future date.

If the marriage had not broken down the wife would have had the right to live in

a the house with no beneficial interest therein save such inchoate right to a future capital sum as is inherent in the principle established in the Court of Appeal cases I have cited and the right to be maintained, making such contribution as she could from her own earnings. The husband would own the house, subject to the wife's inchoate right, and would have been responsible for the maintenance of the wife and children with the aid of any contribution made by the wife.

b In my judgment a capital payment to the wife immediately, certainly of any sum approaching that for which she asks, would put her in a far better position, and the husband in a far worse position, than those hypothetical positions. Taking, as seems to me reasonable, £21,000 as the net value of the only capital asset, she would have nearly 60 per cent thereof and he less than 40 per cent. On the other hand, simply to give her one-third, £7,000, would leave her with a substantial mortgage to service after payment of her debts and might not safeguard the position of the children.

c In my judgment the proper course to take is to discharge both the existing orders; to order the wife to convey her new house to two trustees, one to be selected by each party, to be held on trusts hereafter mentioned; to order the husband to pay to the wife a sum of £12,500 on terms that the payment to the wife's bankers of £3,500 in discharge, or part discharge, of her indebtedness to them and to the building society of such an amount as shall be required to redeem that society's mortgage on the wife's house shall be a good discharge pro tanto of the husband's liability; and to order the husband to pay a sum of £10 per week to each child so long as all school expenses are defrayed either out of those sums or by the wife. The capital sums should be paid on a sale of 4 Butts Hill Road, and I make no order on the s 17 summons except that the house be sold by and at the expense of the husband.

e The wife's house should be held on trust for sale, with the consent or at the request of the wife, and on beneficial trusts of income for the wife and such of the children as are living during a trust period which should end on the death of the wife or earlier so soon as neither of the children shall be under 25 and unmarried; at the end of the trust period the capital should be held in trust for the husband and wife in equal shares. The trustees should be directed to permit the wife to live in the house or any substituted house during the trust period, she paying all outgoings other than structural repairs or improvements with unrestricted power of investment including power, with the consent or at the request of the wife, to buy another house as a residence for her and power to raise money on mortgage for or towards the purchase of such a substituted house or for repairs or improvements. The settlement should be in terms agreed by the respective solicitors or settled by conveyancing counsel to the court. The costs of the settlement should be paid by the wife.

f This arrangement will preserve a home for the wife and the children and will give both the husband and the wife an interest in any capital appreciation of its value. Its fairness may be tested by assuming an almost immediate end of the trust period and distribution of say £11,000 on a sale of the house: the wife would receive £5,500 which with the £1,500 she will now receive as free money would be £7,000, or one-third of the present value of the equity in 4 Butts Hill Road.

h *Appeal allowed. Order accordingly.*

Solicitors: J R Bottrill (for the wife); Winter-Taylor, Woodward & Webb, Marlow (for the husband).

j R C T Habesch Esq. Barrister.

Cripps (Pharmaceuticals) Ltd v Wickenden and another^a

R A Cripps and Son Ltd v Wickenden and another^b

CHANCERY DIVISION

GOFF J

30th, 31st OCTOBER, 1st, 2nd, 3rd, 6th, 7th, 8th, 9th, 20th NOVEMBER 1972

Company – Debenture – Receiver – Appointment – Validity – Premature appointment – Demand by debenture holder for payment – Appointment of receiver valid only if effected after demand made – Appointment complete on communication to and acceptance by receiver – Time for company to comply with demand for payment – Loan repayable on demand under debenture – Time to comply with demand before appointment of receiver effected – Company not having means to comply with demand.^c

P Ltd was a wholly-owned subsidiary of C Ltd. Both companies carried on business in Brighton. Until 1966 both businesses were prosperous but thereafter profits declined; C Ltd began to incur losses. In May 1967 the companies' bank increased their overdraft facilities, and each company gave the bank an all-moneys debenture, under which the money was repayable on demand. By April 1968 C Ltd was again in need of ready money and borrowed a sum from a firm in which S was a partner; the firm took a second debenture. S became chairman of C Ltd but was not a director of P Ltd. The board of P Ltd only met for the purpose of transacting formal business; policy decisions affecting P Ltd were taken by the board of C Ltd of which all P Ltd's directors were members. On 1st August 1969 the companies' draft accounts to 2nd May 1969 were received by the bank. They revealed a serious worsening of the position. On 7th August the bank's Brighton district manager decided that, in view of the critical situation of the companies, a receiver must be appointed. For that purpose he required the authority of the bank's head office in London. On the same day, therefore, he sent a note to the head office recommending that W be appointed receiver for each of the companies. He also stated in the note that S was coming to see him the following morning when he would make formal demand on each of the companies and that he had arranged with W for the two deeds of appointment to be collected from head office the following morning. Two instruments, each dated 7th August and stamped but not sealed, were approved and signed by the assistant general manager of the bank who also approved the necessary overdraft facility for the receiver. W's assistant collected the documents from the head office early on 8th August and then proceeded to Brighton to meet W. On the same day the assistant general manager wrote to the district manager confirming that the appointment of a receiver had been sanctioned and stating that 'The Deeds of Appointment have been handed to [W's assistant] this morning in accordance with your request . . .' Meanwhile, at about 10.45 a.m. on the same morning S, together with the bank's branch manager, went to the office of the district manager who informed S of his decision to appoint a receiver. The branch manager then handed S the written demands for payment and they then left. S went to the office of the two companies and handed the demands to the company secretary some time before midday. Meanwhile W's assistant had arrived in Brighton by train and he and W reached the bank's district office at about 12.30 p.m. They saw the district manager who asked them whether they had the documents collected from the bank's head office. W's assistant then produced the envelope and handed it to the district manager^d
^e
^f
^g
^h
ⁱ

a who passed it on to W without looking at the contents. W and his assistant then went to the bank's branch office and saw the branch manager some time between 2.15 and 2.30 p.m. There W opened a receivership account and inspected the companies' cheques which had arrived for payment; he decided that they should all be returned marked 'Receiver appointed—Refer to Drawer'. They then proceeded to the companies' office and took possession of the premises. By W's order the business was closed on 12th August. W also gave instructions for a statement of affairs to be prepared and he accepted liability for all goods received from 8th August. Subsequently C Ltd and P Ltd brought actions against W and the bank claiming that W's appointment as receiver was invalid in that it had been made before the bank had made demand for payment or, alternatively, before the companies had had an opportunity to comply with the demand.

c

Held – The actions would be dismissed for the following reasons—

(i) An appointment under hand took effect when the document of appointment was handed to the receiver by a person having the necessary authority in circumstances from which it might fairly be said that he was appointing a receiver, and the receiver accepted the proffered appointment, although the acceptance might be tacit. The date of the instrument was irrelevant except as a piece of evidence if the actual date of handing over was not known (see p 614 e and f and p 615 a f and g, post); *Windsor Refrigerator Co Ltd v Branch Nominees Ltd* [1961] 1 All ER 277 applied.

(ii) On the evidence, the instruments of appointment had been given to W's assistant in London as agent for the bank to bring them to the district office where the matter was to be finalised. They did not come to be held by W until the district manager informed W and his assistant that the demands had been made and not satisfied and released the documents by asking W's assistant for them and handing them over to W. Accordingly the appointment of W as receiver had not been effected until that moment (see p 615 j to p 616 b, post).

(iii) The appointment could not be impugned on the ground that insufficient time had been allowed to S after the demands had been made for, where money was repayable on demand, all a creditor had to do was to give the debtor time to get the money from some convenient place; he was not obliged to give the debtor time to negotiate a deal which might produce the money; in the circumstances it was clear that the companies had neither the money nor any convenient place to which they might go to get it. Accordingly the companies could not object on the ground that they were not given time to find the money or that the interval between 11 a.m. when the demand was made and midday or later when the receiver was appointed was too short (see p 616 d and p 617 a and c, post); dicta of Blackburn J in *Brightly v Norton* (1862) 3 B & S at 312, of Lord Cockburn CJ in *Toms v Wilson* (1863) 4 B & S at 453 and of Sir Barnes Peacock in *Moore v Shelley* (1883) 8 App Cas at 293 applied.

(iv) Furthermore it was not open to P Ltd to object to the appointment on the ground that S was not a director of that company since on the evidence it was clear that he was held out as authorised to act for both companies. In any event, any defect would have been remedied when S handed the demand to the company secretary about midday, for in the absence of certainty about the sequence of events it was to be presumed that that event had taken place before W had been received at the district office of the bank (see p 617 d and h j, post); dictum of Lord Cross of Chelsea in *Eaglehill Ltd v J Needham Builders Ltd* [1972] 3 All ER at 905 applied.

Notes

For the appointment of receivers, see 6 Halsbury's Laws (3rd Edn) 508-514, paras 986-998, and for cases on the subject, see 10 Digest (Repl) 818-823, 5322-5379.

Cases referred to in judgment

Bailey v Bodenham (1864) 16 CBNS 288, 33 LJCP 252, 10 LT 422, 10 Jur NS 821, 143 ER 1139, 3 Digest (Repl) 220, 522. a

Brighty v Norton (1862) 3 B & S 305, 1 New Rep 93, 32 LJQB 38, 7 LT 422, 9 Jur NS 495, 122 ER 116, 12 Digest (Reissue) 540, 3768.

Eaglehill Ltd v J Needham Builders Ltd [1972] 3 All ER 895, [1972] 3 WLR 789, [1973] 1 Lloyd's Rep 143, HL.

Lloyds Bank Ltd v Margolis [1954] 1 All ER 734, [1954] 1 WLR 644, 32 Digest (Repl) 478, 922. b

Moore v Shelley (1883) 8 App Cas 285, 52 LJPC 35, 48 LT 918, PC, 7 Digest (Repl) 141, 800.

Toms v Wilson (1863) 4 B & S 442, 2 New Rep 454, 32 LJQB 382, 8 LT 799, 10 Jur NS 201, 122 ER 524, Ex Ch, 12 Digest (Reissue) 540, 3769.

Tradax SA v Volkswagenwerk AG [1970] 1 All ER 420, [1970] 1 QB 537, [1970] 2 WLR 339, [1970] 1 Lloyd's Rep 62, CA, Digest (Cont Vol C) 25, 158a. c

Windsor Refrigerator Co Ltd v Branch Nominees Ltd [1961] 1 All ER 277, [1961] Ch 375, [1961] 2 WLR 196, CA, Digest (Cont Vol A) 182, 5325a.

Cases also cited

Buckingham & Co v London & Midland Bank Ltd (1895) 12 TLR 70. d

Kasofsky v Kreegers [1937] 4 All ER 374, DC.

Miller (James) and Partners Ltd v Whitworth Street Estates (Manchester) Ltd [1970] 1 All ER 796, [1970] AC 583, HL.

National Westminster Bank Ltd v Halesowen Presswork and Assemblies Ltd [1972] 1 All ER 641, [1972] AC 785, HL.

Robbie (NW) & Co Ltd v Witney Warehouse Co Ltd [1963] 3 All ER 613, [1963] 1 WLR 1324, CA. e

Actions

By writs issued on 16th February 1970 the plaintiffs, R A Cripps and Son Ltd and Cripps (Pharmaceuticals) Ltd, a wholly-owned subsidiary of R A Cripps and Son Ltd, brought separate actions against the defendants (1) Keith David Wickenden ('Mr Wickenden') and (2) National Westminster Bank Ltd ('the bank'). The plaintiff company in each action claimed, *inter alia*, (1) against both defendants: (i) a declaration that the purported appointment on 7th August 1969 by the bank of Mr Wickenden to be receiver and manager of the plaintiff company allegedly pursuant to a debenture dated 31st May 1967 was invalid and of no effect; (ii) a declaration that the purported appointment on 8th September 1969 by the bank of Mr Wickenden to be receiver and manager of the plaintiff company allegedly pursuant to the debenture was invalid and of no effect; (2) against Mr Wickenden: (iii) an injunction to restrain him from acting as receiver and manager of the plaintiff company pursuant to such purported appointments or either of them or at all; (iv) an order for delivery of possession of all assets and property of the plaintiff company in his possession; (v) an account of all moneys of the plaintiff company which had been received by Mr Wickenden, or any persons on his behalf, whilst purporting to act as receiver and manager of the plaintiff company under the purported appointments or either of them and of the manner in which he had applied those moneys. Both actions were heard together. The facts are set out in the judgment. f

Allan Heyman QC and Eben Hamilton for the plaintiffs. g

Richard Yorke QC and Konrad Schiemann for the defendants. h

Cur adv vult

20th November. **GOFF J** read the following judgment. In this case two actions were tried together. The plaintiffs in the first were R A Cripps and Son Ltd, which j

a I will call 'Cripps'. The plaintiffs in the other action were Cripps (Pharmaceuticals) Ltd, a wholly-owned subsidiary which I will call 'Pharmaceuticals'. In the actions they challenge the appointment of the first defendant, Keith David Wickenden, as receiver and his conduct, which they say was done without authority, in closing down Cripps' business and selling their stock and leasehold premises and fixtures.

b Cripps were incorporated on 2nd March 1935 to take over the business of a partnership which then existed. Pharmaceuticals were incorporated much later in May 1962. Cripps were wholesalers dealing in various drugs and chemical sundries. Pharmaceuticals were manufacturers and their business was on a much smaller scale.

c Until 1966 the businesses were prosperous but their profit margin then declined and Cripps began to incur losses. Indeed they found themselves with insufficient working capital and their liquidity position was often very serious, although there was generally a credit balance, comparatively small, on Pharmaceuticals' bank account. In May 1967 when the overdraft limit allowed on the account of the two companies taken together was £55,000, a further £25,000 was required. To meet this, the second defendants, National Westminster Bank Ltd ('the bank'), increased the facility to £70,000, and the principal shareholders found £10,000 for which they took up cumulative preference shares of £1 each. The two companies gave cross-guarantees to the bank dated 26th October 1966, and each company also gave the bank an all-moneys debenture dated 31st May 1967. Clause 5 of the debentures made the money payable on the happening of any one of certain events, none of which had occurred when Mr Wickenden was appointed receiver or purported so to be. By cl 6, however, the money was made repayable on demand, which must, of course, be made before a receiver could be appointed. The relevant obligation e in the guarantee given by Pharmaceuticals was as follows: 'we guarantee, on demand in writing being made to us, the discharge of all liabilities of the Principal to the Bank'. It is agreed that under that guarantee the bank could serve a demand on Cripps and Pharmaceuticals at the same time.

f This injection of capital effected temporary relief only and Cripps was again in need of ready money in April 1968. Four of the directors borrowed an aggregate sum of £5,000 from the company's bank on a special account on their joint and several guarantees, and one of them, Mr Stapleton, also provided collateral security. A further £7,000 came from Mr Stapleton's firm, which took a second debenture, and Mr Stapleton became chairman as required by his partners. Mr Stapleton said in evidence:

g 'We borrowed from my firm because we had exhausted all resources available to the company and the directors as individuals. I hoped the business would turn round. In fact it got worse.'

h In these circumstances negotiations were opened with one of Cripps' competitors, Herbert Ferryman Ltd, a family company owned by some people named Cox, for the sale not of the undertaking but of a controlling interest in Cripps. These were conducted by Mr Stapleton, who was not a director of Pharmaceuticals although he was, of course, of Cripps, and by a Mr Yarnell, a director of both. The bank knew this was going on. On 6th June 1969 Ferrymans made an offer for 75 per cent of the preferred ordinary and ordinary £1 shares and all the shilling ordinary shares in Cripps at prices aggregating only £9,300. This offer did not include the cumulative preference shares, and was subject to certain conditions, one of which was that the loss for the year ended 30th April 1969 did not exceed £12,000. In fact it was slightly j in excess of £17,000, of which the Coxes were duly notified, and it seems they agreed to treat the £12,000 limit as if it were £18,000. I will assume that all the conditions were satisfied though I am not absolutely clear that they were. On 9th July 1969 Sangers, another competitor of Cripps, made enquiries but the directors stalled because they thought the sale to the Ferryman company would be effected. It is a

significant commentary on the state of Cripps' finances that the directors were prepared to sell so much of the company's capital for only £9,300. By letter dated 30th June 1969 Mr Yarnell purported to accept the Ferryman offer on behalf of the shareholders of Cripps, although they had not been circularised. Virtually all the shareholders that mattered were directors, and they were prepared to find the 75 per cent out of their own holdings if necessary. The board regarded this letter as making a concluded contract, but even if that be right it is irrelevant because the Coxes refused to go on with the deal and so it produced no money at the crucial time. a

Events now moved very rapidly indeed. On 1st August 1969 the companies' draft accounts to 2nd May 1969 were sent to the bank and these revealed a serious worsening of the position. They showed the loss of about £17,000 and it was estimated at this time that the company was losing £2,000 a month. As a result, on 5th August the Coxes had a meeting with Mr Stokoe, the Brighton district manager of the bank, at which he required Ferrymans to give guarantees for the whole overdraft if the facilities were to be continued. This they refused to do nor were they now prepared to give personal guarantees for £25,000 which had been discussed earlier and they said that they would withdraw from the negotiations. b

Mr Stokoe wrote that same day to Mr Ellis, the Hove, Palmeira branch bank manager instructing him to write to Cripps in terms which appear in Mr Ellis's letter of 6th August 1969: c

'Dear Mr. Stapleton, R. A. Cripps & Son Ltd. With reference to our telephone conversation of yesterday, as it would now seem that Herbert Ferryman Ltd. are to break off their negotiations to take control of the Cripps companies, I write to ask for your proposals for dealing with the borrowing. In view of the disastrous results shown in the Accounts for the year ended 2nd May last and the illiquid position revealed by the Balance Sheet as at that date, it is quite apparent that the Companies must take immediate steps to put their house in order and I should like to know what action they intend to take in this direction. You will recall that when he saw Mr. Stokoe on the 16th April 1968, Mr. Yarnell indicated that, in the absence of additional finance, the only alternative would be to ask the Bank to appoint a Receiver. If this is still his view it is also that of Mr. Stokoe. The position of the Companies is extremely critical and for this reason the Bank must have their proposals as soon as possible, for they cannot be allowed to continue to lose money at the present rate. In view of the position, excesses over £70,000 must cease.' d

At or about the same time the Coxes reported to Mr Stapleton that the bank required a full guarantee which they were not prepared to give. In these circumstances Mr Stapleton got Mr Yarnell to arrange a meeting with Mr Stokoe which was appointed for 10.30 a.m. on 8th August. e

Meanwhile, as a result of the Coxes saying they would not go on, Mr Stokoe had by 7th August definitely made up his mind that a receiver must be appointed but for that purpose he needed the authority of head office. He therefore instructed his assistant, a Mr Cosson, to make the necessary arrangements and it is clear that Mr Cosson telephoned the assistant general manager's office and also sent by hand a written memorandum dated 7th August 1969. This was prepared by Mr Cosson but signed it seems by Mr Stokoe. I read two passages from this: f

'It is quite apparent that the present management are unable to solve the Companies' problems and although the Directors of Ferrymans are without doubt able men, I would not wish to look to this source for a solution bearing in mind the points mentioned above. I accordingly recommend that a Receiver be appointed for each of the Companies and in this connection that the services of Mr. K. D. Wickenden of Messrs. Thornton, Baker & Company, be utilised.' g

a 'As mentioned in our telephone conversation the Chairman of the Cripps' Companies is calling on me to-morrow morning and at that time it is my intention to make formal demand on each of the Companies. I have also arranged with Mr. Wickenden for the two Deeds of Appointment to be collected from your Office to-morrow morning, following which he will call on me before going into the Companies.'

b Mr Cosson also prepared a memorandum under the heading 'LATER' which says:

c 'Mr. Tuck telephoned on behalf of Mr. Wickenden and confirmed that he would be able to act and asked me when we would like to see him. I informed Mr. Tuck that the Deeds of Appointment would be available at Lothbury to-morrow morning and it would perhaps be more convenient if these could be collected from there, following which Mr. Wickenden and Mr. Tuck could come down to Brighton to see Mr. Stokoe before going into the Companies. This he agreed to do and said that they would be here at 11.30 a.m.-12 noon to-morrow.'

d Mr Cosson's evidence is that this was all preparation so that there would be no delay on 8th August if the company did not pay or produce acceptable proposals, and he says he asked Mr Tuck to bring the documents down to Brighton as a matter of convenience, because he was in London and had to travel down. This written memorandum was accompanied by a request for a six months' overdraft facility up to £5,000 for the receiver, the validity date being expressed to be '6.2.70.'. Much reliance was placed on the 'validity date: 6.2.70' as showing that the facility was to run from e 7th August, but I do not feel that is particularly significant. Quite apart from the fact that it should run from 8th August and not 7th August, 7th August was after all the date of the application, and I do not think I should regard it as consciously geared to the appointment taking effect on 7th August. However the general remarks on that form contain observations which do tend to support the view that the appointment was to be made at once without waiting to see if any proposals f were forthcoming. They include:

g 'It is estimated that the Companies are currently incurring losses at a rate of £2,000 per month and during the past three years the management have been unable to take steps to place the Companies' affairs on a profitable basis. It has, therefore, been decided to appoint a Receiver. Mr. K. D. Wickenden is being appointed, and to continue the business pending sale or ultimate liquidation a limit is sought for current needs on the Receiver's accounts.'

h The assistant general manager approved two instruments, one for Cripps and one for Pharmaceuticals, which he signed. They were dated 7th August and stamped on that day with a 10s deed stamp but they were not sealed, and therefore were not deeds but writings under hand only, although often referred to as deeds in the correspondence, evidence and the argument. He also approved the overdraft facility and wrote to Mr Stokoe on 8th August 1969 in these terms:

i 'Your White Form of the 7th August requesting the appointment of a Receiver and an overdraft limit of £5,000 on the Receiver's accounts has been sanctioned and is now returned. The Deeds of Appointment have been handed to Mr. K. D. Wickenden's Assistant, Mr. Tuck this morning in accordance with your request, and I understand that he is arranging to meet Mr. Wickenden in Brighton to-day. Registration of the appointment will be dealt with by Messrs. Waltons Bright & Co. and no doubt the matter will be passed to Securities & Recoveries Section of National Westminster Bank when the South-East Region commences operations shortly.'

It will be noticed that this says, 'The deeds of appointment have been handed to Mr. Wickenden's assistant this morning', not 'we are sending you the deeds'.

Mr Tuck, the defendant Wickenden's assistant, in fact collected an envelope containing these two documents from head office on the morning of 8th August and I am satisfied and find as a fact that a letter from the assistant general manager addressed to the defendant Wickenden (to the effect that, as arranged with the Brighton district office, the bank had appointed him receiver under the bank's debentures; and that the deeds of appointment were enclosed, Mr Wickenden's formal acceptance being invited) was enclosed in that envelope. Mr Tuck proceeded to Brighton by the 11 a m train from Victoria, the defendant Wickenden met him at Brighton station and they went on by car to Mr Stokoe's office.

Meanwhile, Mr Stapleton went to Mr Stokoe's office where he met Mr Ellis downstairs and they were both shortly shown in to see Mr Stokoe. There is some uncertainty as to the precise time they reached Mr Stokoe but it was not before 10.30 a m and probably about 10.45 a m. Mr Cosson, Mr Stokoe's assistant, was already present. On the instructions of Mr Cosson Mr Ellis brought with him two formal demands for payment, one for each company, already signed by Mr Ellis and addressed to the secretary in each case. It is clear that Mr Stokoe conducted the proceedings with great despatch. Mr Stapleton tried to say that the bank had previously agreed to take a limited guarantee from the Coxes and should not change its mind, but he made no impression with that. Then he says he told Mr Stokoe that he would ask the board to close the Farnham depot, and also at once open up negotiations with Sangers. Mr Stokoe cannot remember Sangers being mentioned at all. In any case he would have none of all this, and he told Mr Stapleton of the decision to appoint a receiver. I put it in that neutral way until I have reviewed the evidence on this point as there was some measure of difference in the versions given by the several witnesses. [His Lordship then considered the evidence as to what had taken place at the meeting and continued:] On this evidence I do not feel it safe to conclude that Mr Stokoe said that the receiver had already been appointed. I must look further.

At the end of this brief meeting Mr Ellis produced the written demands which were handed to Mr Stapleton. Mr Stokoe offered him a drink and after he had it, he and Mr Ellis left. They went to the place where Mr Stapleton had parked his car. He then drove Mr Ellis to the Palmeira branch of the bank, then went straight on to Portslade where he handed the demands to the company secretary, Mr Tuppen. He says that he arrived there between midday and 1 p m. He further said it had taken 20 minutes to half an hour to pick up his car and take Mr Ellis to the bank and get on to Portslade. Mr Stapleton was at first rather uncertain in his timing, which is not surprising, but at the conclusion of his evidence, in answer to a question put by me, he said that the interview including the drink lasted about half an hour in all. Mr Ellis said that the meeting lasted 15 minutes or 20 at the outside. He thought they reached his bank before 11.30 a m, he would say 11.20 a m, and that it would take five to ten minutes to get on to Portslade. Mr Stokoe said that he thought Mr Stapleton and Mr Ellis left before 11 a m. It is therefore clear, and I find, that the demands were made after 10.30 a m, probably about 10.50 a m and I am satisfied that they were handed to the company secretary before midday.

Mr Wickenden and Mr Tuck arrived at the district office at Brighton around 12.30 p m. There are considerable discrepancies in the evidence of the four witnesses as to what occurred there. Counsel for the plaintiffs stressed the conflict of evidence between Mr Wickenden and Mr Tuck on the one hand, whose evidence, though there were certain differences, largely corresponded, and Mr Cosson and Mr Stokoe on the other, and he invited me to prefer the bank's witnesses. I do not think it is really a question of preferring witnesses but of trying to reconstruct what did in fact happen from the naturally imperfect recollections of four perfectly honest witnesses. I have no doubt that Mr Cosson went to meet Mr Wickenden and Mr

a Tuck at reception, and that he asked Mr Tuck if he had got the deeds, to which Mr Tuck replied, 'Yes', and handed the envelope to Mr Cosson or possibly the documents themselves, and that Mr Cosson handed them back. Probably he looked at the documents at this stage. This seems natural as Mr Cosson would want to satisfy himself that Mr Tuck had got the documents before he took the two gentlemen in to see Mr Stokoe. I find, however, that the question of the documents was again raised by b Mr Stokoe, who asked across the table if they had got them. Mr Tuck said they had. Thereupon the envelope was produced and handed to Mr Stokoe, who passed it on to Mr Wickenden without looking at the contents. It is impossible to say whether the envelope was sealed or merely had the flap tucked in, and one cannot be certain who actually opened it; but I am satisfied that it was not opened before Mr Wickenden and Mr Tuck were received by Mr Cosson. Mr Wickenden and Mr Tuck then c went on to see Mr Ellis, and they reached him after he had returned from lunch, which he did some time between 2.15 p.m. and 2.30 p.m. There Mr Wickenden opened a receivership account and inspected cheques which had arrived for payment including one for £10,000 payable to the Commissioners of Customs and Excise. He decided that they should all be returned marked 'Receiver appointed—Refer to Drawer'.

d They then went on to Portslade and took possession of Cripps' premises, and by their orders the business was closed on 12th August. The receiver gave instructions for the statement of affairs required by s 372 (1) (b) of the Companies Act 1948 to be prepared as of 7th August and he accepted liability for all goods received from 8th August onwards. The secretary, Mr Tuppen, says he is not aware whether Mr Wickenden paid for all goods which arrived from 8th August onwards, but they were extracted and recorded separately.

e On 19th August Sangers made Mr Wickenden an offer to buy the lease for £10,000, the fixtures at book value not exceeding £11,000, and stock at valuation and in this offer they said:

f 'Should you be prepared to accept the above offer, we will immediately pay to you £70,000 as part purchase consideration which will enable you to eliminate the overdraft which you have at present with the Westminster Bank Limited.'

g Mr Wickenden accepted this offer on 21st August subject to certain modifications which were agreed by Sangers on 25th August. The stock was counted on or about 27th August and Sangers took possession of it straightaway and it was arranged that they could start selling immediately, although there was considerable argument before the price was finally settled. On or about 26th August Mr Folkes, the managing director of Sangers, attended the premises and handed a cheque for £70,000 to Mr Goodall, the managing director of Cripps, saying, 'I understand this is the amount the company owes to the bank. Perhaps this will help you.' Although the cheque was thus physically handed over by Mr Folkes, Sangers also wrote this on 27th August:

h 'Further to my letter of the 25th. August, I now enclose our company's cheque for £70,000, being part purchase consideration of the assets of R. A. Cripps & Son Limited.'

In consequence and as a result of certain receipts by Mr Wickenden the receivership account was on 8th September in credit to an amount in excess of the net overdraft, though it would not have been but for this cheque.

i Meantime Mr Stapleton had queried the validity of Mr Wickenden's appointments because the documents were dated 7th August whereas the demands were not made until 8th August. In those circumstances on 8th September the bank made or purported to make fresh appointments and in sending these to Mr Stokoe the head office said they were made 'to rectify this unfortunate error'. The plaintiffs say that because the receivership account was in credit to an amount in excess of the overdraft, these later appointments must be bad, since the bank had been paid off or

must be treated as if it had. I should add that Mr Wickenden repeatedly asserted that he had been appointed on 7th August but there is no plea of estoppel, even if there could have been, and therefore this is material only as a piece of evidence relevant to the crucial question with what intention the documents were handed to Mr Tuck on 8th August. It was urged that although the accounts showed that on 7th and 8th August Cripps were short of liquid resources, the debentures were in fact amply covered, and despite the then very high rate of loss there would have been no jeopardy for possibly a year, or at least several months, so that panic measures were not necessary. The bank, it was argued, could and should have given time to Mr Stapleton to see what he could do to negotiate a sale to Sangers on a going concern basis or to sell the assets as Mr Wickenden ultimately did. On the other hand, things had for some years been going from bad to worse, and even in 1968 Mr Yarnell had visualised that in the absence of additional finance the only alternative would be to ask the bank to appoint a receiver; Ferrymans had cried off; the negotiations with Sangers had scarcely started, even if they could be said to have started at all; it is clear from the evidence that none of the directors or shareholders was prepared to put up further money. The bank may well therefore be right in saying, as it does, that it took the only possible realistic attitude, but in any case that is not the point as I see it. All I have to determine is whether what it did it did lawfully and regularly.

The first question which arises is whether the first appointments were made before the demands. Despite the date of the documents and of the stamp I am satisfied that they could not have been made on 7th August because *Windsor Refrigerator Co Ltd v Branch Nominees Ltd*¹ shows that the appointment must be communicated to the proposed receiver before it can be effective. Here the bank had taken the precaution beforehand of asking Mr Wickenden if he was prepared to act, and he said that he was, but that in my judgment is not enough. The receiver must know that he has been appointed and when, and until he is told that an appointment has actually been made he does not know this. In the present case the bank might have been persuaded to change its mind or, for all Mr Wickenden knew, the money might have been forthcoming.

The defendants' primary submission is that the true date of an appointment is the date when the receiver takes possession. They rely on Donovan LJ in the *Windsor* case² where he says, 'Clearly the contents of that document must be communicated at least to the receiver'. They ask who else could he have had in mind but the company itself. They also crave in aid the analogy of *Tradax SA v Volkswagenwerk AG*³, where it was held that an arbitrator is not appointed until the other party to the reference has been informed. That however on my view is not in pari materia. The appointment of a receiver is an adverse step taken against the will of the company and I do not think its time of taking effect, and possibly its very validity, can depend on the accident at what time the receiver embarks on his duties. He goes to the company not to perfect his appointment but to take possession by virtue of it. I prefer to rely on the statement of Harman LJ in the *Windsor* case⁴ where he said:

'Nor do I see why, if you so produce them, they should not have effect at the moment when you do produce them to the proper person, here to the receiver,'

although it is fair to observe that he was not directing his mind to the question at which precise time the appointment was completed.

Alternatively, the defendants say that the appointment takes effect when the receiver accepts the office and that, they submit in this case, was at Mr Stokoe's office

1 [1961] 1 All ER 277, [1961] Ch 375

2 [1961] 1 All ER at 284, [1961] Ch at 398

3 [1970] 1 All ER 420, [1970] 1 QB 537

4 [1961] Ch at 397, [1961] 1 All ER at 284

a when Mr Wickenden was informed that demands had been made and not met, and for the first time learnt the names of the companies involved.

I am satisfied by the *Windsor* case¹ that an appointment under hand takes effect when the document of appointment is handed to the receiver by a person having authority to do that and in circumstances from which it may fairly be said that he is appointing a receiver, and the receiver accepts the proffered appointment: see per Lord Evershed MR in the *Windsor* case²:

b 'The words are quite simple words: "appoint by writing"; and in construing them it is fair to note that the condition also empowers the debenture holders by writing to remove. For myself I should have thought that those words would be satisfied if something was done—if the person acting for the debenture holders so conducted himself that one could say that he was appointing someone to be a receiver, and if he accompanied that by handing a writing which was the company's writing to the receiver.'

c See also Donovan LJ³:

d 'As to the second question, the argument is that the receiver was appointed the moment the document was signed, and so before the debt became payable. I agree that in a context where precision is not required, one might speak of the document loosely as appointing a receiver. But in this context precision is required. What the debenture holder wants to do is to levy equitable execution, and for that purpose to have some person in being clothed with the necessary authority to take possession of the company's property, to carry on its business, e to act in its name, and pay the debt; and the company has to submit to the exercise of these powers by the person having such authority. This state of affairs is not achieved simply by the debenture holder signing a document in privacy, and keeping the contents to himself for as long as he wishes. Clearly the contents of that document must be communicated at least to the receiver before his appointment can be said to be effective.'

f As to the necessity of acceptance, which is perhaps self-evident, see Kerr on Receivers⁴. The delivery of the document gives the receiver knowledge, or means of knowledge who the debtor is if he does not know already, and acceptance may, of course, be tacit. The date of the instrument is irrelevant except as a piece of evidence if the actual date of handing over is not known, because as Lord Evershed MR and Harman LJ both observed in the *Windsor* case⁵ it may be prepared and left until it is required.

g Then, in the present case, when were the appointments communicated and accepted? The plaintiffs answer that question, 'When Mr Tuck received the documents' which they say were handed to him as agent for Mr Wickenden. The defendants say, 'No, Mr Tuck received and held them as agent for the bank until they were released by Mr Cosson or Mr Stokoe and then the character of his holding changed'; h and they rely on *Bailey v Bodenham*⁶. There are a number of indications in favour of the plaintiffs' case but there are also a number which tell the other way and I have to decide which is the correct inference. [His Lordship then considered the evidence and continued:] Weighing all these considerations I have come to the conclusion that the proper inference is, and I hold as a fact, that the instruments were given to Mr Tuck as agent for the bank to bring them down to Mr Stokoe's office where the

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1 [1961] 1 All ER 277, [1961] Ch 375

2 [1961] 1 All ER at 282, [1961] Ch at 394, 395

3 [1961] 1 All ER at 284, [1961] Ch at 398

4 14th Edn (1972), pt II, ch 14, p 272

5 [1961] 1 All ER at 282, 284, [1961] Ch at 395, 397

6 (1864) 16 CBNS 288, particularly at 296

matter was to be finalised, and that they did not come to be held by Mr Wickenden or alternatively by Mr Tuck as his representative until Mr Stokoe informed them that the demand had been made and not satisfied and released the documents by asking for them and handing them over, and that the appointment was not complete until then. It is conceivable, though I do not think so, that one ought to take the earlier moment when Mr Cosson took the instruments and returned them in the vestibule, but that would make no difference. In my judgment therefore the appointments dated 7th August and made at Mr Stokoe's office on 8th August are prima facie valid, but two other points have to be considered. First, was sufficient time allowed after the demand had been made? and, secondly, were the demands not properly made because Mr Stapleton was not a director of Pharmaceuticals, which latter point could only avail that company?

It was argued by the plaintiffs that even where money is payable on demand, still a reasonable time must be given to enable the payment to be made: see *Brighty v Norton*¹, *Toms v Wilson*², and *Upjohn J in Lloyds Bank Ltd v Margolis*³. Much was made of the speed with which Mr Stokoe acted, and it was said that he never really gave the company any chance to put up proposals in answer to the letter of 6th August; but in my judgment, that is not the point. The question is whether he gave such time as the law requires where money is payable on demand; and the cases show that all the creditor has to do is to give the debtor time to get it from some convenient place, not to negotiate a deal which he hopes will produce the money. I quote from *Blackburn J in Brighty v Norton*⁴:

'I agree that a debtor who is required to pay money on demand, or at a stated time, must have it ready, and is not entitled to further time in order to look for it.'

Then he went on to deal with the question of the true construction of the proviso in the particular deed in that case which enabled the creditor to curtail a period loan. The significant words for present purposes are in the opening sentence of his judgment which I have just read. The principle is well stated by Lord Cockburn CJ in *Toms v Wilson*⁵ in a passage adopted by the Privy Council in *Moore v Shelley*⁶. Sir Barnes Peacock delivering the opinion of the Board said⁷:

'The case of *Toms v. Wilson*², which was cited in the Court below (there is a similar case in the 3rd Best and Smith⁸), is an authority to shew that there was no default to justify the seizure. It may, therefore, be well to refer to what Lord Chief Justice Cockburn⁴ says in that case: "We are all of opinion," he says, "that by the terms of the bill of sale the plaintiff was under an obligation to pay immediately upon demand in writing, and if he did not, then the defendants were entitled to take possession of and sell the goods. Here such a demand was made. The deed must receive a reasonable construction, and it could not have meant that the plaintiff was bound to pay the money in the very next instant of time after the demand, but he must have a reasonable time to get it from some convenient place. For instance, he might require time to get it from his desk, or to go across the street or to his bankers for it . . ."

1 (1862) 3 B & S 305

2 (1863) 4 B & S 442

3 [1954] 1 All ER 734 at 738, [1954] 1 WLR 644 at 649

4 (1862) 3 B & S at 312

5 (1863) 4 B & S at 453

6 (1883) 8 App Cas 285

7 (1883) 8 App Cas at 293

8 1e *Brighty v Norton* (1862) 3 B & S 305

a It is abundantly plain that Cripps had not got the money and had no convenient place to which they could go to get it. Two passages in the evidence will suffice here. First, Mr Stapleton in chief said:

b 'At one time Mr Stokoe asked if there was any more money likely to be coming from me or anyone else. He asked, "from me". Can't really say if he said, "or others". There were others who helped put up the earlier money. I replied as far as I was concerned I was not prepared to do anything. I did not say I thought someone else would. In fairness I could not have led him to think any likelihood of money coming from anywhere else.'

c Secondly, Mr Yarnell in cross-examination was asked this question: 'Apart from a sale to someone who might put in money, what other sources of further capital were available?' and he answered: 'No immediate sources.'

In my judgment, therefore, the plaintiffs cannot object on the ground that they were not given time to find the money or that the interval of time between 11 a.m., or shortly before, when the demands were made and midday, or later, when the receiver was appointed was too short.

d In my judgment the objection by Pharmaceuticals on the ground of want of authority in Mr Stapleton also fails since it is clear in my view that he was held out as authorised to act for both companies. In the first place the directors of Pharmaceuticals actually passed a resolution as follows:

e 'It was agreed that Resolutions affecting the conduct of the business of Cripps (Pharmaceuticals) Ltd. recorded in the Minutes of the Directors' Meeting of R.A. Cripps & Sons Ltd. shall as appropriate be deemed to be resolutions of Board Meetings of Cripps (Pharmaceuticals) Ltd.'

f Secondly, apart from a formal meeting once a year to deal with purely formal business immediately before the annual general meeting and possibility one or two meetings on other occasions for routine administrative acts, the board of Pharmaceuticals never met at all. All its directors were also directors of Cripps, though Cripps had other directors as well, and the policy and management of Pharmaceuticals was left to that board. Thirdly, in all the exchanges with the bank it was never once suggested that Mr Stapleton had no authority from Pharmaceuticals and the basis on which he approached the bank and in particular at the critical interview with Mr Stokoe on 8th August appears very clearly from this passage in his evidence:

g 'The question whether I had any authority from Pharmaceuticals did not enter my head. I was chairman of the board of Cripps. Borrowing was lump sum, i.e. limits for both companies, and Pharmaceuticals were a wholly-owned subsidiary.'

h Even if that be wrong, however, the defect was remedied when Mr Stapleton handed the demand to Mr Tuppen round about midday and the appointment was also round about midday when Mr Wickenden and Mr Tuck called on Mr Stokoe. The time interval here is short but I find that this letter reached the secretary before Mr Tuck and Mr Wickenden were received at Mr Stokoe's office even by Mr Cosson. In any case at best for the plaintiffs the timing cannot really be determined with any certainty, and that being so I ought to hold that the demand came first on the authority of *Eaglehill Ltd v J Needham Builders Ltd*¹, where Lord Cross of Chelsea said:

i 'The presumption for which the appellants contend may be expressed as follows: "If two acts have been done one of which ought to have been done after the other if it was to be valid and the evidence which could reasonably be expected

¹ [1972] 3 All ER 895 at 905, [1972] 3 WLR 789 at 800

to be available does not show which was done first they will be presumed to have been done in the proper order." Such a presumption would not be—as was suggested in argument—an application of the maxim omnia praesumuntur rite esse acta for it is abundantly clear that the posting of the notice on 30th December was wholly irregular. It would be an extension into another field of the maxim that a document which is reasonably capable of two constructions should be construed ut res magis valeat quam pereat. Such an extension appears to me to be justified—at all events in the case of commercial documents such as those with which we are here concerned.

On this basis the interval between demand and appointment is still shorter but not, I think, unreasonable having regard to the passages in the evidence to which I have drawn attention. In my judgment therefore both actions fail and must be dismissed.

In these circumstances it is not really necessary to say anything about the appointments of 8th September as they would only be material if the earlier ones had been bad, but in case the matter should go further, and as the subject was much canvassed, I think I should add a few words on this aspect of the case. In my judgment the plaintiffs cannot claim the first appointments were bad and at the same time say the second were bad also on the ground that the bank had by sale under the first raised enough to pay off the overdraft. The two are inconsistent and mutually exclusive. Therefore in my view it matters not whether the deposit was returnable or whether Sangers got no title against the company. The contract might indeed be good as between Sangers and the company by estoppel if on no other grounds. As it seems to me, if I had held the first appointments bad I would have had to have found the second appointments to be bad also, because no person can take advantage of his own wrong. In my judgment the bank could not appoint a receiver until it had restored the company to possession of its assets and renewed its demands.

If it could not do that because it had sold the assets, then there might be a serious question whether it had forfeited its right altogether, or would be entitled to appoint a receiver after restoring the proceeds, the company having an action for damages for conversion for any loss not recouped by return of the proceeds, but the bank never affected to do anything of the sort and I need not pursue that further. Even if that were wrong and the second appointments were good still the bank would be liable for damages down to 8th September for the first wrongful appointments, and that would include damages for loss of the opportunity to avoid the second appointments occasioned by the wrongful freezing of the assets under the first. This might or might not produce the same result. As I have said, however, on my findings as to the first appointments these questions do not arise.

Actions dismissed.

Solicitors: *Wm F Prior & Co* (for the plaintiffs); *Waltons & Co* (for the defendants).

Susan Corbett Barrister.

a Simplicity Products Co (a firm) v Domestic Installations Co Ltd

COURT OF APPEAL, CIVIL DIVISION
LORD DENNING MR, STAMP AND JAMES LJ

b 26th FEBRUARY 1973

Practice – Reference to referee – Power to order trial before official referee – Exercise of power – Absence of appeal from referee on questions of fact – Pleadings raising allegations of importance to party – Trial before judge providing opportunity for Court of Appeal to review findings of fact – Party entitled to trial before judge.

c The plaintiffs were manufacturers and suppliers on a large scale of a special type of tubing for use in gas central heating systems. They brought an action against the defendants for goods sold and delivered. The defendants put in a defence and counter-claim alleging that the tubing was not suitable for its purpose. The case was ordered to be heard by an official referee against whose decision there was, by virtue of RSC
d Ord 58, r 5 (1), no appeal on the questions of fact raised by the action. The plaintiffs appealed.

Held – The question raised by the proceedings affected the plaintiffs' standing as a supply company; it was of such importance to them that they were entitled to trial by a judge so that the facts could be reviewed on appeal by the Court of Appeal. Accordingly the appeal would be allowed.

e Charles Osenton & Co v Johnston [1941] 2 All ER 245 applied.

Notes

For reference for trial of a cause or matter before an official referee, see 30 Halsbury's Laws (3rd Edn) 440, para 825, and for cases on the subject, see 51 Digest (Repl) 680, 681,
f 2823-2840.

Case referred to in judgment

Osenton (Charles) & Co v Johnston [1941] 2 All ER 245, [1942] AC 130, 110 LJKB 420, 165 LT 235, HL, 51 Digest (Repl) 681, 2840.

Interlocutory appeal

g This was an appeal by the plaintiffs, Simplicity Products Co (a firm), against the order of Forbes J made on 24th November 1972 dismissing the plaintiffs' appeal against the order of Master Harwood whereby, on an application by the defendants, Domestic Installations Co Ltd, it was ordered that the plaintiffs' action against the defendants should be transferred to the official referee. The facts are set out in the judgment of Lord Denning MR.

**h H E P Roberts QC and N T Salts for the plaintiffs.
P Sheridan for the defendants.**

LORD DENNING MR. In 1969 the Gas Council initiated a plan for installing central heating on a large scale in houses. It was called the 'Guaranteed Warmth Fixed Price System'. In order to implement it, it was necessary to have supplies of tubing and so forth. Copper tubing was very expensive. So a company called Simplicity Products Co produced a tubing which was made of mild steel and was zinc-plated. They also produced tins of solder paint. They supplied these materials to contractors who did the installation in the various houses. One such contractor was Domestic Installations Co Ltd who installed the system in many houses.

This is an action by Simplicity Products for £1,868 for goods sold and delivered. Domestic Installations defend the claim and put in a counterclaim. They say that the tubing and the paint was not suitable for the purpose; that it gave rise to a great deal of trouble in many of the homes in which they were fitted. They say that there were 2,300 houses and flats in which the installation turned out to be defective. They further say that the plaintiffs made representations which were not fulfilled. The plaintiffs have put in a reply in which they claim to be protected by the terms of a guarantee. Furthermore the plaintiffs say the trouble was caused by the bad workmanship of the workmen who actually did the installations.

The question here today is how the case should be tried. The master and the judge have decided that it should go to an official referee. The plaintiffs, Simplicity Products, appeal to this court. They object to an official referee because from his decision there is no appeal on a question of fact; there is only an appeal on a point of law. RSC Ord 58, r 5 (1), provides:

'An appeal shall lie to the Court of Appeal—(a) from a decision of an official referee on a point of law; and (b) from a decision of an official referee on a question of fact relevant to a charge of fraud or breach of professional duty.'

This case is not within para (b). So from an official referee there would be no appeal on a question of fact. The plaintiffs say that the allegation against them raises matters of the highest importance for them. They would wish, if the findings of fact went against them, for them to be reviewed in the Court of Appeal.

The question of trial by a judge or by an official referee was considered by the House of Lords in *Charles Oseinton & Co v Johnston*¹. In that particular case, estate agents were charged with negligence and their reputation was involved. The House of Lords ordered the case to be tried by a judge and not by an official referee. The considerations which influenced the House of Lords in that case apply to this case also. Here the question is as to the suitability of a product which was manufactured and supplied by the plaintiffs on a large scale. It affects their standing as a supply company. The issues are very proper to be tried by a judge alone and reviewed if need be by the Court of Appeal.

Counsel for the defendants stressed certain advantages before an official referee: such as that he himself holds the summons for directions; he has himself a control over the course of proceedings; he can have a view and so forth. But those advantages do not outweigh the serious disadvantage of there being no appeal on fact. The questions here are of such importance to the parties that they should be tried by a judge alone. They should not be remitted to an official referee. I therefore would allow the appeal.

STAMP LJ. I agree and have nothing to add.

JAMES LJ. I also agree.

Appeal allowed.

Solicitors: *Wilders & Sorrell* (for the plaintiffs); *Lynch, Hall & Hornby*, Harrow (for the defendants).

L J Kovats Esq Barrister.

a R v Woking Justices, ex parte Gossage

QUEEN'S BENCH DIVISION

LORD WIDGERY CJ, ASHWORTH AND BRIDGE JJ

6th MARCH 1973

b *Magistrates – Jurisdiction – Binding over – Natural justice – Acquitted defendant – Opportunity to make representations – Defendant bound over to keep the peace – Defendant neither warned of proposed binding-over order nor given opportunity to make representations – Whether order should be set aside as being made in breach of rules of natural justice.*

The defendant was charged before justices with using insulting behaviour whereby a breach of the peace was likely to be occasioned. Having considered their verdict **c** the justices told the defendant that the charge against him was dismissed and the chairman of the Bench went on to inform the defendant that he was bound over to keep the peace for 24 months in his own recognisance of £100. On a motion to quash the binding-over order the defendant contended that it had been made in breach of the rules of natural justice in that he should have been given an opportunity to make representations against the proposed order before it was made.

d *Held* – Although justices were required to inform a person who was before them as a complainant or witness that it was proposed to make a binding-over order against him and to give him an opportunity of being heard, no such rule applied in the case of an acquitted defendant and accordingly the motion would be dismissed (see p 623 d e f and h, post).

e *Sheldon v Bromfield Justices* [1964] 2 All ER 131 distinguished.

Per Curiam. Justices should, as a matter of courtesy, warn an acquitted defendant that it is proposed to bind him over before making the order (see p 623 g and h, post).

Notes

f For the power of magistrates courts to bind over any person to keep the peace, see 25 Halsbury's Laws (3rd Edn) 231-233, paras 427-429, and for cases on the subject, see 33 Digest (Repl) 258-260, 853-870.

Case referred to in judgment

Sheldon v Bromfield Justices [1964] 2 All ER 131, [1964] 2 QB 573, [1964] 2 WLR 1066, DC, Digest (Cont Vol B) 511, 849a.

g Cases also cited

Davis, ex parte (1871) 35 JP 551, DC.

R v Wilkins [1907] 2 KB 380, DC.

Motion for certiorari

h By notice of motion dated 28th November 1972 Stephen Jeremy Gossage applied for an order of certiorari to quash an order of the justices for the petty sessional division of Woking made on 10th October 1972 that he be bound over to keep the peace for 24 months in his own recognisance of £100. The facts are set out in the judgment of Lord Widgery CJ.

Stephen Sedley for the applicant.

j The respondents did not appear and were not represented.

LORD WIDGERY CJ. In these proceedings counsel moves on behalf of the applicant, Stephen Jeremy Gossage, for an order of certiorari to remove into this court for the purpose of its being quashed an order made by justices for the petty sessional division of Woking on 10th October 1972, whereby it was ordered that the applicant be bound over to keep the peace for 24 months in his own recognisance of £100.

The facts are that on 10th October, before the Woking justices, this applicant and others were charged that at Woking on a Saturday in September 1972, the applicant used insulting behaviour whereby a breach of the peace was likely to be occasioned, contrary to s 5 of the Public Order Act 1936. The other defendants were charged in the same terms. The applicant was not legally represented at the hearing; the case was heard out in the ordinary way, and no complaint is made about the conduct of the trial or any deprivation of the appropriate rights and facilities for the applicant in the course of the trial. The justices retired to consider their decision, and when they came back they convicted one of the other defendants, a man called Bullock, and fined him £2. They told the applicant and the third defendant, Mr Larter, that the charges against them were dismissed, and then the chairman of the Bench went on to inform the applicant, amongst others, that he was to be bound over to keep the peace for two years in his own recognisance of £100, and he was asked if he understood what that meant. He understood what was meant, but asked what would happen if he did not acknowledge his obligation, and it was then explained to him that a prison sentence might result.

To put it briefly, that information having been given to him by the Bench, he entered into the recognisance and this court is moved today to set aside the decision of the Bench requiring the entry into the recognisance on the footing that there was a breach of natural justice.

The breach of natural justice is alleged to be that the justices when they returned to court to announce the acquittal of the applicant, should have told him that they were nevertheless minded to consider a binding-over, and then given him an opportunity of making any representations which he wished against that conclusion. The Bench did not give him that opportunity, and that is the substance of the complaint. We need not go back over the old authorities to establish the fact that the justices' ancient power to bind over applies to all persons who are before the court, whether as parties or as witnesses, and that the fact that a defendant is acquitted of the charge against him is no bar to the justices binding him over to keep the peace. There are many instances, where, although the offence is not adequately proved, the conduct of the defendant has, in the opinion of the Bench, justified that use of preventive justice. One can pick up the justices' power in the most recent authority of all, *Sheldon v Bromfield Justices*¹. In that case there was a charge brought by the police against a man called Marshall; the charge was that he had assaulted his mother-in-law and thereby occasioned her actual bodily harm. On the hearing of the charge, the mother-in-law and her husband gave evidence for the prosecution. It was one of those not unfamiliar domestic cases in which the son-in-law was blaming the mother-in-law and the father-in-law collectively for the disturbance which had occurred, and the mother-in-law and the father-in-law were blaming the son-in-law, and saying he was responsible.

At the end of the case, the justices dismissed the charge against the son-in-law, he being the only person who had been charged, and they then proceeded to bind over not only the defendant, the son-in-law, but the two appellants in that case, the father-in-law and the mother-in-law as well. It is interesting to note that Lord Parker CJ, giving the leading judgment, said²:

'At the end of the case, the justices dismissed the charge and bound over not only the defendant son-in-law, which they were fully entitled to do, but also the two appellants, Mr. and Mrs. Sheldon . . .'

In that case the son-in-law did not appeal; the prosecution witnesses, the father and mother-in-law, were the ones who did appeal and they appealed on the same basis as the applicant applying to the court today, because it was said they were not given any warning before being bound over that the justices had a binding-over in mind.

¹ [1964] 2 All ER 131, [1964] 2 QB 573

² [1964] 2 QB at 577

a Lord Parker CJ, having recited the arguments and the contention that there was no obligation on justices to give any such warning at all in the context of that case where the two persons bound over were witnesses only, said¹:

b 'I must say that I shudder at the idea that that can be done, although it is said that it is done quite generally. It seems to me to be elementary justice that particularly a mere witness before justices should at any rate be told what is passing through the justices' minds, and should have an opportunity of dealing with it.'

c That case is undoubtedly authority for the proposition that in regard to the complainant and the witnesses, if the justices are minded to bind over, they must give the intended recipient of the binding-over an opportunity of being heard. But what that case is not directly authority for is the position of justices who contemplate binding over an acquitted defendant. I have already drawn attention to the fact that Lord Parker CJ seems to have been of the opinion that no difficulty arose about binding over the son-in-law in that case. But, of course, he was not concerned with the point that arises before us, and we have to deal with it, one gathers, for the first time.

d It seems to me that a very clear distinction is drawn between, on the one part, persons who come before the justices as witnesses, and on the other, persons who come before the justices as defendants. Not only do the witnesses come with no expected prospect of being subjected to any kind of penalty, but also the witnesses as such, although they may speak in evidence, cannot represent themselves through counsel and cannot call evidence on their own behalf. By contrast, the defendant comes before the court knowing that allegations are to be made against him, knowing that he can be represented if appropriate, and knowing that he can call evidence if he wishes. It seems to me that a rule which requires a witness to be warned of the possibility of a binding-over should not necessarily apply to a defendant in that different position.

e I think from the extracts from Lord Parker CJ's judgment that I have read, Lord Parker CJ would have taken the same view; but, be that as it may, it seems to me to be putting it far too high in the case of an acquitted defendant to say that it is a breach of the rules of natural justice not to give him an indication of the prospective binding-over before the binding-over is imposed. That is not to say that it would not be wise, and indeed courteous in these cases for justices to give such a warning; there certainly would be absolutely no harm in a case like the present if the justices, returning to court, had announced they were going to acquit, but had immediately said 'We are however contemplating a binding-over; what have you got to say?' I think it would be at least courteous and perhaps wise that that should be done, but I am unable to elevate the principle to the height at which it can be said that a failure to give such a warning is a breach of the rules of natural justice. I would accordingly refuse the application.

f **ASHWORTH J.** I agree.

BRIDGE J. I agree.

Application refused.

j 20th March 1973. The court (Lord Widgery CJ, James LJ and Nield J) refused an application under s 1 (2) of the Administration of Justice Act 1960 for a certificate that a point of law of general public importance was involved.

Solicitor: L A Grant (for the applicant).

Jacqueline Charles Barrister.

R v Chapman and another

COURT OF APPEAL, CRIMINAL DIVISION
 ROSKILL LJ, THOMPSON AND SHAW JJ
 13th, 16th FEBRUARY 1973

Criminal law – Evidence – Corroboration – Rejection of defendant's evidence – Whether rejection corroboration of otherwise uncorroborated evidence against the defendant.

Mere rejection of a defendant's evidence is not corroboration of the otherwise uncorroborated evidence against him (see p 626 j, p 628 b and p 629 c d and h to p 630 a, post).

Macpherson v Lague (1896) 23 R 785, *Dawson v M'Kenzie* (1908) 45 SLR 473 and dictum of Lord MacDermott in *Tumahole Bereng v R* [1949] AC at 270 followed.

Notes

For the nature of corroboration, see 10 Halsbury's Laws (3rd Edn) 460, para 846, and for cases on the subject, see 14 Digest (Repl) 538-540, 5218-5250.

Cases referred to in judgment

Credland v Knowler (1951) 35 Cr App Rep 48, DC, 15 Digest (Repl) 1027, 10,090.

Dawson v M'Kenzie (1908) 45 SLR 473, 15 SLT 951, 3 Digest (Repl) 459, *317.

Director of Public Prosecutions v Kilbourne [1973] 1 All ER 440, [1973] 2 WLR 254, 56 Cr App Rep 828, HL.

Jones v Thomas [1934] 1 KB 323, [1933] All ER Rep 535, 103 LjKB 113, 150 LT 216, 98 JP 41, 31 LGR 424, 30 Cox CC 47, DC, 3 Digest (Repl) 453, 425.

M'Bayne v Davidson (1860) 22 D 738, 32 Sc Jur 296, 3 Digest (Repl) 458, *299.

Macpherson v Lague (1896) 23 R 785, 33 SLR 615, 4 SLT 43, 3 Digest (Repl) 459, *307.

R v Clynes (1960) 44 Cr App Rep 158, CCA, Digest (Cont Vol A) 379, 5276b.

R v Golder, R v Jones, R v Porritt [1960] 3 All ER 457, [1960] 1 WLR 1169, 124 JP 505, 45 Cr App Rep 5, CCA, Digest (Cont Vol A) 354, 2775a.

R v Jackson [1953] 1 All ER 872, [1953] 1 WLR 591, 117 JP 219, 37 Cr App Rep 43, CCA, 14 Digest (Repl) 537, 5217.

Tumahole Bereng v R [1949] AC 253, [1949] LJR 1603, PC, 14 Digest (Repl) 542, *3660.

Appeals

The appellants, Samuel Ian Chapman and Bernard James Baldwin, appealed against their convictions in the Crown Court at Winchester on 9th June 1972 before his Honour Judge McCreery and a jury. The facts are set out in the judgment of the court.

Florence O'Donoghue for the appellants.

N R Blaker QC and *M R Selfe* for the Crown.

Cur adv vult

16th February. **ROSKILL LJ** read the following judgment of the court. These two appeals, brought by leave of the single judge, raise an important question of law in relation to the proper direction to be given to a jury regarding corroboration of evidence from an accomplice. We use the word 'corroboration' for convenience, though we have well in mind the observation of Lord Hailsham of St Marylebone LC, in the recent case of *Director of Public Prosecutions v Kilbourne*¹, that the word is not a term of art and is slightly unusual in common speech and that it might be better not to use it.

The appellant Chapman was convicted at Winchester Crown Court after a long trial before Judge McCreery on three counts of theft, counts 1, 2 and 4. The appellant

¹ [1973] 1 All ER 440 at 447, [1973] 2 WLR 254 at 262

a Baldwin was similarly convicted on 15 counts of dishonest handling, counts 8–22. The learned judge sentenced Chapman to a total of 30 months' imprisonment and Baldwin to a total of three years' imprisonment.

b All the charges arose out of alleged theft and dishonest handling of large quantities of clothing belonging to the Portland branch of a firm called Greenburgh Bros Ltd, of which Chapman was the manager. The main evidence against these two men was given by a man named Thatcher, who was plainly an accomplice, but it is important to observe that Thatcher's evidence only related directly to counts 1 and 2 in the case of Chapman and to counts 8–12 inclusive in the case of Baldwin.

c The prosecution case was that in September 1971 it had been decided to close the Portland branch and Chapman was instructed to transfer property from the Portland branch to the Plymouth branch. On 21st September he reported that the company's van, loaded with goods ready to be taken to Plymouth, had disappeared from outside his house. When the van was later found most of the clothing had disappeared from it. He gave the police statements specifying in detail certain items which had been stolen to a total value of £2,171.

d On 26th September a further stocktaking revealed that, taking into account all known transactions, there was a gross deficiency of £4,515 worth of stock. According to cash sale returns which Chapman had made, there had only been £258 worth of cash sales between the stocktaking in January 1971 and the second stocktaking in September 1971: and Chapman had sent in no weekly cash summaries after 31st August. Various customers gave evidence that, when they had bought goods from Chapman over the counter, he provided change out of his own pocket, gave no receipts, and did not put the money in the till. Chapman's explanation was that he did not give receipts because his predecessor had done the same thing, and he did not put the cash into the till because it was not convenient to do so.

e Chapman was very friendly with Baldwin. These two men would gamble together and Baldwin admitted that he had sold various items of clothing which resembled those sold by Greenburgh's shop. The prosecution case was that Chapman had stolen various items and passed them on to Baldwin, who disposed of them dishonestly and that Chapman arranged the stealing of items from his van in order to cover up the deficiency which he had created.

f It is only necessary to add to that brief summary of the facts that count 4 was what might be called a general deficiency count. It alleged theft of the balance of the stock of clothing beyond those specified items covered by count 1.

g The defence was, *inter alia*, that Thatcher was lying and, according to Chapman, must himself have stolen the contents of the van. Thatcher had two previous convictions for theft, but it is only fair to point out that the second was as long ago as 1964. Clearly the case was one which required a warning from the judge as to the dangers of convicting on the uncorroborated evidence of an accomplice. The Crown had suggested that some corroboration in relation to count 1 was to be found in the evidence of Mrs Jesty, a prosecution witness, but the learned judge, rightly in the view of this court, suggested in the summing up that the jury should ignore Mrs Jesty's evidence.

h The judge warned the jury that they should look for corroboration and he used this phrase, 'because it is dangerous to act on the uncorroborated evidence of an accomplice'. Thus, the usual warning was properly given. But the learned judge, having advised the jury to reject Mrs Jesty's evidence, then went on to direct the jury in these terms:

j 'But corroboration can come not only from witnesses for the prosecution, but from witnesses for the defence—or from the accused themselves, and I direct you as a matter of law, if you think it right, there is abundant evidence here from the defence which is capable of corroborating Thatcher. You have got to decide, in due course, what weight you attach to the evidence of each of

the accused. If you think that Chapman's story about the disappearance of the van and its contents is so obviously untrue that you do not attach any weight to it at all—in other words, you think Chapman is lying to you—then I direct you that that is capable of corroborating Thatcher, because, members of the jury, if Chapman is lying about the van, can there be any explanation except that Thatcher is telling the truth about how it came to disappear? Whether you regard that as corroboration is a matter for you. My direction is that it is capable in law of corroborating Thatcher. Similarly, in the case of Baldwin, if you think that Baldwin's story about going up to London and buying these goods in Petticoat Lane is untrue—in other words he has told you lies about that—then, members of the jury, that I direct you, so far as he is concerned, is capable of amounting to corroboration of Thatcher. So, members of the jury, I repeat: in each case I direct you, as a matter of law, there is evidence capable of corroborating Thatcher. Whether you think so, is entirely a matter for you.'

Later in his summing up the learned judge repeated the direction which I have just read in these terms:

'Members of the jury, I say it for the third time [in fact I think it was the second] Thatcher is a very important witness. He is an accomplice. Approach his evidence with great care and look for corroboration. If you find that Chapman's story is a pack of lies, that, so far as the case against him is concerned, is capable of amounting to corroboration. It is for you to decide whether it does or not. Similarly, if you find that Baldwin's story about Petticoat Lane is a pack of lies, then that is capable of corroborating the case against him, so far as he is concerned. That is the approach, members of the jury, and that is the task you have to resolve.'

Counsel for the Crown told us that there had been no previous indication from the learned judge that he proposed to give this direction, nor had he invited help from counsel what the direction was which he ought properly to give. After the judge had concluded his summing up he asked counsel in the presence of the jury if any of them wished to raise any point on the summing up. Leading counsel for Baldwin in the court below (J H Inskip QC) at once challenged the direction I have just read, but the learned judge said that he had given his ruling and if it was wrong it could be put right.

This court feels bound to observe that it is a pity that if the judge were minded to give this direction he did not first inform counsel of that fact and then allow them to seek to challenge it before it was given. It was difficult for counsel effectively to challenge the direction after it had been given in such emphatic terms. Had he done so the judge might have avoided falling into the serious error which he made.

No member of this court has ever heard of a direction on corroboration in the terms in which the learned judge gave it. Indeed, if the learned judge were right, on a charge of alleged rape the jury could properly be told that if they rejected a defendant's evidence that the prosecutrix consented, that rejection was capable of constituting corroboration of her evidence that there was no consent and that they need go no further.

In the view of this court the learned judge's direction was wrong, both on principle and on authority, to none of which was his attention drawn. It was wrong in principle for this reason: if the question is whether A's evidence or B's evidence is true, the mere rejection of B's evidence does not of itself mean that A's evidence must be accepted as true. B might have a separate and independent reason for lying or otherwise giving unreliable evidence or evidence which is for some reason incapable of belief. Mere rejection of evidence is not affirmative proof of the contrary of the evidence which has been rejected.

a The most recent decision on this question is *Tumahole Bereng v R*¹, a decision of the Judicial Committee of the Privy Council which included both Lord MacDermott and Lord Reid. It is not necessary to relate the complex facts of that case. Lord MacDermott, delivering the opinion of the Board, said²:

b 'The circumstances that the appellants (other than No. 2) elected not to give evidence is equally incapable of constituting corroboration, though on more general grounds. Silence on the part of an accused person which is tantamount to an admission by conduct may, on occasion, amount to corroboration. But an accused admits nothing by exercising at his trial the right which the law gives him of electing not to deny the charge on oath. Silence of that kind—and it is the only kind relevant to this appeal—affords no corroboration to satisfy the rule of practice under consideration. Nor does an accused corroborate an accomplice merely by giving evidence which is not accepted and must therefore be regarded as false. Corroboration may well be found in the evidence of an accused person; but that is a different matter, for there confirmation comes, if at all, from what is said, and not from the falsity of what is said. It is, of course, correct to say that these circumstances—the failure to give evidence or the giving of false evidence—may bear against an accused and assist in his conviction if there is other material sufficient to sustain a verdict against him. But if the other material is insufficient either in its quality or extent they cannot be used as a make-weight. To hold otherwise would be to undermine the presumption of innocence in a manner as repugnant to the Proclamation of 1938 as to the common law of England.'

e That passage is, of course, not strictly binding on this court, but this is the highest persuasive authority. For some reason that decision is not cited in Archbold³.

Two years later in *Credland v Knowler*⁴ Lord Goddard CJ, delivering the judgment of the Divisional Court, treated as axiomatic the proposition that the fact that a defendant's evidence ought to be rejected did not of itself amount to corroboration. The learned Lord Chief Justice went on to refer to a judgment of the Lord President (Lord Dunedin) in the First Division of the Inner House in *Dawson v M'Kenzie*⁵, later approved by the Divisional Court in *Jones v Thomas*⁶.

f Reference to the report of *Dawson v M'Kenzie*⁵ shows that the learned Lord President was himself founding on an earlier decision of the Second Division of the Inner House in *Macpherson v Largue*⁷. This, like *Dawson v M'Kenzie*⁵ and *Jones v Thomas*⁶, was a bastardy case. Corroboration was required by statute. The putative father's evidence had been rejected both by the sheriff-substitute and by the sheriff. There was other evidence capable of being corroboration. When the appeal came before the Second Division of the Inner House the learned Lord Justice-Clerk said⁸:

g 'I agree that no corroboration can be derived from evidence of the defender which shews he is not speaking the truth. If his evidence is not to be believed it must be taken out of the case altogether, and the case must be treated as if he had not been examined.'

h Lord Trayner said⁹:

'On the other hand, the denial by the defender of material facts or circumstances

i [1949] AC 253

2 [1949] AC at 270

3 Pleading, Evidence and Practice in Criminal Cases (37th Edn, 1969)

4 (1951) 35 Cr App Rep 48 at 54, 55

5 (1908) 45 SLR 473

6 [1934] 1 KB 323, [1933] All ER Rep 535

7 (1896) 23 R 785

8 (1896) 23 R at 790

9 (1896) 23 R at 791

(although not believed) does not corroborate the pursuer's statement. A false statement, or a statement not believed, by whomsoever made, is not corroboration of anything else. But if the pursuer is corroborated as to material statements made by her, and as to which she is contradicted by the defender, his denial, if proved false, or not believed, may give a complexion to the whole evidence, adverse to the defender, different from what it would have borne had his denial not been disbelieved or shewn to be false.'

Lord Moncrieff agreed. This is a clear Scottish decision that mere rejection of a defendant's evidence is not corroboration of the otherwise uncorroborated evidence against him. In the learned Lord Justice-Clerk's words¹: 'If [the] evidence is not to be believed it must be taken out of the case altogether'. Once so taken out it plainly cannot be used as corroboration.

In *Dawson v M'Kenzie*², the Lord President (Lord Dunedin) said:

'The modern doctrine [that is plainly, in the context, the modern doctrine relating to corroboration]—and the modern doctrine owed its introduction to the alteration of the old law under which the parties were not competent witnesses—was first laid down in the case of *M'Bayne*³, and perhaps the best expression of it was that given in a more recent decision by the Lord Justice-Clerk and Lord Trayner in the case of *Macpherson*⁴, with which I entirely concur. The outcome of it is this, that there must be something more than the pursuer's own statement, and that that something must amount to corroboration. Now, the mistake which the learned Sheriff had made here is in taking the mere proof of opportunity as amounting to corroboration. Mere opportunity alone does not amount to corroboration, but two things may be said about it. One is, that the opportunity may be of such a character as to bring in the element of suspicion. That is, that the circumstances and locality of the opportunity may be such as in themselves to amount to corroboration. The other is, that the opportunity may have a complexion put upon it by statements made by the defender which are proved to be false. It is not that a false statement made by the defender proves that the pursuer's statements are true, but it may give to a proved opportunity a different complexion from what it would have borne had no such false statement been made. I am really only repeating in other words what was said by the Lord Justice-Clerk in the case of *Macpherson*⁵.'

The learned Lord President went on to quote the words that the learned Lord Justice-Clerk had used. Lord M'Laren, whose opinion followed, said⁶:

'I concur in your Lordship's opinion, and it is hardly necessary to add anything. It is a very common state of the evidence in such cases as this that the pursuer's case depends only upon her own evidence, with a certain amount of corroboration as to opportunities, and then the question of fact arises whether these opportunities were such as to raise legal grounds of suspicion, or were merely of the nature of innocent meetings between man and woman. I think that in this class of cases the law laid down by the Lord Justice-Clerk in the case of *Macpherson*⁴ comes to be of importance, because I agree with his Lordship that it is not sufficient corroboration if you merely displace the evidence of the defender and show that he has made false statements. There must be corroboration of the pursuer's evidence; yet when the effect of the defender's false evidence, i.e., his denial of circumstances which are otherwise proved, is to show that there is something of which he is ashamed, or something the

1 (1886) 23 R at 790

2 (1908) 45 SLR at 474

3 *M'Bayne v Davidson* (1860) 22 D 738

4 (1896) 23 R 785

5 (1896) 23 R at 790

6 (1908) 45 SLR at 475

- a admission of which he conceived would throw suspicion upon himself, this will put a different complexion on what the Court might otherwise be disposed to regard as innocent intimacy between the parties.'

Lord Kinnear agreed. As already stated, Lord Dunedin's opinion was expressly approved by the Divisional Court in *Jones v Thomas*¹.

- b Those two decisions of the Inner House are in precise accord with the passages from the opinion of the Board in *Tumahole*², though neither decision nor *Jones v Thomas*¹ appears to have been cited in argument before the Judicial Committee and *Tumahole*² does not appear to have been cited to the Divisional Court in *Credland v Knowler*³. Curiously enough this point seems never to have arisen for direct decision by the Court of Appeal in this country either in a civil or criminal case. But this court has no doubt both on principle and authority that the statements quoted are
- c correct and respectfully adopts them all.

As already mentioned, *Tumahole*² finds no place in Archbold⁴, but it is mentioned by Professor Cross in his book on Evidence⁵. The learned author, after citing the passage already quoted from *Tumahole*⁶, goes on to say:

- d 'There is nothing in the context which suggests that this dictum is only applicable to the testimony of an accomplice, and there can be no doubt that it is generally true of all cases in which corroboration must be sought.'

This court respectfully agrees with and adopts that passage. Professor Cross then continues⁵:

- e 'There is, however, room for some debate whether it is universally valid. We shall see that demonstrable lies out of court may amount to corroboration of the case against the person who tells them, and there is no obvious reason why lies of a certain type told in the evidence of the defendant or accused should not have a similar effect. The contrivance of a falsehood can sometimes only be explained on the footing that its contriver is anxious to conceal his guilt, but this is not always so.'

- f The learned author does not there mention the two Scottish decisions to which we have referred which, as we think, state the position with precise accuracy though he does cite *Dawson v M'Kenzie*⁷ lower down on the same page⁵ in a different connection. There is no doubt that a lie told out of court is capable in some circumstances of constituting corroboration, though it may not necessarily do so. There may be an explanation of the lie which will clearly prevent it being corroboration: see, for example, *R v Clynes*⁸.
- g

- h But, in the view of this court, there is a clear distinction in principle between a lie told out of court and evidence given in the witness box which the jury rejects as incapable of belief or as otherwise unreliable. Proof of a lie told out of court is capable of being direct evidence, admissible at the trial, amounting to affirmative proof of the untruth of the defendant's denial of guilt. This in turn may tend to confirm the evidence against him and to implicate him in the offence charged. But a denial in the witness box which is untruthful or otherwise incapable of belief is not positive proof of anything. It leads only to the rejection of the evidence given, which then

1 [1934] 1 KB 323, [1933] All ER Rep 535

j 2 [1949] AC 253

3 (1951) 35 Cr App Rep 48

4 Pleading, Evidence and Practice in Criminal Cases (37th Edn, 1969)

5 3rd Edn (1967), p 179

6 [1949] AC at 270

7 (1908) 45 SLR 473

8 (1960) 44 Cr App Rep 158 at 163, 164

has to be treated as if it had not been given. Mere rejection of evidence is not of itself affirmative or confirmatory proof of the truth of other evidence to the contrary. a

For these reasons we are clearly of the view that the learned judge's direction on corroboration was wrong and cannot be supported. It is, of course, always open to a jury to convict on the uncorroborated evidence of an accomplice, provided they are fully warned of the dangers of so doing and are convinced, whilst always bearing that warning in mind, that the uncorroborated evidence is true. The Judicial Committee b observed in the passage quoted¹ that failure to give evidence or the giving of false evidence may bear against an accused and assist in his conviction if there is other material sufficient to sustain a verdict against him.

The relevant other material in the present case (so far as concerns the counts depending on Thatcher's evidence) was the uncorroborated evidence of Thatcher. It was for the jury to decide whether or not, in the light of the judge's warning, that c uncorroborated evidence was sufficient to justify conviction. If they took the view that, having rejected as they plainly did the evidence of the appellants on all the counts, including those counts in which Thatcher was not involved, they had disbelieved the two persons best qualified to give the lie to Thatcher's evidence on the counts to which his evidence was directed, and that this disbelief led them irresistibly to accept Thatcher's evidence directed to those counts, though uncorroborated, d as clearly true, no one could have challenged their reasoning or their verdicts.

If the defence is an alibi and the alibi breaks down the jury must not be told that they may convict merely because the alibi has broken down, but they are entitled to ask themselves the single question, 'Why has a false alibi been tendered?' If there is only one possible answer to that question they are entitled to give their answer by their verdict. Similarly in a case such as the present if the accused are found to have given evidence which is incapable of belief or otherwise unreliable, the jury are e entitled to ask the single question, 'Why has this evidence which we have rejected been tendered to us?' If there is only one possible answer—that the accomplice, though uncorroborated, was telling the truth—once again they are entitled to give their answer in their verdict, provided, of course, that the trial judge has properly warned them of the dangers of acting on the accomplice's uncorroborated evidence. f

The question, therefore, arises whether this court should now apply the proviso. The fact that there was a misdirection on corroboration does not oblige this court to quash the convictions: see for example *R v Jackson*².

Counsel for the appellants sought to argue that the present misdirection vitiated all the convictions, including those on counts on which Thatcher was not involved. He contended that the misdirection on the Thatcher counts 'corroded', to use a word g employed during the argument, the convictions on the other counts. We do not think that this is right. The learned judge delivered a full, careful and accurate summing up on the facts and no challenge has been, or could be, made as to its accuracy in any respect. Both the appellants manifestly cut poor figures in the witness box, to use no harsher language. Counsel for the Crown described Chapman's evidence as having been pathetic in his attempts to challenge the force of the case h against him, especially on count 4. If the jury, as they may well have done, considered count 4 first and rejected Chapman's defence out of hand, they may very well have thought that conviction on count 4, where Thatcher was not directly involved, led irresistibly to a conviction on count 1 where Thatcher was involved and then on count 2 where Thatcher was also involved.

Similarly, Baldwin's denial of ever buying clothing from Chapman and his defence i that he had bought certain clothing in Petticoat Lane and that it was sheer coincidence that 29 articles said to have been bought in Petticoat Lane so closely resembled the comparable stolen stock, must indeed have struck the jury as quite incredible.

1 [1949] AC at 270

2 [1953] 1 All ER 872, [1953] 1 WLR 591

a The evidence on the non-Thatcher counts was in truth overwhelming. On the Thatcher counts the ultimate question for the jury was this: have we got the truth from Thatcher? The jury thought that they had and this court sees no reason to disagree with that conclusion in spite of the misdirection, for it is of the opinion that in coming to the overall conclusion which they reached they must have accepted Thatcher as truthful in the witness box irrespective of the absence of corroboration.

b Accordingly this court is convinced that there is no miscarriage of justice caused by the misdirection. It proposes to apply the proviso and to dismiss the appeal on all counts. There are no applications for leave to appeal against sentence.

c Counsel for the appellants also sought to make a point arising from the number of statements Thatcher had made to the police. He complained that the learned judge had not told the jury to disregard Thatcher's evidence in toto. He contended that the judge ought to have directed the jury as was suggested in *R v Golder*, *R v Jones*, *R v Porritt*¹. But in that case the relevant witness was a hostile witness. Thatcher was not a hostile witness. There is nothing in this point and it is only mentioned for the sake of completion.

The appeals are dismissed.

Appeals dismissed.

d Solicitors: Registrar of Criminal Appeals (for the appellants); J R Pryer, Dorchester (for the Crown).

S A Hatteea Esq Barrister.

e

Burnett v British Waterways Board

COURT OF APPEAL, CIVIL DIVISION

LORD DENNING MR, PHILLIMORE AND SCARMAN LJJ

f 5th, 6th FEBRUARY 1973

g Negligence – Defence – Exclusion of liability – Notice – Implied agreement – Freedom to choose whether to submit to terms of notice – Employee acting in course of employment – Plaintiff employed as lighterman on barge – Train of barges being brought into dock by means of capstan rope provided and operated by defendants – Notice excluding liability of defendants to lightermen availing themselves of assistance provided by defendants – Plaintiff injured by reason of defect in rope caused by defendants' negligence – Notice apt to cover accident – Plaintiff not free to refuse to avail himself of assistance provided by defendants – Whether notice protecting defendants from liability.

h Negligence – Defence – Volenti non fit injuria – Consent to risk of injury – Free and voluntary consent – Notice by defendants excluding liability for injury – Plaintiff undergoing risk of injury in course of employment – Plaintiff a lighterman employed on barge – Train of barges being brought into dock by means of capstan rope provided and operated by defendants – Notice excluding liability of defendants to lightermen availing themselves of assistance provided by defendants – Plaintiff having no freedom to choose not to submit to terms of notice – Plaintiff injured by reason of defect in rope caused by defendants' negligence – Whether plaintiff having freely and voluntarily consented to risk of injury.

j Negligence – Defence – Exclusion of liability – Statutory board – Duty to have regard to safety of operations in provision of services and facilities – Power to make use of services and facilities subject to such terms and conditions as board think fit – Power to exclude liability

for negligence in providing services and facilities – Power to exclude liability in absence of contract – British Waterways Board – Plaintiff employed as lighterman on barge – Barge being brought into dock by means of capstan rope provided by board – Notice excluding liability for board's negligence – Plaintiff injured by reason of board's negligence – Whether board protected by notice – Transport Act 1962, ss 10 (1), 43 (3). a

The plaintiff was a lighterman on the River Thames and a freeman of the river. He was employed by C Ltd on a barge which was one of a train of five barges being slowly moved forward into the lock of the Regents Canal dock. The dock was in the occupation of the British Waterways Board ('the board'). The barges were moved forward under the direction of the board's servants by a capstan rope attached to the shore which was wound round a button on the dock quay and from there on to each barge. The plaintiff's barge was still in tidal waters, a little distance from the lock gates, when the rope which was pulling it forward snapped, because it was defective, and hit the plaintiff injuring him. He brought an action against the board for damages for personal injuries on the grounds of the board's negligence and/or breach of statutory duty. The board admitted that the defect in the rope was due to the negligence of one of its servants but contended that the board's liability was excluded by a notice outside the docks office which was in the following terms: 'Lightermen and others availing themselves of the facilities and assistance of the servants of the [board] in bringing their craft into and through the entrance of the dock must do so at their own risk and upon the understanding that no liability . . . shall attach to the [board] or its servants for any loss, damage or injury from whatever cause arising to . . . any person . . . on board thereof.' The notice could not be read from where the plaintiff was working on his barge but he had read the notice when, as a young apprentice, he had been to the docks office. b
c
d
e

Held – The board was not protected by the notice from liability for breach of its common law duty to use reasonable care towards the plaintiff as a person affected by its activities because—

(i) although the notice was apt to cover the circumstances of the accident, as the plaintiff was 'availing [himself] of the facilities and assistance' of the board's servants, the plaintiff had no choice whether to enter the dock on the terms of the notice or not to enter it, as he was an employee on the barge in a train of barges; accordingly, no agreement to be bound by the terms of the notice could be implied or imputed to him (see p 634 h, p 635 f and g and p 636 c d and j post); *Buckpitt v Oats* [1968] 1 All ER 1145, *Bennett v Tugwell (an infant)* [1971] 2 All ER 248 and *Birch v Thomas* [1972] 1 All ER 905 distinguished; f
g

(ii) the doctrine of *volenti non fit injuria* could not afford a defence to the claim because that defence was available only when the plaintiff freely and voluntarily, with full knowledge of the nature and extent of the risk, impliedly agreed to incur it and to waive any claim for injury; no such agreement could be implied on the part of the plaintiff since he had no choice in the matter of entering the dock (see p 635 g and h and p 636 c d and j, post); dictum of Wills J in *Osborne v London and North Western Railway Co* (1888) 21 QBD at 223, 224, as approved in *Letang v Ottawa Electric Railway Co* [1926] All ER Rep at 549, and dictum of Lord Denning MR in *Nettleship v Weston* [1971] 3 All ER at 587 applied. h

Per Curiam. The board was in breach of its statutory duty under s 10 (1)^a of the Transport Act 1962 but s 10 (4)^b precluded an action for damages for breach of that duty (see p 636 a b e and j, post). j

Per Phillimore LJ. If the notice could be justified at all under s 43 (3)^c of the Transport Act 1962 it could only be justified in the case of those with whom the board had

^a Section 10 (1), so far as material, is set out at p 636 a, post

^b Section 10 (4), so far as material, is set out at p 636 b, post

^c Section 43 (3) is set out at p 636 f, post

- a** entered into contracts for the use of its services and facilities. Accordingly, in relation to the plaintiff's claim, the notice was to be treated as repugnant to s 10 (1) and of no effect in dealing with his claim in negligence since he had not entered into a contract with the board (see p 636 g and h, post).

Decision of Waller J [1972] 2 All ER 1353 affirmed.

Notes

- b** For exclusion of liability for negligence, see 28 Halsbury's Laws (3rd Edn) 86, 87, para 91.

For the application of the defence of *volenti non fit injuria*, see 28 Halsbury's Laws (3rd Edn) 82-84, para 88, and for cases on the subject, see 36 Digest (Repl) 150-155, 781-818.

- c** For the Transport Act 1962, ss 10, 43, see 26 Halsbury's Statutes (3rd Edn) 933, 964.

Cases referred to in judgment

- Ashdown v Samuel Williams & Sons Ltd* [1957] 1 All ER 35, [1957] 1 QB 409, [1956] 3 WLR 1104, CA, Digest (Cont Vol A) 1158, 375c.
- Bennett v Tugwell (an infant)* [1971] 2 All ER 248, [1971] 2 QB 267, [1971] 2 WLR 847, [1971] 1 Lloyd's Rep 333, [1971] RTR 221.
- d** *Birch v Thomas* [1972] 1 All ER 905, [1972] 1 WLR 294, [1972] 1 Lloyd's Rep 209, [1972] RTR 130, CA.
- Buckpitt v Oates* [1968] 1 All ER 1145, Digest (Cont Vol C) 160, 7c.
- Letang v Ottawa Electric Railway Co* [1926] AC 725, [1926] All ER Rep 546, 95 LJPC 153, 135 LT 421, PC, 8 Digest (Repl) 95, 633.
- e** *Nettleship v Weston* [1971] 3 All ER 581, [1971] 2 QB 691, [1971] 3 WLR 370, [1971] RTR 425, CA.
- Osborne v London and North-Western Railway Co* (1888) 21 QBD 220, 57 LJQB 618, 59 LT 227, 52 JP 806, DC, 36 Digest (Repl) 156, 822.
- Parker v South Eastern Railway Co* (1877) 2 CPD 416, [1874-80] All ER Rep 166, 46 LJQB 768, 36 LT 540, 41 JP 644, CA, 8 Digest (Repl) 141, 909.
- f** *White v Blackmore* [1972] 3 All ER 158, [1972] 2 QB 651, [1972] 3 WLR 296, CA.
- Wilkie v London Passenger Transport Board* [1947] 1 All ER 258, [1947] LJR 864, 177 LT 71, 111 JP 98, 45 LGR 170, CA, 8 Digest (Repl) 112, 724.

Cases and authorities also cited

- Forbes, Abbott & Lennard Ltd v Great Western Railway Co* (1927) 138 LT 286, 44 TLR 97.
- g** *Henson v London & North Eastern Railway Co and Coote & Warren Ltd* [1946] 1 All ER 653, 175 LT 76, CA.
- Hollier v Rambler Motors (AMC) Ltd* [1972] 1 All ER 399, [1972] 2 QB 71, CA.
- Humorist, The* [1944] P 28.
- McCawley v Furness Railway Co* (1872) LR 8 QB 57.
- Charlesworth on Negligence* (5th Edn, 1971), para 347.
- h** *Clerk & Lindsell on Torts* (13th Edn, 1969), paras 1029, 1032.

Appeal

- This was an appeal by the defendants, the British Waterways Board, against the judgment of Waller J¹ given on 11th May 1972 in favour of the plaintiff, James Patrick Burnett, a lighterman, on his claim for damages for personal injuries arising out of the defendants' negligence and breach of statutory duty. The facts are set out in the judgment of Lord Denning MR.

- i** *D P O'Brien* for the defendants.
- David Turner-Samuels QC* and *T J C Goudie* for the plaintiff.

LORD DENNING MR. The plaintiff, Mr Burnett, is a lighterman on the River Thames. He is a freeman of the the river. On 12th September 1968 he was employed by Charrington Lighterage Co Ltd. He was on the barge 'Durley', which was one of five barges which were being towed to the Limehouse Cut. It was being warped in towards the entrance of the lock. It was still in the tidal way, a little distance from the lock gates. The warping in was being done by means of ropes from the shore. The ropes were attached to the shore, then round a button on the quay, thence on to the barges. Mr Burnett was looking to the ropes on his barge. Suddenly the rope which was pulling his barge forward snapped. It snapped because it was defective. It is admitted now by the defendants, the British Waterways Board, that the defect was due to the negligence of some one of their staff, for which at common law they would be liable. a

The rope snapped and part of it hit Mr Burnett. He was rendered unconscious. Fortunately he was not seriously injured. He was only in hospital for three days; but he was an out-patient for some time and suffered from depression which lasted for some months. The judge¹ assessed the general damages at £350 and the special damages at £135.52. It seems a high figure for such a small accident. There was an appeal about it. But it is not the sort of figure which was so wholly unreasonable that this court would interfere with it. b

The serious issue is on liability. The board say that they are protected by a notice which was put out outside the docks office. It was some distance away from the barges. It could not be read at the distance where Mr Burnett was. In any case, he would not dream of reading it from the place where he was working on the barge. But he admitted that as an apprentice, when he was young, he had been to the docks office and had seen and read this notice: but he said that he thought that it did not apply at the time he had his accident. The notice was in these words: c

'BRITISH WATERWAYS BOARD

NOTICE d

TO LIGHTERMEN & OTHERS e

'Lightermen and others availing themselves of the facilities and assistance of the servants of the [board] in bringing their craft into and through the entrance of the dock must do so at their own risk and upon the understanding that no liability whatever shall attach to the [board] or its servants for any loss, damage or injury from whatever cause arising to or by the craft or to or by any person or goods on board thereof. f

BY ORDER'. g

The first question is whether the wording was strong enough to cover this accident. Mr Burnett argued that it did not, because he had not availed himself of the facilities or assistance of the servants of the board. It was his employers, Charrington Lighterage, who had done so. The judge rejected this argument. He said² that the words were apt to cover this situation. I am inclined to agree with him. h

The second question is what was the duty owing by the board to Mr Burnett? I doubt whether the Occupiers' Liability Act 1957 applies to this case, because the board were not in occupation of the barge on which the accident occurred. They were in occupation of the quay alongside and of the equipment there. I should have thought their duty was at common law to use reasonable care towards the men on the barge who would be affected by their activities. That is virtually the same i

¹ [1972] 2 All ER 1353 at 1359, [1972] 1 WLR 1329 at 1335

² [1972] 2 All ER at 1356, [1972] 1 WLR at 1332

a duty as an occupier owes to a visitor. So it does not matter under which head it is put. In any case it was a duty to use reasonable care. It was broken. They are liable for negligence unless the notice is a defence.

The third question is whether the notice affords a defence. If the board had made a contract with Mr Burnett, in which this notice was incorporated, of course, the board could rely on it. But there is no shadow of ground for saying that there was a contract between the board and Mr Burnett. He was just one of the men working on the barge coming in. His only contract was with the barge owners.

Irrespective of whether there was a contract properly so called, there are cases which show that if Mr Burnett agreed, expressly or impliedly, to be bound by the terms of the notice, he could not claim. Thus there are several cases where the driver of a vehicle gives a passenger a lift and, at the same time, gives him reasonable notice that he rides at his own risk. The passenger is bound by the notice. He cannot claim: see *Buckpitt v Oates*¹, *Bennett v Tugwell (an infant)*² and *Birch v Thomas*³. Likewise when a man is given a free pass to go on a vehicle, he is bound by the conditions on it, if reasonable notice is given of them: see *Wilkie v London Passenger Transport Board*⁴. Similarly when dangerous operations are in progress on land and apparent, and the owner gives a licensee permission to go on it, but at the same time gives him reasonable notice that he comes at his own risk, again he cannot claim: see *Ashdown v Samuel Williams & Sons Ltd*⁵ and *White v Blackmore*⁶. In some of these cases, there may not be a contract properly so called; but the passenger who accepts the lift, or the licensee who takes advantage of the permission, is bound by the notice. He has a choice either to go on the premises on the terms of the notice, or not to go to them. If he goes, he is taken to have impliedly agreed to take the risk. Just as in the 'ticket' cases, a man, by accepting the ticket with the conditions, is taken to have agreed to them: see *Parker v South Eastern Railway Co*⁷. The 'ticket' cases are, of course, based on contract, whereas the licensee cases are not. But in each the basis is implied agreement.

In the present case the plaintiff had no choice. No agreement can be implied or imputed to him. The judge put it well⁸:

f 'The plaintiff was not somebody arriving on his own at the entrance to the dock and saying: "Well, I will not go in because of this notice." He was an employee on a barge, part of a train of barges, and by the time he had got to the dock it was certainly beyond his ability to make a choice and not go in.'

On this ground—that there was no choice to the plaintiff—the judge held that the plaintiff was not bound by the notice. I agree entirely.

g The other ground on which it was sought to deprive the plaintiff of his claim was the doctrine of *volenti non fit injuria*. This defence too must be based on implied agreement. It is only available when the plaintiff freely and voluntarily, with full knowledge of the nature and extent of the risk, impliedly agreed to incur it: see *Letang v Ottawa Electric Railway Co*⁹; and to waive any claim for injury (*Nettleship v Weston*¹⁰). No such agreement could possibly be implied here. In my opinion therefore the board cannot rely on the notice as a defence to this action.

1 [1968] 1 All ER 1145

2 [1971] 2 All ER 248, [1971] 2 QB 267

3 [1972] 1 All ER 905, [1972] 1 WLR 294

4 [1947] 1 All ER 258

j 5 [1957] 1 All ER 35, [1957] 1 QB 409

6 [1972] 3 All ER 158, [1972] 2 QB 651

7 (1877) 2 CPD 416, [1874-80] All ER Rep 166

8 [1972] 2 All ER at 1358, [1972] 1 WLR at 1334

9 [1926] AC 725 at 731, [1926] All ER Rep 546 at 549, citing proposition of *Wills J in Osborne v London and North-Western Railway Co* (1888) 21 QBD 220 at 233

10 [1971] 3 All ER 581 at 587, [1971] 2 QB 691 at 701

I ought perhaps to say a word about s 10 (1) of the Transport Act 1962. It says that it is the duty of the board 'to have due regard to efficiency, economy and safety of operation as respects the services and facilities provided by them'. It was suggested that that was a statutory duty which would carry a right to damages if it was broken. But the answer is given by s 10 (4) which says that s 10 (1)— a

'shall not be construed as imposing, either directly or indirectly, any form of duty or liability enforceable by proceedings before any court to which the Board would not otherwise be subject.' b

So no reliance can be placed on breach of that statutory duty.

I think the case is properly to be considered as one where the board was under a duty at common law to use reasonable care: that this duty was broken: and that the board are not protected by the notice because Mr Burnett never agreed to it. He had seen it and read it, but he had no choice in the matter. c

I think the learned judge was right and I would dismiss the appeal.

PHILLIMORE LJ. I entirely agree, and I would only add a word or two on the points raised on the provisions of the Transport Act 1962. It seems to me clear that s 10 (1) imposes a statutory duty. It is a duty, inter alia, to have due regard to the safety of operations, as to services and facilities provided by them. Now, what happened here? A rope was used which had previously broken, which had been spliced and which broke again at the very same place where it had broken before. It is not disputed that there was negligence. Counsel agreed that as a result of the provisions of s 10 (4) it was not open to the plaintiff here to found his action on a breach of statutory duty; but that there was a breach of statutory duty seems to me to be very clear. What is said is that the defendants notwithstanding their breach of statutory duty were entitled to rely on this notice to relieve them of this claim in negligence by reason of the provisions of s 43 (3), which provides: d

'Subject to this Act and to any such enactment as is mentioned in the last foregoing subsection, the Boards shall have power to demand, take and recover such charges for their services and facilities, and to make the use of those services and facilities subject to such terms and conditions as they think fit.' e

And it is said by counsel for the defendants that this notice was put up as a term and condition under that subsection. Now, as I see it, if this notice is intended—and it clearly is—to excuse the defendants from any liability in negligence, then it hardly fits with their statutory duty under s 10 (1). If it is permissible at all, it can only, as I see it, under s 43 (3), be justified in the case of those with whom they enter into contracts for the use of their services and facilities. I can see no possible ground for extending their freedom to disregard their statutory duty beyond what is permitted by the strict wording of the Act; and it seems to me accordingly that, at any rate in relation to the present claim by this plaintiff, who entered into no contract with the defendants, this notice must be treated as repugnant to s 10 (1) and of no effect in dealing with the claim which he makes. f

For the reasons given by Lord Denning MR and for this reason also, I would dismiss this appeal. g

SCARMAN LJ. I agree and have nothing to add. h

Appeal dismissed. Leave to appeal to the House of Lords. i

Solicitors: *H C Rutherford* (for the defendants); *W H Thompson* (for the plaintiff).

Wendy Shockett Barrister.

Aplin v White (Inspector of Taxes)

CHANCERY DIVISION

MEGARRY J

2nd, 3rd, 4th APRIL 1973

Income tax – Persons chargeable – Profits and interest of money – Person ‘receiving’ income chargeable – Interest of money – Agent receiving interest belonging to principal – Estate agent collecting rents on behalf of clients – Agent depositing clients’ money in bank deposit account in own name – Interest arising on deposit account – Whether interest to be charged on taxpayer as interest of money received by him – Income Tax Act 1952, ss 123 (1) (Sch D, Case III), 148.

Income tax – Income – Total income – Total income exceeding stated amount – Higher rate of tax – Income received by taxpayer on behalf of third party – Taxpayer assessed to tax at standard rate as person ‘receiving’ income – Assessment final and conclusive for purposes of tax at standard rate – Assessment also final and conclusive in estimating total income – Whether income to be included in total income of taxpayer although not belonging to taxpayer beneficially – Income Tax Act 1952, ss 148, 524 (4).

The taxpayer carried on business as an estate agent. In the course of his business he collected rents on behalf of his clients. He placed part of the money so collected in a deposit account which was in the name of his firm and which was not marked as a clients’ deposit account. Only the clients’ moneys were placed in the deposit account. As it would have been a complicated matter to divide the interest arising on the deposit account between the various clients the taxpayer had not accounted to them for it. The taxpayer was assessed under Sch D, Case III, in s 123 (1)^a of the Income Tax Act 1952 in respect of the interest for the year 1967-68. He appealed, contending, inter alia, that the interest was really the property of his clients; alternatively that it was part of the profit of the business and therefore assessable under Sch D, Case II.

Held – The taxpayer had been properly assessed under Sch D, Case III. The interest arising from the deposit account fell clearly within the words ‘interest of money’ in Case III and did not fall within the other heads of Sch D. The fact that the taxpayer was not beneficially entitled to the interest was of no consequence, for he was the person who had ‘received’ it and who was, therefore, chargeable in respect of it by virtue of s 148^b of the 1952 Act (see p 641 h and p 643 b to d, post).

Per Megarry J. Where, by virtue of s 148 of the 1952 Act, a taxpayer has been assessed in respect of income which is not his beneficially and the assessment has become final and conclusive for the purposes of tax at the standard rate, it cannot, however conclusive as to amount, be used in ‘estimating total income’ for the purposes of surtax, under s 524 (4)^c of the 1952 Act, for, lacking the beneficial quality

^a Section 123 (1), so far as material, provides: ‘Tax under Schedule D shall be charged under the following Cases respectively, that is to say—

‘Case I—tax in respect of any trade carried on in the United Kingdom or elsewhere;
‘Case II—tax in respect of any profession or vocation not contained in any other Schedule;
‘Case III—tax in respect of—(a) any interest of money, whether yearly or otherwise, or any annuity, or other annual payment . . .
‘Case VI—tax in respect of any annual profits or gains not falling under any other Case of Schedule D and not charged by virtue of Schedule B, Schedule C or Schedule E . . .’

^b Section 148 is set out at p 641 g, post

^c Section 524 (4) is set out at p 642 f and g, post

requisite for 'total income', it is incapable of performing any function in estimating 'total income' (see p 642 j to p 643 a, post). a

Notes

For the charge to tax under Sch D, Case III, and the person assessable, see 20 Halsbury's Laws (3rd Edn) 245-247, paras 448-452.

For the computation of total income by reference to income directly assessed to tax at the standard rate, see 20 Halsbury's Laws (3rd Edn) 538, para 1037, and for cases on the computation of total income, see 28 (1) Digest (Reissue) 498-510, 1796-1857. b

For the Income Tax Act 1952, ss 123, 148, 524, see 31 Halsbury's Statutes (2nd Edn) 116, 145, 484.

For 1970-71 and subsequent years of assessment, ss 123, 148 and 524 of the 1952 Act have been replaced respectively by ss 109, 114 (1) and 528 of the Income and Corporation Taxes Act 1970. c

Cases referred to in judgment

Andrew v Taylor (Inspector of Taxes), *Taylor (Inspector of Taxes) v Andrew* (1965) 42 Tax Cas 557, 44 ATC 351, [1965] TR 355, CA, 28 (1) Digest (Reissue) 117, 341.

Brown v Inland Revenue Comrs [1964] 3 All ER 119, [1965] AC 244, 42 Tax Cas 42, [1964] 3 WLR 511, 43 ATC 244, [1964] TR 269, 1964 SC (HL) 180, 1964 SLT 302, HL, 28 (1) Digest (Reissue) 451, 1617. d

Dreyfus v Inland Revenue Comrs (1963) 41 Tax Cas 441, 42 ATC 513, [1963] TR 461.

Farthing v Inland Revenue Comrs (1959) 38 ATC 115, [1959] TR 123, 52 R & IT 262.

Hanbury, Re, Comiskey v Hanbury (1939) 38 Tax Cas 588, 20 ATC 333, CA, 28 (1) Digest (Reissue) 266, 865.

Hart (Inspector of Taxes) v Sangster [1957] 2 All ER 208, [1957] Ch 329, 37 Tax Cas 231, [1957] 2 WLR 812, 50 R & IT 349, sub nom *Sangster v Hart* 36 ATC 63, [1957] TR 73, CA, 28 (1) Digest (Reissue) 277, 921. e

Reid's Trustees v Inland Revenue Comrs (1929) 14 Tax Cas 512, 1929 SC 439, 28 (1) Digest (Reissue) 394, *1133.

Rigden v Inland Revenue Comrs, *Inland Revenue Comrs v Urwick's Executors* (1935) 19 Tax Cas 542, 28 (1) Digest (Reissue) 314, 1106. f

Cases also cited

Hoystead v Commissioner of Taxation [1926] AC 155, [1925] All ER Rep 56, PC.

Inland Revenue Comrs v National Book League [1957] 2 All ER 644, [1957] Ch 488, 37 Tax Cas 455, CA.

Lawson (Inspector of Taxes) v Hosemaster Machine Co Ltd [1966] 2 All ER 944, 43 Tax Cas 337, [1966] 1 WLR 1300, CA. g

Martin v Inland Revenue Comrs (1938) 22 Tax Cas 330.

Muir v Inland Revenue Comrs [1966] 3 All ER 38, [1966] 1 WLR 1269, 43 Tax Cas 367, CA.

Noddy Subsidiary Rights Co Ltd v Inland Revenue Comrs [1966] 3 All ER 459, 43 Tax Cas 458, [1967] 1 WLR 1. h

Port of London Authority v Inland Revenue Comrs [1920] 2 KB 612, 12 Tax Cas 122, CA.

Rose v Humbles (Inspector of Taxes) [1972] 1 All ER 314, [1972] 1 WLR 33, CA.

Williams v Singer, *Pool v Royal Exchange Assurance* [1921] 1 AC 65, 7 Tax Cas 387, HL.

Case stated

1. At a meeting of the Commissioners for the General Purposes of the Income Tax for the Division of West Brixton in the county of Greater London held on 29th September 1970 and the adjourned hearing on 14th January 1971, Geoffrey Weston Aplin ('the taxpayer') of Beech Avenue, Sanderstead, Surrey, appealed against assessments for the year 1967-68 made on him under Case II of Sch D in the sum of £6,000 as an estate agent and under Case III of Sch D in the sum of £150 for interest. i

2. The questions for determination by the commissioners were: (a) whether

a interest arising on a bank deposit account was income of the taxpayer; and (b) whether such interest should be included as part of his profits as estate agent assessable under the rules applicable to Case II of Sch D or separately under the rules applicable to Case III.

3. The following facts were proved or admitted. (a) The taxpayer conducted a business of estate agency from 968 Garratt Lane, Tooting, under the name of James Fisher & Son. (b) He succeeded to the practice in 1946. (c) Rents were collected for clients out of which expenses including commission were deducted and the balance of the funds sent to the respective clients each month or yearly. Substantial sums were held and a percentage of the moneys was placed on deposit. (d) The practice of putting that money on deposit ceased at one time (following discussions with the Royal Institution of Chartered Surveyors) but was resumed in 1963. (e) The deposit account was in the name of the firm; it was not marked as a clients' deposit account. (f) The moneys deposited were entirely from clients' moneys. (g) As regards the interest arising on the deposit account, in order to divide the interest between the various clients regard would have to be had to the daily collection of rents (bankings being made daily). (h) There was no form of contract between the taxpayer and his clients. There was only a written document setting out the services to be provided and the charges to be made. In some cases there had been exchanges of letters, usually amplified by verbal statements, but often nothing more than verbal instructions. Where there were any written instructions, those might well have been altered from time to time either by written or verbal amendments, and some of the collections went back to before the war and some to even before the 1914-18 war. (i) The firm (i.e. James Fisher & Son) was instructed and authorised to collect rents on behalf of the persons entitled thereto. In some cases they were instructed to pay rates, water rates, repairs, insurance and other outgoings (or some of them) and for the most part had a general mandate to manage the property on the owners' behalf, though, of course, the services required varied from case to case. (j) There was no condition or contract or obligation by or on the taxpayer to put his clients' moneys on deposit.

f 4. It was contended on behalf of the taxpayer: (i) The interest was really the property of the persons entitled to rents, but the cost of apportioning the interest between the various clients would have outweighed the total interest received and at the end of the day the clients would then have received less out of their rents than they did under the existing arrangement. (ii) Following the decision of the House of Lords in *Brown v Inland Revenue Comrs*¹ the interest fell to be regarded as interest belonging to the taxpayer's individual clients, and not as the income of the taxpayer. g Alternatively, the income should be regarded as part of the profit of the business and assessable under Case II of Sch D.

h 5. It was contended on behalf of the Crown: (a) (i) The interest fell to be assessed under Case III of Sch D. (ii) The taxpayer was the person to be assessed. (iii) In the event of alternative cases of Sch D being equally applicable the Revenue had the right to choose the Case. (b) Interest on a bank deposit account was assessable under Case III of Sch D in accordance with ss 122 (1) (b) and 123 (1) of the Income Tax Act 1952. The immediate source of the interest was the deposit of money on the terms of the contract between the taxpayer and the bank. It followed that the interest was not immediately derived by the taxpayer from the carrying on of his profession. (c) The taxpayer was correctly assessed under s 148 of the 1952 Act.

j [Paragraph 6 set out the cases² referred to.]

¹ [1964] 3 All ER 119, [1965] AC 244, 42 Tax Cas 42

² *Brown v Inland Revenue Comrs* [1964] 3 All ER 119, [1965] AC 244, 42 Tax Cas 42, HL; *Bucks v Bowers (Inspector of Taxes)* [1970] 2 All ER 202, [1970] Ch 431, 46 Tax Cas 267; *Butler v Mortgage Co of Egypt Ltd* (1928) 13 Tax Cas 803, CA; *Hart (Inspector of Taxes) v Sangster* [1957] 2 All ER 208, [1957] Ch 329, 37 Tax Cas 231, CA; *Hughes v Utting & Co Ltd* [1940] 2 All ER 76, [1940] AC 463, sub nom *Utting & Co Ltd v Hughes* 23 Tax Cas 174, HL; *Liverpool & London & Globe Insurance Co v Bennett* [1913] AC 610, 6 Tax Cas 327, HL

7. The commissioners gave their decision as follows:

'We, the Commissioners who heard the appeal held that the [taxpayer] was the person chargeable under Section 148 of the Income Tax Act 1952 as the person who received the interest and is chargeable under Case III Schedule D although the Income was derived from his business, and we found that the income received was that of the [taxpayer].'

8. At the adjourned meeting on 14th January 1971 the commissioners determined the 1967-68 assessment in the following figures:

CASE II PROFIT	£4,786	Less capital allowances	£53.
CASE III INTEREST	£314	Less exempt	£2.

9. Immediately after the determination of the appeal the taxpayer expressed his dissatisfaction with the decision as being erroneous in point of law and in due course required the commissioners to state a case for the opinion of the High Court.

10. The question for the decision of the court was whether on the facts as found by the commissioners their decision was correct in law.

Marcus Jones for the taxpayer.

M P Nolan QC and *Patrick Medd* for the Crown.

MEGARRY J. This is an appeal by the taxpayer from the General Commissioners for the West Brixton Division of Greater London. The only subject of appeal is an assessment for 1967-68 under Case III of Sch D. I am not concerned with the figures, but with whether the taxpayer is assessable at all in respect of the type of income in question.

The taxpayer conducts an estate agency business, and as part of his business he collects rents for clients of his, in some cases paying outgoings and also managing the properties. He deducts expenses and a commission, and periodically accounts to his clients. He carries on this work without any formal contracts with his clients, though in some cases there have been exchanges of letters, while in others there are merely oral instructions. Out of the rents thus collected, from time to time the taxpayer places on deposit at a bank in his firm name, and not in the name of his clients, a percentage of what he has collected; and the deposit account contains nothing save clients' money and the interest earned on it. The taxpayer succeeded to the business in question in 1946, but the collection of rents has gone on for a long while, reaching back to before the last war, and in a few cases even to before the war of 1914-18. The practice of putting clients' money on deposit at one time ceased, but in 1963 it was resumed. There is no obligation on the taxpayer to place the money on deposit. The deposit account yields interest, and to divide that interest between the various clients would be a complicated matter, since rents are banked daily. The taxpayer has therefore not accounted to his clients for any of the interest. It is on the interest yielded to the taxpayer by the deposit account that he has been assessed under Case III of Sch D.

Before the General Commissioners the taxpayer contended that the interest was really the property of his clients, but that the cost of apportioning it would outweigh the total interest received, and that the interest that he received and did not account for enabled him to make lower charges for collecting the rents. In the alternative, he contended that the income was part of the profits of his business and so was assessable under Case II of Sch D. The inspector, on the other hand, contended that the interest from the deposit account was interest which fell to be assessed on the taxpayer under Case III of Sch D as being interest on the deposit of money, and that the taxpayer was correctly assessed under s 148 of the Income Tax Act 1952. The commissioners gave their decision in the following words. They held that—

- a 'the [taxpayer] was the person chargeable under Section 148 of the Income Tax Act 1952 as the person who received the interest and is chargeable under Case III Schedule D although the Income was derived from his business, and we found that the income received was that of the [taxpayer].'

The question as stated by the commissioners for this court is whether on the facts found by the commissioners their decision was correct in law.

- b At an early stage before me, counsel for the Crown rejected the concluding words of the commissioners' decision to the effect that the income was the income of the taxpayer. He did this on the ground that these words were unsupported by any evidence; and he joined counsel for the taxpayer in saying that the income was truly the income of the various clients. This made it unnecessary for counsel for the taxpayer to develop fully his contention that this indeed was the case. The words
- c in question, I may say, are in effect added on at the end of the decision of the commissioners, and no conclusion appears to have been drawn from those words as part of the decision. The immediately preceding words, stating 'although the Income was derived from his business', were found puzzling by counsel for the Crown, but, he said, harmless. In other respects, counsel for the Crown said that the decision of the commissioners was right. There was indeed a further point in the determination
- d of the figures which played a small part in the case, namely, that the figure for the Case III interest was stated to be subject to a deduction of £2, the words used being 'Less Exempt'. This may have been a slip on the part of the commissioners or it may have been sound, but I do not think that it is in any way decisive of any point that is before me for decision.

- e The analysis of the situation which counsel for the Crown advanced in the face of the onslaught by counsel for the taxpayer was as follows. First, he said that the interest fell squarely within Case III of Sch D as being within the words 'any interest of money, whether yearly or otherwise' in the Income Tax Act 1952, s 123 (1). It was, he said, plainly within the concept of 'pure profit income', within *Re Hanbury, Comiskey v Hanbury*¹. The source of that income was the deposit of the money with the bank coupled with the taxpayer's contract with the bank whereunder the bank
- f paid interest. This accorded with *Hart (Inspector of Taxes) v Sangster*².

Second, counsel for the Crown relied on s 148 of the Income Tax Act 1952, as indeed the commissioners had relied. For a section in an income tax Act, s 148 is a paragon of brevity and clarity. It runs as follows:

- g 'Tax under Schedule D shall be charged on and paid by the persons receiving or entitled to the income in respect of which tax under that Schedule is in this Act directed to be charged.'

These words, said counsel for the Crown, with the expression of 'receiving or entitled to' in the alternative, enabled an assessment under Sch D to be made on a person who either received the income or was entitled to it. If he received some income to which he was entitled and also some income to which he was not entitled, in the sense

h that he was a trustee or other person who received it in a fiduciary capacity for others, it mattered not: he could be assessed under Sch D on it all. This, said counsel for the Crown, was supported by what Lord Clyde, the Lord President, said in *Reid's Trustees v Inland Revenue Comrs*³; and see *Dreyfus v Inland Revenue Comrs*⁴. This view is reinforced by *Brown v Inland Revenue Comrs*⁵, which is in many respects indistinguishable in principle from the present case: and in affirming the decision in that case I

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1 (1939) 38 Tax Cas 588 at 590

2 [1957] 2 All ER 208 at 210, 211, [1957] Ch 329 at 337, 338, 37 Tax Cas 231 at 238

3 (1929) 14 Tax Cas 512 at 522-525

4 (1963) 41 Tax Cas 441 at 447, 448

5 (1964) 42 Tax Cas 42 at 58, 59

do not think that the House of Lords¹ in any way indicated disapproval of what had been said in the First Division. a

The result, said counsel for the Crown, was thus that a trustee or agent could be assessed under s 148 on income which he had received on behalf of many beneficiaries or clients. What was left after suffering tax and expenses and so on should then be paid to the various beneficiaries or clients. It might then be that some of the beneficiaries or clients, having thus in effect suffered deduction of income tax at the standard rate, would want to claim reliefs: and one of the complaints of counsel for the taxpayer was that the process of assessment on the taxpayer in this case meant that his clients, if any part of this interest ever reached them despite the cost of apportioning it, might not be able to claim any reliefs. The answer, said counsel for the Crown, was that the Acts provided machinery for reliefs to be claimed by a process which was in substance separate and independent from the process of assessment. Section 208 of the Income Tax Act 1952 allowed a claim for relief to be made in the prescribed manner, and provisions which are now consolidated as the Taxes Management Act 1970, s 42 and Sch 2, provided for the claim to be made to an inspector with an appeal to the General Commissioners. The process of assessing the taxpayer under s 148 in respect of income to which he was not beneficially entitled thus worked no injury to his clients in respect of reliefs. Counsel for the taxpayer's contention that if an agent was to be assessed under s 148 in respect of income which he received for two or more clients there must be a separate assessment for each client seems to me to be wholly unsupported by any statutory provision to which I was referred, as well as being likely to be impracticable. b c d

There was a further contention in relation to surtax. For surtax, the concept of 'total income' within the Income Tax Act 1952, s 524 (1), is important in determining whether the income is large enough to be drawn up into surtax regions, and also in determining the amount of surtax: see s 2 of the Act. This concept has some relevance, though not much, to income tax itself: see s 226 (1) of the Act. This concept of 'total income' led to some argument on the effect of s 524 (4) of the Act. This reads: e

'Where an assessment has become final and conclusive for the purposes of tax at the standard rate for any year of assessment, that assessment shall also be final and conclusive in estimating total income, and no allowance or adjustment of liability, on the ground of diminution of income or loss, shall be taken into account in estimating total income unless that allowance or adjustment has previously been made on an application under the special provisions of this Act relating thereto.' f g

This provision might be read as laying down that when an assessment on the taxpayer has become final and conclusive, the 'total income' of a client of his might be finally and conclusively determined by the assessment on the taxpayer under s 148, without the client having had any hearing. The answer of counsel for the Crown was, first, that it appeared from s 2 and from the judgment of Finlay J in *Rigden v Inland Revenue Comrs*² that 'total income' is necessarily beneficial income, and so sums received in a fiduciary capacity could not be included; and, second, that the assessment only became final and conclusive 'in estimating total income', that is, in the process of estimating what constituted the beneficial 'total income'. Despite the restrictive interpretation of Finlay J's judgment which counsel for the taxpayer put forward in his reply, I think that the proper construction of the subsection is essentially in accordance with the submission of counsel for the Crown. If three assessments on X, for example, had become final and conclusive, those assessments could not be challenged as to amount in the process of computing X's total income: h i

1 [1964] 3 All ER 119, [1965] AC 244, 42 Tax Cas 42

2 (1935) 19 Tax Cas 542 at 558

a but if one of them was an assessment in respect of income that was not X's beneficially, that, however conclusive as to amount, could not be used in 'estimating total income' for, lacking the beneficial quality requisite for 'total income', it was incapable of performing any function in estimating 'total income'. I may add that a case cited by counsel for the taxpayer in reply, *Farthing v Inland Revenue Comrs*¹, provides something of an illustration of assessments not being questionable on quantum, though I may mention that it does not seem to me that the headnote is justified in attributing to Roxburgh J the decision that it does.

b As I have indicated, it appears to me that in their essentials the contentions of counsel for the Crown are sound, that they sufficiently meet the contentions of counsel for the taxpayer, and that they are not invalidated by the criticisms of counsel for the taxpayer in reply. Counsel for the taxpayer's complaint that the assessment was in the wrong form because it would cover both beneficial and fiduciary income is c fully met by the answer that s 148 permits such an assessment. His complaint that neither the taxpayer, as agent, nor his clients had had any hearing in relation to the incidence of taxation on profits of the clients is met by the fact that the taxpayer has in fact had a hearing, and the clients can have a hearing if they wish. The argument that the clients are not assessable in respect of 'interest of money' under Case III of d Sch D, but ought to be assessed under Cases I, II or VI, or perhaps in respect of 'annual payments' under Case III, is met by the fact that in my judgment the payments clearly fall within the meaning of 'interest of money' in Case III and do not fall within the other heads. That being so, and the taxpayer being assessed in that way, I do not accept counsel for the taxpayer's contention that each client (or the taxpayer on behalf of each client) ought to be assessed on 'annual payments' under Case III of e Sch D, with the source of income being the contract between the taxpayer and each client.

There is a further point. Counsel for the taxpayer contended that the Crown was estopped from contending or accepting that the commissioners were wrong in law in holding that the assessment covered profits to which the taxpayer was beneficially entitled. I have already mentioned the quality of this finding as being something of f an addendum to the decision. The inspector, said counsel, was instrumental in getting the commissioners to decide that the taxpayer did not receive the income as agent, and the inspector had acted on the decision of the commissioners by asking them to assess the taxpayer on this footing, and, he said, by collecting the income tax from the taxpayer on this basis: and counsel for the taxpayer relied on *Andrew v Taylor* (Inspector of Taxes)². If one accepts to the full that on an appeal one of the parties cannot submit a case that is wholly inconsistent with the case that he submitted below, g at least one of the answers to the contention of the taxpayer on this point is that it does not appear in the least clear from the case stated that the inspector did in fact advance the argument that the taxpayer received the income beneficially. I need not repeat the summary of this argument that I have already given. The factual foundation for any form of estoppel of this type (if such it be) is therefore lacking. h There were a number of other contentions put forward by counsel for the taxpayer, some of them rather theoretical and unreal, and I do not propose to explore them.

There remain three other matters that I should mention. First, the taxpayer apparently lost the assessment in question, and through his solicitors orally requested the Crown for a copy. This, on advice, was refused, apparently because the Revenue authorities suspected that the taxpayer wanted the copy so that he could use it on the appeal even though it had not been made part of the case stated or i attached to it, and the taxpayer had made no request for it to be included or attached. I find it difficult to think of circumstances in which it could be right for the Revenue authorities to refuse to supply a taxpayer with a copy of the assessment on him against

1 (1959) 38 ATC 115

2 (1965) 42 Tax Cas 557 at 571, 572

which he is appealing if he says that he has lost the original. It is perfectly possible to supply him with a copy and at the same time, if suspicious that an attempt will be made to bring the assessment into the argument of the appeal, to warn the taxpayer that such an attempt would be opposed. I can well see that it may be very burdensome to be faced on an appeal by a last-minute transformation when the appellant attempts to take some point based on a document which, when the case stated was settled, was not made part of the case: yet that seems to me to be no justification for refusing to supply a copy of an assessment for the appellant's use, making a charge for it, if need be. In fact, the Crown's suspicions in this case proved to be justified, in that counsel for the taxpayer, without a word to counsel for the Crown beforehand (even though the case had been kept waiting for a time while I gave judgment in the previous case), did indeed attempt to persuade me to call for a copy of the assessment for use in the appeal. The attempt failed, and later counsel for the taxpayer withdrew his request on the ground that he had been able to make all the points that he wanted to without using the assessment. Yet even though the suspicions of the Revenue authorities were well-founded, they provided no justification for withholding the copy; and at an appropriate moment a very proper expression of regret was made on the part of the Revenue authorities, coupled with the proffer, belated though it was, of a copy of the assessment. That is therefore that; doubtless there will be no recurrence of such a refusal.

The other points are smaller. One is that the formal notice of an additional point which the taxpayer gave the Crown under RSC Ord 91, r 7, bears no date. Under the rule notice must be given not less than ten days before the hearing, and it is at least convenient, if no more, that such a document should be dated. I hope not to see any such undated documents in the future. The other point is that the copy of the case stated which the taxpayer provided for the court consisted of five pages of four different sizes, one page being less than half the size of another, but more than half the size of the others. I can see no justification for supplying so wretched a copy, hindering the easy turning over of the right number of pages: and if the taxpayer had succeeded, I would have considered depriving him of part of his costs. As it is, for the reasons I have given, the appeal fails and must be dismissed.

Appeal dismissed.

Solicitors: *Beachcroft & Co* (for the taxpayer); *Solicitor of Inland Revenue*.

Rengan Krishnan Esq Barrister.

R v Inwood

COURT OF APPEAL, CRIMINAL DIVISION
STEPHENSON, ORR LJJ AND CAULFIELD J
15th, 23rd FEBRUARY 1973

Arrest – Arrest without warrant – What constitutes arrest – Suspect voluntarily visiting police station to assist police with enquiries into theft – Suspect informed after questioning that he would be charged – Police proceeding with appropriate formalities – Suspect deciding to leave police station – Police officers restraining suspect – Suspect charged with assaulting officers in execution of their duty – Issue whether suspect under arrest – Duty of police to make clear to suspect that he has been arrested – Issue whether made clear to him one of fact for jury.

The appellant went voluntarily to a police station to help the police with their enquiries into certain thefts which had taken place. After some questioning a police officer said to the appellant, 'I propose to charge you with theft . . . and dishonest handling . . .' The police then began the appropriate formalities, such as taking fingerprints and preparing documents. After some time the appellant decided to leave. He was prevented from so doing by two police officers and in the resulting struggle the police officers were injured. The appellant was charged with assaulting a police officer in the execution of his duty. The trial judge directed the jury as a matter of law that the words of the police officer and the commencement of formalities meant that the appellant was no longer merely a suspect, free to leave the police station at any time, but had been adequately placed under arrest and that the police officers were therefore acting in execution of their duty in preventing him from leaving. The appellant was convicted and appealed.

Held – In order to establish that the police were entitled to use force to restrain the appellant from leaving the police station it was necessary to show that it had been made clear to the appellant that he was under arrest. The question whether it had been made clear to him was a question of fact for the jury; on the facts of the case it was impossible to conclude as a matter of law that it had been made clear to the appellant that he had been arrested. Accordingly the question had been wrongly withdrawn from the jury and the appeal would be allowed (see p 649 f to p 650 c, post).

Notes

For the meaning of arrest, see 10 Halsbury's Laws (3rd Edn) 342, para 631, and for cases on arrest without warrant, see 14 Digest (Repl) 194-207, 1590-1729.

Cases referred to in judgment

Alderson v Booth [1969] 2 All ER 271, [1969] 2 QB 216, [1969] 2 WLR 1252, 133 JP 346, 53 Cr App Rep 301, DC, Digest (Cont Vol C) 191, 1550a.

Erskine v Hollin [1971] RTR 199, DC.

Ghani v Jones [1969] 3 All ER 1700, [1970] 1 QB 693, [1969] 3 WLR 1158, 134 JP 116, CA, Digest (Cont Vol C) 158, 607b.

Kenlin v Gardiner [1966] 3 All ER 931, [1967] 2 QB 510, [1967] 2 WLR 129, 131 JP 191, DC, Digest (Cont Vol B) 192, 8225a.

Ludlow v Burgess [1971] Crim LR 238, DC.

R v Bass [1953] 1 All ER 1064, [1953] 1 QB 680, 117 JP 246, 37 Cr App Rep 51, CCA, 14 Digest (Repl) 476, 4568.

R v Jones, ex parte Moore [1965] Crim LR 222, DC.

R v Waterfield, R v Lynn [1963] 3 All ER 659, [1964] 1 QB 164, [1963] 3 WLR 946, 128 JP 48, 48 Cr App Rep 42, CCA, Digest (Cont Vol A) 416, 8201a. a
R v Wattam (1952) 36 Cr App Rep 72, CCA, 14 Digest (Repl) 515, 4986a.
Squires v Botwright [1973] Crim LR 106, DC.
Wheatley v Lodge [1971] 1 All ER 173, [1971] 1 WLR 29, [1971] RTR 22, DC.

Case also cited

Robson v Hallett [1967] 2 All ER 407, [1967] 2 QB 939, DC. b

Appeal

This was an appeal by Derek Inwood against his conviction in the Crown Court at Croydon on 11th October 1972 before his Honour Judge Granville Slack and a jury on two counts of assaulting a police constable in the execution of his duty. The appellant was found guilty by a majority of ten to two, a previous jury having failed to agree, and was fined £50 on each count. He appealed by certificate of the trial judge. The facts are set out in the judgment of the court. c

M R Hickman for the appellant.

A C Lewisohn for the Crown.

Cur adv vult

23rd February. **STEPHENSON LJ** read the following judgment of the court. Caulfield J, who is not able to be here today, agrees with the judgment we are about to give. On 11th October 1972, at Croydon Crown Court, the appellant was convicted on two counts of assaulting a police constable in the execution of his duty. The verdicts were by majorities of ten to two, the jury having failed to agree at an earlier trial. He was fined £50 on each. The appellant now appeals against conviction on a certificate from the learned judge. The certificate is in these terms: d

'I certify that the case is a fit case for appeal on the ground that the convictions of the defendant on counts 10 and 11 raise the following question of general importance:—It being accepted (a) on the one hand, that a person at a police station who has been arrested (whether arrested outside and brought to the police station or arrested whilst at the police station) is not free to leave the police station, and if he attempts to do so may be restrained by the police, and if in attempting to leave he assaults a police officer, that is an assault on a police constable in the execution of his duty; and (b) on the other hand, that a person who attends at a police station voluntarily, e.g. to answer questions, is free to leave the police station at any time, and if he attempts to do so may not be restrained by the police, and if in attempting to assert that right to leave he assaults a police officer (using no more force than is necessary to assert his right), that is not an assault on a police officer in the execution of his duty; what is the position of a man who attends voluntarily at a police station, is questioned, is told by the police that they propose to charge him with specified offences (e.g. dishonest handling), is not told in specific words "You are being arrested", but the police start to carry out the steps leading up to charging him, i.e. type out the charge sheet, take his fingerprints, and ask him to empty his pockets (which he does) to make a list of his property, and then tries to leave the police station? Is he still free to leave as in paragraph (b) above, or is he then held at the police station under compulsion and no longer free to leave, as in paragraph (a) above? I directed the jury that in these circumstances he was acting under compulsion, was no longer free to leave, and that an assault committed in attempting to leave was an assault on the police constable in the execution of his duty. The question in law is whether I was right so to rule.' e

The case for the prosecution was this. In January 1971 police were investigating certain thefts and handling of stolen goods. On 31st January they called at the appellant's house in Hayes with a search warrant, and took away a television set and some copper tubing. The appellant, who had not then been home, called next morning f

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a at St Mary Cray Police Station, and had a lengthy interview with Det Con Crisp, after which it was left that the police should pursue their enquiries and make an appointment to see him again. The appellant in fact called again at the station at about 7 p m on 15th February and was interviewed in an upstairs room by Det Con Crisp and Det Sgt Gale.

b According to the police evidence, on 15th February, after Det Con Crisp had put some questions to the appellant, he said to him: 'I propose to charge you with theft of the copper and dishonestly handling the T.V. set', and cautioned him. The appellant replied, 'I understand. I don't want to be awkward'. Then, between 7.30 p m and 8.30 p m, Det Con Neville was engaged in taking fingerprints from the appellant, and also obtaining antecedents and completing forms in relation to offences with which he was to be charged. Det Con Crisp again saw the appellant with Det Sgt Gale and told him he would have to be searched. The detective sergeant c did search him, and came across the two purported insurance certificates, which were later the subject of two other counts in the indictment to which the appellant pleaded guilty at the first trial.

d Soon after 9 p m the appellant became excited and shouted 'Look, when are you going to finish with me, I want to get out of here', and held his head in his hands. He was told 'You will be released when we have completed our inquiries'. After some further questions, Det Con Crisp got up and went to the door. As he opened it, the appellant shouted, 'That's it, then' and got up. Det Sgt Gale got up too, whereupon, according to both officers, the appellant punched the sergeant in the chest. The sergeant caught hold of the appellant's coat, and they both fell to the floor struggling and fighting. The constable turned back and grabbed the appellant, but the appellant eluded his grasp and dashed out of the door. The constable called to another e detective constable, Neville, who came out of his office and tried to bar the appellant's way. The appellant punched Neville in the chest also and made off down the stairs with Neville hanging on to his coat, being dragged down after him. At the bottom they both fell to the ground. Neville said that in doing so he banged his head on the front door. According to the police, the appellant, as he fell, caught his face on the fire extinguisher. After that he really went berserk and kicked and punched Neville as he f lay dazed before other officers secured him and later put him in a cell.

There was medical evidence of Dr Comper who was called to the station. At 9.30 p m he said that he found Det Con Neville to have a swelling over his right eye, to be dazed and concussed and to be unfit for duty. A quarter of an hour later, he found Det Sgt Gale to have a bruised and swollen left thumb and a slightly swollen right kneecap. Ten minutes after that he found the appellant to have a deep laceration g over his right eyebrow which was bleeding and required suturing.

h The appellant gave evidence in his own defence that from about 7.30 p m until 9.10 p m at the police station, Det Sgt Gale was more or less continuously punching him, slapping him and calling him a liar; but towards the end the blows became harder; the cut over his eye and the subsequent bruising were caused in this way, and Det Con Crisp made no attempt to stop the sergeant, merely remarking 'Don't connect me with it'. The appellant said that he twice tried to get out of the room and run downstairs, once before 9 p m and then shortly after 9 p m on the occasion already recounted. He said further that at no time did he strike the sergeant, and there was no physical contact between him and Det Con Neville. Indeed he seems to have gone so far as to say that Det Con Neville never came out of his room on to the landing, did not attempt to stop him leaving, did not chase him down the stairs, and j was not at the bottom of the stairs in the hallway when the appellant was collared.

It should be noted that at the time of these incidents the appellant was a man of good character with no previous convictions apart from minor motoring offences, and that he called medical evidence that he was at the time under stress from sources quite independent of these police enquiries.

Now the judge directed the jury in this way. He said:

'The question we have to consider in this case, as I see it, is this: had the police the right to keep this man, or was he free to go? That raises a question of law which you must take from me. Now, the law is quite clear. If a man is arrested either before he comes to the police station or whilst he is at the police station, and then he is in custody, and then tries to leave the station, the police are entitled to restrain him. If he assaults the police in the course of trying to leave the station, when he is in custody, or tries to leave the room where he is being detained—if he assaults the police in those circumstances—then that is an assault on a constable in the execution of his duty. That is quite clear. That is one side of the picture. The other extreme is this: if a man goes to a police station voluntarily and is being questioned—or to use this wonder phrase which we see in the papers or hear on television or radio, "a man is assisting police with their enquiries"—if he is there merely in a voluntary capacity, he is free at any time to leave whether they have finished their questioning or not. He can say "Right, I am going to leave". He can get up and walk out. If, in those circumstances, the police seek to detain him they have no right to do so unless they arrest him. They have no right to detain him. If, in those circumstances, he assaults the police in trying to assert his right to leave, that is not an assault in the execution of the constable's duty because the police are then exceeding their authority. They are acting beyond their duty in restraining a man they have no right to restrain. So, you have those two positions.'

The judge went on:

'It seems to me that this case raises the problem of what is the position in a case between those two? What is the position if a man goes voluntarily to the police station at seven o'clock, as this man did, and then is questioned for a time, and the position comes, and it is not disputed that this happened at half-past seven, where the police say to him "We are going to charge you", "We propose to charge you", and then take the necessary steps. They start on the formalities leading up to charging him. They ask him to produce the contents of his pockets because they have to make a list of his property, take his fingerprints and start to type out the charge sheet, the formal document which is used on these occasions. So it is clear that it was bona fide. They were going to charge him. In this case they said they were going to charge him with dishonestly handling the television set and the copper. Now, this case raises the question: if the police say that, does a man's position alter? Is he still a volunteer? Does he still have the right to leave freely of his own accord or is he then acting under compulsion and in the same position as the man who has been arrested?'

A little later he said:

'The view of the law put forward by [counsel for the appellant] yesterday, was that even in those circumstances if the man has never been formally arrested he is still free to leave, free to assert his right to leave, and if the police restrain him and had no right to restrain him, and if in the course of leaving—asserting his right to leave—he assaults them, that is not an assault in the execution of their duty. That was the view of the law which he put forward. Now, there is another possible view of the law, and that is this: when the stage is reached that the police say "We are charging you", and they start on the formalities, then his status changes and he is then ceasing to be there voluntarily. You then have a man who is under compulsion. Then if he seeks to leave, he is in the same position as a man who has been formally arrested, and the police have a right to restrain him. If he assaults them in the course of trying to leave, in those circumstances, that is an assault in the execution of their duty. Now, I am going to direct you, as a matter of law, that that is the law, and not as stated by [counsel for the appellant]. It may be that in certain circumstances this case might go to some other court, and some other court might say I am wrong or they might say

a that [counsel] is wrong. I do not know. I am going to direct you that that is the state of the law, namely, that when the police said to this man "We are going to charge you", and then started on these formalities so that it was bona fide that they were going to charge him, then he was a man under compulsion and then he was no longer there voluntarily. Then if he tried to go either out of the room or out of the station, the police had a right to detain him just in the same way as if he had been arrested. They had a right to detain him, and if in trying to leave he then assaults them, that is an assault in the execution of their duty. I am going to ask you to consider the case on that basis. Accept that from me. It is my responsibility that that is the law.'

Counsel for the appellant submitted to us, as to the trial judge, that as the appellant had gone to the police station voluntarily as distinct from being arrested, then notwithstanding that he had been told he was to be charged with handling stolen goods and the procedure and formalities preliminary to such a charge were being followed, he was not under arrest and if he sought to leave the police station the police were not entitled to restrain him. In other words the police would not then be restraining him in the execution of their duty but would be unlawfully restraining his liberty. He supported his interesting argument that the police had no right or duty to hold or detain a suspect unless and until he was arrested and charged by numerous authorities, none of them, he concedes, directly in point. They were *Kenlin v Gardiner*¹; *Ludlow v Burgess*²; *Alderson v Booth*³; *Wheatley v Lodge*⁴; *Erskine v Hollin*⁵; *R v Wattam*⁶; *R v Bass*⁷; *R v Waterfield*, *R v Lynn*⁸; *Ghani v Jones*⁹; *R v Jones*¹⁰; *Squires v Botwright*¹¹.

Counsel for the Crown submitted that it is unsatisfactory to restrict the argument to the question of arrest. Detention, arrest and custody are all synonymous. Here on the admitted facts the officers had made up their minds to charge the appellant and therefore they then had to follow certain procedures preliminary to making the formal charge, such as taking his antecedent history, fingerprinting him, preparing the charge sheet and searching him. Counsel conceded that there was an obligation on the police officers to make it clear to the appellant that he had to remain until actually charged and then until bailed, but he submitted that on the facts which were not disputed the appellant must have known he was under compulsion to stay. As the court understands this argument, the Crown is saying that the obligation on the police to convey to the appellant that he was in custody had been discharged.

This court does not wish to say and cannot conclude as a matter of law that it had been made clear to the appellant that he had been arrested. We are of the opinion that, as counsel for the appellant submitted in reply, this is a question of fact. It all depends on the circumstances of any particular case whether in fact it has been shown that a man has been arrested, and the court considers it unwise to say that there should be any particular formula followed. No formula will suit every case and it may well be that different procedures might have to be followed with different persons depending on their age, ethnic origin, knowledge of English, intellectual qualities, physical or mental disabilities. There is no magic formula; only the obligation to make it plain to the suspect by what is said and done that he is no longer a free man. However, what we think is clear is that it is a question of fact, not of law, and it must be left to the jury to decide whether a person has been arrested or not, at least where there is

1 [1966] 3 All ER 931, [1967] 2 QB 510

2 [1971] Crim LR 238

3 [1969] 2 All ER 271, [1969] 2 QB 216

4 [1971] 1 All ER 173, [1971] 1 WLR 29

5 [1971] RTR 199

6 (1952) 36 Cr App Rep 72

7 [1953] 1 All ER 1064, [1953] 1 QB 680

8 [1963] 3 All ER 659, [1964] 1 QB 164

9 [1969] 3 All ER 1700, [1970] 1 QB 693

10 [1965] Crim LR 222

11 [1973] Crim LR 106

a a real dispute as to the question whether the defendant understood that he was being arrested.

Here there was such a dispute. The appellant had been to this police station before in connection with the same enquiry and had been allowed to go free. He was told on the occasion of the assaults that he would be released when the police enquiries were completed, with nothing said about bail. He was a man of good character, who had never before been asked to go to a police station to help the police in their enquiries. Nevertheless, the jury might have concluded that the appellant must have understood perfectly well that he was under arrest and no longer at liberty, if they had been allowed to do so. They might well have reached this conclusion without the direction which the judge gave, but we cannot be sure. For this reason then there was, we think, a misdirection in withdrawing this question from the jury and the ruling which the judge gave was wrong. b

In our judgment, the Crown's concession, properly made, compels us so to decide and to quash these convictions, and makes it unnecessary to review, still less to comment on, the authorities cited to us or the important principle of law which counsel for the appellant extracted from them. c

If we had been asked to apply the proviso¹ we could not have done so. One jury had already failed to agree on these two charges of assault, and we cannot say that this jury would inevitably have taken the same view of the facts as the judge plainly took. Indeed if we said so we would be falling into the same error as the judge in stating our view of the facts as necessarily being the jury's view. d

This appeal is allowed.

Appeal allowed.

Solicitors: *Attwater & Cope*, Orpington (for the appellant); *Solicitor, Metropolitan Police*. e

Jacqueline Charles Barrister.

Fuller (otherwise Penfold) v Fuller f

COURT OF APPEAL, CIVIL DIVISION

LORD DENNING MR, STAMP AND JAMES LJ

8th MARCH 1973

Divorce – Separation – Living apart – Meaning – Parties 'living apart' unless living with each other in the same household – Parties living in same house – Parties living with each other otherwise than as husband and wife – Wife leaving husband to live with another man as his wife – Husband coming to live in other man's house as paying lodger – Parties treating marriage as at an end – Parties living apart – Divorce Reform Act 1969, s 2 (1) (e), (5). g

The husband and wife were married in 1942 and lived in the matrimonial home in Croydon until 1964 when the wife left the husband, taking the two children of the marriage with her, and went to live with P as his wife at his house in South Norwood. The husband remained in the matrimonial home. In 1968 the husband became ill with coronary thrombosis. His doctor told the wife that he must not live on his own and that he had only about a year to live; so, on his discharge from hospital in October 1968, the husband went to live at P's house. He lived there as a lodger paying a weekly sum. The wife and P slept together and the husband slept in a separate bedroom. The wife got his meals, which he ate with the family, and did his washing, but they clearly treated the marriage as at an end. The husband lived thus in h

¹ I.e. the proviso to s 2 (1) of the Criminal Appeal Act 1968 j

a P's house for four years. In April 1972 the wife petitioned for divorce under s 2 (1) (e)^a of the Divorce Reform Act 1969, on the basis that she and the husband had 'lived apart' for a continuous period of five years preceding the petition. The husband consented to a divorce. The judge dismissed the petition on the ground that the parties were not living apart during the period when the husband was living at P's house. On appeal,

b **Held** – The husband and wife were 'living apart' within s 2 (1) (e) while the husband lived at P's house because they were not 'living with each other in the same household' within the meaning of s 2 (5)^b; the words 'with each other' meant living with each other as husband and wife; the parties were not living with each other in that sense since the wife was living with P as his wife and the husband was living in the house as lodger. Accordingly, the appeal would be allowed and a decree nisi of divorce

c pronounced (see p 652 g to p 653 a, post).

Mouncer v Mouncer [1972] 1 All ER 289 distinguished.

Notes

For proof of the breakdown of marriage where the parties have been living apart, see Supplement to 12 Halsbury's Laws (3rd Edn) para 437A, 5, and for cases on the subject, see 27 (1) Digest (Reissue) 359, 360, 2634, 2635.

d For the Divorce Reform Act 1969, s 2, see 40 Halsbury's Statutes (3rd Edn) 770.

Cases referred to in judgments

Bartram v Bartram [1949] 2 All ER 270, [1950] P 1, [1949] LJR 1679, 113 JP 422, 47 LGR 692, CA, 27 (1) Digest (Reissue) 437, 3186.

e *Hopes v Hopes* [1948] 2 All ER 920, [1949] P 227, [1949] LJR 104, 113 JP 10, 46 LGR 538, CA, 27 (1) Digest (Reissue) 436, 3185.

Mouncer v Mouncer [1972] 1 All ER 289, [1972] 1 WLR 321, 27 (1) Digest (Reissue) 359, 2635.

Santos v Santos [1972] 2 All ER 246, [1972] Fam 247, [1972] 2 WLR 889, CA.

Appeal

f This was an appeal by the wife, Irene Doris Fuller, against the order of his Honour Judge Granville Slack, made on 5th July 1972, dismissing her undefended petition for dissolution of her marriage to the husband, Henry Fred Fuller, under ss 1 and 2 (1) (e) of the Divorce Reform Act 1969. The facts are set out in the judgment of Lord Denning MR.

g *R G Marshall-Andrews* for the wife.

The husband did not appear and was not represented.

LORD DENNING MR. This case raises the meaning of the words 'living apart' in the new Divorce Reform Act of 1969. Section 2 (1) (e) says that a marriage is to be held to have broken down irretrievably if 'the parties to the marriage have lived apart for a continuous period of at least five years immediately preceding the presentation of the petition'. Section 2 (5) says:

h 'For the purposes of this Act a husband and wife shall be treated as living apart unless they are living with each other in the same household.'

The husband and wife were married on 25th May 1942, more than 30 years ago. He was 28 and she was 18. They have two daughters, born in 1943 and 1951. They lived at 388 King Henry's Drive, New Addington, Croydon. They separated in 1964. The wife left the husband, taking with her the two daughters. She went to live with another man, a Mr Penfold, at 164 South Norwood Hill, South Norwood. The husband remained in the matrimonial home. His wife lived with Mr Penfold as his wife. She slept with him and became known as Mrs Penfold.

i ^a Section 2 (1), so far as material, is set out at letter h, *supra*

^b Section 2 (5) is set out at letter h, *supra*

Four years later, in 1968, the husband fell ill. He had a coronary thrombosis and was in hospital. He went back for a little while to what had been the matrimonial home, living on his own. He was taken ill again and again he went to hospital. The doctor explained to the wife, who was now living as Mrs Penfold, that the husband could not live on his own again; the main valve of his heart had collapsed; he would only be able to do light office work if ever he worked again; he had only about a year to live.

So in October 1968 the husband was discharged from hospital. Then events took place which raise the problem. The husband went to live at 164 South Norwood Hill, where Mr Penfold was, with the wife now living as Mrs Penfold, and the daughter. The husband, if I may still use that word, went and became a lodger in the house. Mr Penfold and the wife still continued to live together in one bedroom. The husband just slept in the back bedroom. He got his own cup of tea in the morning himself. In the evening he came back to have a meal with the family. On Saturday he was out all day. The wife gave him food and he ate his meals with some of the others in the house. She did the washing. He paid like a lodger at first £5 a week, and later £7 a week. In spite of the doctor's gloomy forecast, he is still alive.

Four years passed in this way. Then in April 1972 the wife petitioned for a divorce on the ground of living apart for five years. The husband was only too willing to recognise this. He signed a form of consent. But at the hearing the judge held that he had no jurisdiction to grant a divorce because he thought that when the husband came back to the house, he and his wife were not living apart. The judge referred to the cases under the old law, such as *Hopes v Hopes*¹; and also the cases under the new Act: *Mouncer v Mouncer*² and *Santos v Santos*³.

In *Santos v Santos*³ this court stressed the need, under the new Act, to consider the state of mind of the parties and, in particular, whether they treated the marriage as subsisting or not. Clearly they treated it in this case as at an end.

In this case we have to consider the physical relationship of the parties. From 1964 to 1968 the parties were undoubtedly living apart. The wife was living with the other man as the other man's wife in that household, and the husband was separate in his household. From 1968 to 1972 the husband came back to live in the same house but not as a husband. He was to all intents and purposes a lodger in the house. Section 2 (5) says they are to be treated as living apart 'unless they are living with each other in the same household'. I think the words 'with each other' mean 'living with each other as husband and wife'. In this case the parties were not living with each other in that sense. The wife was living with Mr Penfold as his wife. The husband was living in the house as a lodger. It is impossible to say that husband and wife were or are living with each other in the same household. It is very different from *Mouncer v Mouncer*² where the husband and wife were living with the children in the same household—as husband and wife normally do—but were not having sexual intercourse together. That is not sufficient to constitute 'living apart'. I do not doubt the correctness of that decision. But the present case is very different. I think the judge put too narrow and limited a construction on the Act. I would allow the appeal and pronounce the decree nisi of divorce.

STAMP LJ. I agree. I can only say that to my mind the words 'living with each other in the same household' in the context of the Act relating to matrimonial proceedings are not apt to describe the situation where the wife is indisputably living with another man in the same household and her husband is there as a paying guest in the circumstances Lord Denning MR has described. 'Living with each other' connotes to my mind something more than living in the same household: indeed the words 'with each other' would otherwise be redundant.

1 [1948] 2 All ER 920, [1949] P 227

2 [1972] 1 All ER 289, [1972] 1 WLR 321

3 [1972] 2 All ER 246, [1972] Fam 247

JAMES LJ. I entirely agree with the reasons expressed in both judgments. I would only add this, that the decision of this court in this case is one which derives some support from *Bartram v Bartram*¹ and from *Santos v Santos*², which was a very different case, of course, but in which Sachs LJ reviewed the whole of the new 1969 Act, and there are passages in his judgment there which go to show very clearly the meaning that should be attached to the words in s 2 (5) 'living with each other in the same household'. Those words must be viewed in that sense.

Appeal allowed; decree nisi on ground that parties had lived apart for five years.

Solicitors: W G H Saunders & Son (for the wife).

Wendy Shockett Barrister.

Shields Furniture Ltd v Goff and another

NATIONAL INDUSTRIAL RELATIONS COURT

SIR JOHN BRIGHTMAN, MR R BOYFIELD AND MR H ROBERTS

8th FEBRUARY, 1ST MARCH 1973

Employment – Redundancy – Dismissal by reason of redundancy – Dismissal – Termination of contract by employer – Repudiation of contract by employer – Circumstances in which employee will be taken to have accepted repudiation – Employee informed that work being transferred to new premises – Employee not indicating whether prepared to work at new premises – Employee directed to work at new premises – No renewal of contract or offer of new contract by employer – Employee working at new premises for short time and then giving week's notice – Whether employee having accepted employer's repudiation of contract – Whether contract terminated by employer alone or by mutual agreement between employer and employee.

Two employees worked for some years at their employers' premises in Chelsea. On 5th May 1972 they were verbally informed by one of their employers' directors that the employers' company would be moving to premises in Fulham, though they were not told when the move would be made. The employees did not indicate whether they were prepared to work in Fulham, nor were they offered either a renewed or a new contract of employment by their employers. On 15th May the employees were directed to work at Fulham as from the following day. The employees worked at Fulham for three weeks although the working conditions there were unsatisfactory. They then went on holiday for two weeks. On their return they gave their employers one week's notice and left their employment when the notice expired. An industrial tribunal held that the employees were entitled to redundancy payments from their employers. On appeal it was contended by the employers (a) that although the employers had wrongfully repudiated the employees' contract of employment at Chelsea the employees had not accepted such repudiation and the contract had continued when they moved to Fulham; (b) that the contract had not been terminated by the employers alone but by mutual agreement between the employers and the employees; (c) that consequently the employees were not entitled to redundancy payments.

Held – The employers repudiated the existing contracts of employment when they directed the employees to work at Fulham; when the employees gave notice, they accepted such repudiation. The three weeks which the employees had worked in Fulham followed by the two weeks when they had been on holiday was not so long

¹ [1949] 2 All ER 270, [1950] P 1

² [1972] 2 All ER 246, [1972] Fam 247

a
a period of time that it could be assumed that there had been an agreed variation or replacement of the employees' previous contract. The employees had never been asked whether they wished to be dismissed from their employment in Chelsea or to start on new work in Fulham. They had been given no time in which to assess the position but had been directed by the employers to work in Fulham, which the employers had no contractual right to do. It followed that the employees were entitled to redundancy payments (see p 656 e to g, post).

b
Dicta of Lord Denning MR in *Marriott v Oxford and District Co-operative Society Ltd* [1969] 3 All ER at 1128 considered.

Notes

For redundancy payments, see Supplement to 38 Halsbury's Laws (3rd Edn) paras 808A, 1, 808C, 1.

c
For the Redundancy Payments Act 1965, s 3, see 12 Halsbury's Statutes (3rd Edn) 240.

Cases referred to in judgment

Hill v C A Parsons & Co Ltd [1971] 3 All ER 1345, [1972] Ch 305, [1971] 3 WLR 995, CA.

Marriott v Oxford and District Co-operative Society Ltd [1969] 3 All ER 1126, [1970] 1

QB 186, [1969] 3 WLR 984, 7 KIR 219, CA, Digest (Cont Vol C) 689, 816Adc.

Cases also cited

Barratt v Thomas Glover & Co Ltd (1970) 5 ITR 95, IT.

Charles v Spiralynx (1933) Ltd (1970) 5 ITR 82, CA.

Cooksley v C Allen & Son Ltd (1967) 2 ITR 322, IT.

Farelee Motors (Gosport) Ltd v Winter (1971) 6 ITR 57, DC.

Forrest v Aluminium Foils Ltd (1967) 2 ITR 104, IT.

Goody v Calico Printers' Association Ltd (1967) 2 ITR 132, IT.

Joel v Cammel Laird (Ship-Repairers) Ltd (1969) 4 ITR 206, IT.

Appeal

f
This was an appeal by Shields Furniture Ltd ('the company') against the decision of an industrial tribunal (chairman Sir John Clayden) sitting in London, dated 1st November 1972, that the respondents, L H Goff and D Goff, were entitled to redundancy payments from the company. The facts are set out in the judgment of the court.

Adrian Hamilton for the company.

Michel Kallipetis for the respondents.

g
Cur adv vult

1st March. **SIR JOHN BRIGHTMAN** read the following judgment of the court. This is an appeal from a decision of a London industrial tribunal that two employees are entitled to redundancy payments. The appellant is a company called Shields Furniture Ltd. The respondent employees are father and son, Mr L H Goff and Mr D Goff. They are upholsterers. The company in the course of its history has carried on business at a number of places in London. At one time the workshops were in Harriet Street. The respondents were employed there for about four years. The workshops were then moved to 30/35 Markham Street, Chelsea. The respondents worked there continuously until the middle of 1972. Mr Marriott was an executive director of the company. On 5th May 1972 he announced to the respondents that the company would be moving to Fulham, but he did not say when. The respondents lived in North London and travelled to work by car. Fulham was about 2½ miles further for them than Markham Street, and it involved another 15 minutes journey each way. On Monday, 15th May, Mr Marriott announced to Mr Goff junior that he was to go to Fulham the next day instead of Markham Street, and he was told to pass the message to his father. The respondents then worked at Fulham for three weeks.

a They did not like conditions there but thought they would give the place a fair try. They found it damp, noisy and dirty, with inadequate toilet accommodation. Mr Marriott in his evidence admitted that conditions at Fulham were not really good to begin with. They were old premises which had been gutted. At the end of three weeks the respondents went away for two weeks' holiday to which they were entitled. When they returned, they gave Mr Marriott a week's notice and left when the notice expired. Their employment accordingly came to an end on 23rd June.

b On 21st September they applied for redundancy payments.

The tribunal made the following findings of fact. Both the respondents were under contract to work at Markham Street and not elsewhere; at no stage were they asked if they were prepared to move to Fulham and at no stage did either of them indicate that he was prepared to move to Fulham; at the most there was an announcement that the company was moving, apparently on the basis that if the company

c moved, its employees automatically moved with it. The tribunal decided that the respondents were entitled to redundancy payments. The basis of the decision was that their contract of employment came to an end at Markham Street on Monday, 15th May. They were then impliedly dismissed by the company. The work at Fulham was not in pursuance of any written offer by the company. They were not employed

d under a new or renewed contract of employment falling within s 3 (2) of the Redundancy Payments Act 1965. In the result, they were entitled to redundancy payments.

Counsel for the company, in a forceful argument before us, submitted that redundancy payments were not due. He conceded and indeed asserted that the order to move to Fulham constituted a wrongful repudiation by the company of the existing contracts of employment. This did not bring the contract of employment to an end

e because, submitted counsel, though *employment* as a status can usually be ended unilaterally, a *contract* as a legal relationship cannot be determined unilaterally. The company's order to its employees placed each of them in a position where he might accept the wrongful repudiation, in which case the contract of employment terminated; or he might affirm the contract of employment, in which case it would continue until lawfully determined (see *Hill v CA Parsons & Co Ltd*¹). The position, therefore, when the respondents went to Fulham, was that the contract of employment

f still continued, because the respondents had not accepted the company's wrongful repudiation; but the company's repudiation was still capable of being accepted, in which case the contract would end, and it would be the company which ended it so as to entitle the respondents to redundancy payments. In fact, submitted counsel, the respondents never did accept the company's repudiation of the contracts.

g What they did was to accept the company's offer to work at Fulham. The logical result of the acceptance of that offer was that the contract to work at Markham Street was terminated. But it was not terminated by the employer: it was terminated by mutual agreement between employer and employee. So went the argument of counsel. Counsel relied on the words of Lord Denning MR in *Marriott v Oxford and District Co-operative Society Ltd*²:

h

'If the man accepts an offer by the employers to re-engage him without a break, I do not see why he should be entitled to redundancy payment . . . If the parties agree consensually to vary the terms of the contract of employment, or to rescind it and substitute a new contract of employment, the plain fact is that the contract is not terminated by the employers but by consent.'

j In the *Marriott* case³, the employee had been employed as an electrical supervisor or foreman for eight years, when he was suddenly informed that his salary and status

1 [1971] 3 All ER 1345, [1972] Ch 305

2 [1969] 3 All ER 1126 at 1128, [1970] 1 QB 186 at 191, 192

3 [1969] 3 All ER 1126, [1970] 1 QB 186

would be reduced in six days' time. The employee protested but continued to work for some weeks before leaving. He then claimed a redundancy payment. The tribunal considered that there had been a consensual variation of the original contract and not a termination of the contract by the employer. The employee successfully appealed to the Court of Appeal. Lord Denning MR put his view in this way¹:

'He never agreed to the dictated terms. He protested against them. He submitted to them because he did not want to be out of employment. By insisting on new terms to which he never agreed, the [employer] did, I think, terminate the old contract of employment.'

In the case before us the respondents were never asked if they were willing to work at Fulham. They were simply told on Monday that on Tuesday their work was being moved 2½ miles away. What is an employee expected to do in those circumstances? He does not want to be out of a job. Nor, if he is a conscientious workman, does he want to let his employer down if this can be avoided. In most cases, therefore, he goes to the new job. He goes with an open mind. There is a period when he is uncommitted. During that period he makes up his mind whether he will accept the new employment, in which case he is not entitled to a redundancy payment; or whether he will leave or, in legal language, accept the employer's repudiation. So what we have to decide is whether, on the primary facts found by the tribunal, the proper inference is that the respondents accepted the new employment at Fulham and so lost any claim to redundancy payments, or whether they accepted the employer's repudiation and so became entitled to redundancy payments.

In our view the proper inference is that the respondents did not commit themselves to working at Fulham instead of Markham Street, but did, in lawyer's language, accept the company's repudiation of the Markham Street contract. We do not think that the three weeks that the respondents worked at Fulham and their two weeks' holiday was so long an elapsed period of time that one ought to assume an agreed variation or replacement of the previous contract. The company never asked them to consider whether they wished to be discharged at Markham Street or to take on new work at Fulham. They were given no period of time in which to assess the position. The company directed them to Fulham, which it had no contractual right to do. The respondents reacted to that direction in the way that most men would react: they went. They did not protest but went to work and waited to see to what extent conditions would be improved. In these circumstances the time they allowed to go by was not so long as to imply the agreed substitution of a different contract. The notice which the respondents gave was an acceptance of the company's repudiation.

For the reasons we have given we dismiss the appeal. We wish, however, to add this. The company would have saved itself and others a great deal of trouble if it had adopted the simple expedient, in line with the Industrial Relations Act 1971 and the Code of Practice², of making known in advance details of the job and working conditions at Fulham, and establishing in advance who was willing to work there and who was not willing to do so. Instead the company seems to have taken no steps to keep its workpeople informed. When rumours of a move were current, Mr Griggs, the union representative, wrote to the company. We understand that the company did not reply to that letter.

Appeal dismissed.

Solicitors: Hewitt, Woollacott & Chown (for the company); Shaen, Roscoe & Bracewell (for the respondents).

Gordon H Scott Esq Barrister.

¹ [1969] 3 All ER at 1128, [1970] 1 QB at 191

² The Code of Practice was brought into operation on 28th February 1972 by the Industrial Relations (Code of Practice) Order 1972 (SI 1972 No 179)

a Ransom (Inspector of Taxes) v Higgs
 Motley (Inspector of Taxes) v Higgs's
 Settlement Trustees

b Dickinson (Inspector of Taxes) v Downes
 Grant (Inspector of Taxes) v Downes's
 Settlement Trustees

c Kilmore (Aldridge) Ltd v Dickinson (Inspector
 of Taxes)

COURT OF APPEAL, CIVIL DIVISION

RUSSELL, STAMP AND ROSKILL LJJ

d 4th, 5th, 6th, 7th, 8th, 11th, 12th, 13th, 14th, 15th DECEMBER 1972, 12th APRIL 1973

e *f* Income tax – Trade – Adventure in nature of trade – Taxpayer receiving or entitled to profits arising from trade – Profits from dealing in or developing land – Taxpayer not personally engaged in dealing in or developing land – Taxpayer operating through companies controlled by himself and wife – Series of transactions relating to sale and development of land owned by taxpayer's companies – Transactions part of overall scheme devised by taxpayer – Purpose of scheme to place profit from sale of land in hands of trustees of taxpayer's family settlement – Effect of scheme to reduce profits of taxpayer controlled companies from sale and development of land by amount corresponding to sum received by trustees – Whether taxpayer engaged in adventure in nature of trade – Whether transactions to be regarded individually in isolation or as part of overall scheme constituting trade – Whether taxpayer or trustees receiving or entitled to profit accruing in consequence of transactions – Income Tax Act 1952, ss 123 (1) (Sch D, Case I), 148, 526 (1).

g *h* Income tax – Deduction in computing profits – Disbursements or expenses wholly and exclusively laid out or expended for purposes of trade – Purpose of expenditure – Payments made under trading contract – Payments made for purpose of making profit – Payment made to acquire an advantage not identifiable as or related to making of profits – Development company acquiring benefit of contract to develop land – Agreement requiring development company to pay premiums to company assigning benefit of contract – Agreement part of overall scheme involving series of transactions relating to sale of benefit of contract – Scheme devised by controlling shareholders of development company – Purpose of scheme to place part of profits arising under contract in hands of trustees of controlling shareholders' family settlement – Effect to reduce profits of development company arising under contract – Payments made to assignee company in order to effect that purpose – Whether payments made wholly and exclusively for purposes of development company's trade – Whether payments deductible by development company in computing profits – Income Tax Act 1952, s 137 (a).

j Ransom (Inspector of Taxes) v Higgs
 Motley (Inspector of Taxes) v Higgs's Settlement Trustees

The taxpayer, Mr Higgs, and his wife controlled certain companies which carried on the trade of dealing in or developing land. Various companies under the Higgs's control agreed to sell land to a newly formed partnership for £87,135, which was much less than its market value. The partnership consisted of Mrs Higgs, who owned a 90 per cent interest in it, and two non-Higgs companies, which owned 5 per cent

each. Mrs Higgs then settled the whole of her interest in the partnership on discretionary trusts for herself, Mr Higgs and their issue. The trustees of the settlement promptly sold that 90 per cent interest in the partnership to a non-Higgs company for £170,000 whereupon Mrs Higgs was replaced in the partnership by the purchasing company. The partnership then contracted to sell the land to the purchasing company for £87,600, so that the purchasing company had vested in it the right to both the land and the 90 per cent interest in the partnership. It contracted to sell both to another non-Higgs company for £286,000. That company then sold the land to another non-Higgs company for £286,750 and the 90 per cent interest in the partnership, now greatly reduced in value as the partnership no longer owned the land, to another non-Higgs company for £275. Finally, a Higgs company contracted under an agency agreement to carry out the development of the land for the purchaser in such a way as to yield to the purchaser £287,135. In accordance with a prior understanding which was part of the overall scheme the Higgs company was put in funds for that purpose by the trustees of the settlement lending the company the £170,000 which they had received for the 90 per cent share in the partnership. For 1960-61 Mr Higgs was assessed to tax on £170,000 in respect of profits of 'the trade of land dealer and developer'. It was contended by Mr Higgs that he was not liable to tax on that sum since (i) the £170,000 did not represent the profit of any 'trade' within the meaning of the Income Tax Act 1952, ss 123^a (Sch D, Case I) and 526 (1)^b, in which he had been engaged, (ii) the £170,000 was not 'income' to which he was entitled within the Income Tax Act 1952, s 148^c, since it had been received as capital in the hands of the trustees. The commissioners upheld the assessment to tax in principle but reduced the assessment on Mr Higgs to nil on the basis that the trustees had received the £170,000 'on the understanding that they would pass it on for the purpose of the scheme; if the exploitation of the properties should not turn out as profitable as expected there is no knowing whether they would ever get it back in full'. Megarry J^d dismissed Mr Higgs's appeal holding that the scheme as a whole had the flavour of trade and Mr Higgs's activity fell within the statutory concept of trade. He upheld the assessment against Mr Higgs and allowed the Crown's cross-appeal against the reduction of the assessment on Mr Higgs to nil. He dismissed the Crown's appeal in respect of the assessment on the trustees as an alternative to assessment on Mr Higgs. Mr Higgs appealed against the assessment on him in the sum of £170,000, and the Crown appealed against the discharge of the alternative assessment on the trustees.

Held – (i) Looking at the transactions as a whole the sum of £170,000 received by the trustees from the sale of the 90 per cent interest in the partnership could not be regarded as the proceeds of sale of a capital asset. Taking into account the fact that everyone concerned was acting at Mr Higgs's behest and the fact that it was his personal action which enabled the assets of the companies, which he and Mrs Higgs controlled, to be exploited for the benefit of their own interests rather than for the profit of those companies, it was clear that the reality of the transactions, which shone through when regarded as a whole, was that the profit of £170,000 was taken at a particular point in the transactions where Mr Higgs wanted it to be taken. In the result, the part played by Mr Higgs in the series of transactions amounted to trade or an adventure in the nature of trade within the meaning of s 526 (1) of the

^a Section 123 (1), so far as material, provides: 'Tax under Schedule D shall be charged under the following Cases respectively, that is to say—Case I—tax in respect of any trade carried on in the United Kingdom or elsewhere . . .'

^b Section 526 (1), so far as material, provides: 'In this Act . . . "trade" includes every trade, manufacture, adventure or concern in the nature of trade . . .'

^c Section 148 provides: 'Tax under Schedule D shall be charged on and paid by the persons receiving or entitled to the income in respect of which tax under that Schedule is in this Act directed to be charged.'

^d [1972] 2 All ER 817

a 1952 Act from which the profit of £170,000 accrued (see p 685 h to p 686 c, p 695 d to j, p 696 b to d and p 699 e, post).

(ii) Mr Higgs was not, however, liable to be assessed to tax on the profit of £170,000 under s 148 of the 1952 Act since he had not received that sum nor was he 'entitled' to it. The word 'entitled' in s 148 meant 'legally entitled'. It was the trustees and not Mr Higgs who were legally entitled to the sum. Accordingly the trustees were liable to be assessed to tax on the profit of £170,000 and the appeals of Mr Higgs and the Crown would be allowed (see p 686 d e and h, p 696 d to f and p 699 e, post).

b Per Roskill LJ. If it is desired to contend on the hearing of a case stated that there was no evidence to justify a particular conclusion of fact then a party must ask for the case to include the question whether there was any evidence to justify such a conclusion (see p 681 f, post).

c *Dickinson (Inspector of Taxes) v Downes*

Grant (Inspector of Taxes) v Downes's Settlement Trustees

d [The facts of these two cases (which also gave rise to the appeal in *Kilmorie (Aldridge) Ltd v Dickinson*, infra, on the issue of trading expenses) disclosed a scheme which, while differing in detail from that in *Ransom v Higgs*, *Motley v Higgs's Settlement Trustees*, was similar in scope and purpose; the issues of law raised in the two *Downes* cases are covered by the decision in the *Higgs* cases.]

Kilmorie (Aldridge) Ltd v Dickinson (Inspector of Taxes)

e A company ('Downes'), controlled by a Mr and Mrs Downes, were entitled under a building agreement to develop an estate belonging to a company ('Roodhouse') not controlled by Mr and Mrs Downes, on terms as to payment by Downes of £67,500. Downes sold the benefit of the agreement to a third company for £2,250. Subsequently the benefit of that agreement was acquired by another company ('Opendy'), not controlled by Mr and Mrs Downes, which resold it to a company ('Kilmorie') which was controlled by them on terms under which Kilmorie was to undertake the obligations under the building agreement (including the payment of £67,500) and to pay Opendy £77,250 and interest over the period of development. As a result of intermediate transactions the difference between the original payment of £2,250 and the £77,250 came, as to £60,000, into the hands of trustees of a settlement made by Mrs Downes for the benefit of her family and, as to the balance, into the hands of certain companies participating in the scheme not controlled by Mr and Mrs Downes. In effect Kilmorie paid £77,250 for the benefit of an agreement which had been sold a few days previously for £2,250. In pursuance of their agreement with Opendy in the year ending 31st March 1964 Kilmorie paid Opendy an instalment of the £77,250 amounting to £19,240. In computing its gross profits for the year in question, Kilmorie sought to deduct the sum paid to Opendy as a disbursement 'wholly and exclusively laid out . . . for the purposes of' its trade within s 137 (a)^e of the 1952 Act. That deduction was disallowed. On appeal by Kilmorie the commissioners drew certain inferences of fact. They found, inter alia, that the transactions of which the Kilmorie/Opendy agreement formed part were planned with a view to enabling the development of the land in question 'to be carried out by a company or companies controlled by Mr. Downes and at the same time so arranging matters that if as a consequence of such development a substantial profit arose a large slice of that profit would not attract liability to income tax'. The commissioners concluded that the Opendy/Kilmorie agreement was entered into by Kilmorie with the object of enabling it to develop the land and 'of facilitating the scheme for avoiding liability to income tax'.

e Section 137, so far as material, provides: 'Subject to the provisions of this Act, in computing the amount of the profits or gains to be charged under Case I or Case II of Schedule D, no sum shall be deducted in respect of—(a) any disbursements or expenses, not being money wholly and exclusively laid out or expended for the purposes of the trade . . .'

The commissioners disallowed the deduction and Megarry J^f affirmed their decision. On appeal it was contended by Kilmore that if a trader entered into what, from his point of view, was a trading agreement which provided for the trader to make certain payments, those payments must of necessity be paid exclusively for the purposes of his trade.

Held – The mere fact that a payment was made under a trading contract did not necessarily mean that the payment was a trading expense. Where it was shown that a payment, which could be separated and quantified, had been made by the taxpayer, not for the purpose of making profits, but to acquire some advantage not identifiable as, or related to, the making of profits, that payment was not expenditure ‘wholly and exclusively laid out . . . for the purposes of trade’ within s 137 (a). The payment made by Kilmore to Opendy was not expenditure for the purpose of Kilmore making profits; it was expenditure that Kilmore was required to make reducing its own profits in order that others, parties to different individual transactions which were part of the main scheme, might gain. Accordingly the payment was not deductible and the appeal would be dismissed (see p 691 g, p 692 d and e and p 699 b to e post).

Inland Revenue Comr v Europa Oil (NZ) Ltd [1971] AC 760 applied.

Decision of Megarry J [1972] 2 All ER 817 varied in part, affirmed in part^g.

Notes

For the meaning of trade, see 20 Halsbury’s Laws (3rd Edn) 113-115, paras 207, 208, and for cases on the subject, see 28 (1) Digest (Reissue) 24-57, 85-226.

For disbursements and expenses wholly and exclusively laid out for the purposes of trade, see 20 Halsbury’s Laws (3rd Edn) 166, 167, para 286, and for cases on the subject, see 28 (1) Digest (Reissue) 141-145, 421-439.

For the Income Tax Act 1952, ss 123, 137, 148 and 526, see 31 Halsbury’s Statutes (2nd Edn) 116, 134, 145 and 489.

For 1970-71, and subsequent years of assessment, ss 123, 137, 148 and 526 of the 1952 Act have been replaced by the Income and Corporation Taxes Act 1970, ss 109, 130, 114 and 526 respectively.

Cases referred to in judgments

Barry v Cordy (Inspector of Taxes) [1946] 2 All ER 396, sub nom *Cordy (Inspector of Taxes) v Smith Barry* 176 LT 111, sub nom *Smith Barry v Cordy (Inspector of Taxes)* 28 Tax Cas 250, CA, 28 (1) Digest (Reissue) 43, 178.

Bentleys, Stokes and Lowless v Beeson (Inspector of Taxes) [1952] 2 All ER 82, 33 Tax Cas 491, [1952] TR 239, 45 R & IT 461, sub nom *Beeson (Inspector of Taxes) v Bentleys, Stokes and Lowless* 31 ATC 229, CA, 28 (1) Digest (Reissue) 150, 465.

Californian Copper Syndicate (Limited and Reduced) v Harris (Surveyor of Taxes) (1904) 5 Tax Cas 159, 28 (1) Digest (Reissue) 100, *309.

Cameron v Prendergast [1940] 2 All ER 35, [1940] AC 549, 109 LJKB 486, 162 LT 348, sub nom *Prendergast (Inspector of Taxes) v Cameron* 23 Tax Cas 122 HL, 28 (1) Digest (Reissue) 329, 1181.

f [1972] 2 All ER 817

g For convenience the determination of the appeals before Megarry J and the Court of Appeal may be tabulated as follows:

	Megarry J	Court of Appeal
<i>Ransom v Higgs</i>	Crown’s appeal allowed	Taxpayer’s appeal allowed
<i>Motley v Higgs’s Settlement Trustees</i>	Taxpayer’s appeal dismissed	Crown’s appeal allowed
<i>Dickinson v Downes</i>	Crown’s appeal allowed	Taxpayer’s appeal allowed
<i>Grant v Downes’s Settlement Trustees</i>	Crown’s appeal dismissed	Crown’s appeal allowed
<i>Kilmore (Aldridge) Ltd v Dickinson</i>	Taxpayer’s appeal dismissed	Taxpayer’s appeal dismissed

- a *Craddock (Inspector of Taxes) v Zevo Finance Co Ltd* [1946] 1 All ER 523, 27 Tax Cas 267, 174 LT 385, HL, 28 (1) Digest (Reissue) 124, 367.
- Ducker v Rees Roturbo Development Syndicate Ltd, Inland Revenue Comrs v Rees Roturbo Development Syndicate Ltd* [1928] AC 132, [1928] All ER Rep 682, 97 LJKB 317, 138 LT 598, sub nom *Rees Roturbo Development Syndicate Ltd v Ducker (Inspector of Taxes)*, *Rees Roturbo Development Syndicate Ltd v Inland Revenue Comrs* 13 Tax Cas 366, HL, 28 (1) Digest (Reissue) 30, 115.
- b *Edwards (Inspector of Taxes) v Birstow* [1955] 3 All ER 48, [1956] AC 14, 36 Tax Cas 207, [1955] 3 WLR 410, 34 ATC 198, [1955] TR 209, 48 R & IT 534, HL, 28 (1) Digest (Reissue) 566, 2089.
- F A & A B Ltd v Lupton (Inspector of Taxes)* [1971] 3 All ER 948, [1972] AC 634, [1971] 3 WLR 670, Tax Case Leaflet 2420, HL.
- c *Gillespie Bros & Co v Thompson Bros & Co* (1922) 13 Lloyd LR 519.
- Inland Revenue Comr v Europa Oil (NZ) Ltd* [1971] AC 760, [1971] 2 WLR 55, sub nom *New Zealand Inland Revenue Comrs v Europa Oil (NZ) Ltd* [1970] TR 261, PC, 28 (1) Digest (Reissue) 203, *670.
- Littlewoods Mail Order Stores Ltd v McGregor (Inspector of Taxes), Littlewoods Mail Order Stores Ltd v Inland Revenue Comrs* [1969] 3 All ER 855, 45 Tax Cas 519, [1969] 1 WLR 1241, sub nom *McGregor v Littlewoods Mail Order Stores Ltd* 48 ATC 216, [1969] TR 215, CA, 28 (1) Digest (Reissue) 169, 514.
- d *Nello Simoni v A/S M/S Straum* (1949) 83 Lloyd LR 157, Digest (Cont Vol B) 27, 1154a.
- New Zealand Shipping Co Ltd v Stephens (Surveyor of Taxes)* (1907) 5 Tax Cas 553, CA, 28 (1) Digest (Reissue) 366, 1340.
- Royal Greek Government v Minister of Transport* (1949) 66 (pt 1) TLR 504, 83 Lloyd LR 228, 41 Digest (Repl) 220, 470.
- e *Smith's Potato Estates Ltd v Bolland (Inspector of Taxes), Smith's Potato Crisps (1929) Ltd v Inland Revenue Comrs* [1948] 2 All ER 367, [1948] AC 508, 30 Tax Cas 267, [1948] LJR 1557, [1948] TR 261, 41 R & IT 373, HL, 28 (1) Digest (Reissue) 151, 470.
- Tersons Ltd v Stenavage Development Corp* [1963] 3 All ER 863, [1965] 1 QB 37, [1964] 2 WLR 225, [1963] 2 Lloyd's Rep 333, CA, Digest (Cont Vol A) 39, 1151a.
- f *Thomson (Inspector of Taxes) v Gurneville Securities Ltd* [1971] 3 All ER 1071, [1972] AC 661, [1971] 3 WLR 692, Tax Case Leaflet 2421, HL.

Cases also cited

- Associated London Properties Ltd v Henriksen (Inspector of Taxes)* (1944) 26 Tax Cas 46, CA.
- Attorney-General v Avelino Aramayo & Co* [1925] 1 KB 86, CA.
- Balgownie Land Trust Ltd v Inland Revenue Comrs* 1929 SC 790, 14 Tax Cas 684.
- g *Benmax v Austin Motor Co Ltd* [1955] 1 All ER 326, [1955] AC 370, HL.
- Bowden (Inspector of Taxes) v Russell and Russell* [1965] 2 All ER 258, [1965] 1 WLR 711, 42 Tax Cas 301.
- Copeman v William Flood and Sons Ltd* [1941] 1 KB 202, 24 Tax Cas 53.
- Graham v Green (Inspector of Taxes)* [1925] 2 KB 37, 9 Tax Cas 309, [1925] All ER Rep 690.
- Heather v P-E Consulting Group Ltd* [1973] 1 All ER 8, [1973] Ch 189, Tax Case Leaflet 2465, CA.
- h *Iswera v Inland Revenue Comr* [1965] 1 WLR 663, PC.
- Jenkinson (Inspector of Taxes) v Freedland* (1961) 39 Tax Cas 636, CA.
- Kassam v Kampala Aerated Water Co Ltd* [1965] 2 All ER 875, [1965] 1 WLR 668, PC.
- Muir v Inland Revenue Comrs* [1966] 3 All ER 38, [1966] 1 WLR 1269, 43 Tax Cas 367, CA.
- j *OK Trust Ltd v Rees (Inspector of Taxes)* (1940) 23 Tax Cas 217.
- Pilkington v Randall (Inspector of Taxes)* (1966) 42 Tax Cas 662, CA.
- Pritchard (Inspector of Taxes) v Arundale* [1971] 3 All ER 1011, [1972] Ch 229.
- Sharkey (Inspector of Taxes) v Wernher* [1955] 3 All ER 493, [1956] AC 58, 36 Tax Cas 275, HL.
- Strong & Co of Romsey Ltd v Woodfield (Surveyor of Taxes)* [1906] AC 448, 5 Tax Cas 215, [1904-7] All ER Rep 953, HL.

Williams (Inspector of Taxes) v Davies, Williams (Inspector of Taxes) v Nisbet [1945] 1 All ER 304, 26 Tax Cas 371. a

Appeals

(10) *Ransom (Inspector of Taxes) v Higgs*

The Commissioners for the Special Purposes of the Income Tax Acts (B James Esq and R A Furtado Esq) stated the following case for the opinion of the High Court. b

1. At a meeting of the commissioners held on 3rd December 1968 Alan Edward Higgs ('Mr Higgs') appealed against the following assessments to income tax: 1960-61, £170,000; 1961-62, £170,000, made on him under Case I of Sch D in respect of profits of the trade of land dealer and developer.

2. The question for decision (shortly stated) was whether a sum of £170,000, received in the circumstances set out below, by the trustees of the settlement referred to below, was assessable to income tax on Mr Higgs as a profit chargeable under Sch D in either of the years of assessment. c

[Paragraph 3 listed the witnesses who gave evidence and para 4 the documents proved or admitted before the commissioners.]

5. The following facts were proved or admitted.

(1) At all material times Mr Higgs and Mrs Higgs were the main or sole shareholders and directors in a number of companies ('the Higgs companies'), which carried on trades of dealing in or developing land. d

(2) At all material times the following companies were either subsidiaries of Harlox Equities Ltd ('Harlox') or associated or connected with Harlox: Laurtpins Building Co Ltd ('Laurtpins'), Nuduch Building Co Ltd ('Nuduch'), Harley Street Securities Ltd ('Harley Street'), Downry Building Co Ltd ('Downry'), and The Palatine Investments Corporation Ltd ('Palatine'). Neither Mr Higgs nor Mrs Higgs held any interest, office or employment at any material time in Harlox or any of Harlox's subsidiaries or in any of the companies associated or connected with Harlox. e

(3) The assessments under appeal arose out of a series of transactions, which began with a deed of partnership dated 1st March 1961 and made between (1) Mrs Higgs (2) Laurtpins and (3) Nuduch, whereby the parties agreed to carry on the business of dealers in and/or developers of land property under the firm name of HLN Properties ('HLN') from 1st March 1961. The partnership was determinable by any partners on service of seven days' written notice, but not by death or retirement. The partners were entitled to capital and assets in the proportions of 90 per cent to Mrs Higgs, 5 per cent to Laurtpins and 5 per cent to Nuduch; and profits and losses were to be divided and borne in the same proportions. The initial capital was £100, £90 of which Mrs Higgs provided from her own money. All partners were required to give equally of their time and service. Any proposed transaction was to be fully discussed and entered into only if a majority of the partners (including Mrs Higgs) so agreed. f

(4) On 29th March 1961 a settlement was made between (1) Mrs Higgs and (2) Gwendoline Stella Pickersgill (who was Mr Higgs's sister) and Harold Josiah Jenkins ('the trustees'), whereby Mrs Higgs irrevocably settled all her right under the deed of partnership to receive a share of profits interest on her share of capital and all moneys due to her on capital account or otherwise in respect of the assets of the partnership but excluding any moneys advanced by her and interest accrued and profits earned before the date of the settlement ('the 90 per cent partnership interest') on discretionary trusts during the appointed period to pay, divide or apply the capital or income of such settled interest among the following beneficiaries: Mr Higgs, and the children or remoter issue of Mr Higgs, his daughter and his son. The settlement contained, inter alia, the usual powers of sale and conversion, maintenance, resettling of beneficiaries' interests' unrestricted power of investment. The trustees were authorised to exercise all powers and discretions notwithstanding any direct or other personal interest in the mode or result of exercise, but they were expressly prohibited from carrying on any trade or business. g
h
i

a (5) From 1st March 1961 HLN purchased and sold a number of properties in the course of its trade and on 30th March 1961 HLN purchased 27 items of land and houses ('the properties') for the sum of £87,135. Mr Higgs was the vendor of one item, which comprised two small parcels of land at the price of £310, and which were needed to form a possible access to one of the main properties. The vendors of all the other 26 properties were various Higgs companies. The decision to sell the properties to HLN was taken by Mr and Mrs Higgs at informal meetings. The prices for the various parcels, aggregating £87,135, was a little over the cost price at which the properties stood in the books of the vendor companies.

b (6) By letter dated 1st April 1961 Harlox's solicitors (K Tompkins & Co) wrote to the trustees and to their solicitors (Pickering, Kenyon & Co) offering on behalf of unnamed clients, subject to contract, to purchase for £170,000 the 90 per cent partnership interest, the purchase to be by way of option exercisable orally. By letter dated 3rd April 1961 the trustees replied to Harlox's solicitors accepting the offer and its terms, and granted the option signed by the trustees over a 6d stamp on 4th April 1961. Harlox paid £10 for the grant of the option.

c (7) On 4th April 1961 Harlox verbally exercised the option to purchase the 90 per cent partnership interest from the trustees for £169,990, which (together with the £10 paid for the option) made up £170,000.

d (8) By letter dated 4th April 1961 to Mrs Higgs, Laurantpins and Nuduch suggested that Mrs Higgs might care to resign from the partnership. At the foot of the letter was an endorsement of resignation by Mrs Higgs signed over a 6d stamp and dated 4th April 1961.

e (9) On 4th April 1961 the retirement of Mrs Higgs from, and the admission of Harlox to, the partnership was recorded in a memorandum, stamped with a 10s stamp and executed on that date by the companies therein mentioned.

(10) By an agreement dated 4th April 1961 and made between (1) Harlox, Laurantpins and Nuduch (then the partners in HLN) and (2) Harlox, the partners agreed to sell the properties to Harlox at the price of £87,600.

f (11) The following transactions then took place between Harlox and certain of its subsidiaries or associates: (a) by an agreement dated 4th April 1961 Harlox sold the properties and the 90 per cent partnership interest to Harley Street for £286,000. (b) On 5th April 1961 Harley Street sold the 90 per cent partnership interest to Palatine for £275 and by an agreement of the same date sold the properties to Downry for £286,750. No copy of the agreement for sale to Palatine was produced to the commissioners but a copy of the agreement for sale to Downry was annexed thereto. The purpose of the two last-mentioned transactions was not explained to the commissioners; the effect (so far as concerns this case) was that Downry became the owner of the properties.

g (12) Coventry Homesteads Ltd ('Coventry') was an estate agency and a property dealing company controlled by Mr Higgs, and managed for some eight years by Mr Jenkins (one of the trustees of the settlement).

h (13) By an agreement dated 5th April 1961 ('the agency agreement') Downry appointed Coventry its sole agent to lay out, develop and sell or lease the properties; that appointment was to continue for three years. The financial arrangements set out in that agreement were involved and at some points difficult to understand. As the commissioners construed them they were (shortly stated) as follows: (a) Coventry was to produce for Downry, from sales and leases, and after meeting its own and Downry's expenses: first, £87,135 (the same amount as HLN paid for the properties); second, a net yield of £200,000 (i.e. £30,000 more than Harlox paid to the trustees for the 90 per cent partnership interest). (b) If the net yield should be less than £200,000 Coventry would pay Downry the deficiency; if it should be more, the excess should go to Coventry. (c) Coventry was to pay Downry £257,135 (the 'deposited sum'). (d) Downry was to repay Coventry the deposited sum in the manner provided in Part III to the agency agreement. (e) Coventry was to receive a fixed percentage as remuneration, in addition to any such excess as is mentioned in (b) above.

j

(14) Shortly stated, the financial effect of all those transactions was, broadly, as under:

The Higgs companies sold properties to HLN for	£87,135
The trustees sold the 90 per cent partnership for	£170,000
	<u>£257,135</u>
Coventry deposited with Downry	£257,135
The agency agreement contemplated that the realisation of the properties would produce for Downry (after expenses and Coventry's percentage remuneration) £87,135 plus £200,000	£287,135
When that happened, Coventry would have received back the deposited sum	<u>£257,135</u>

(15) By written authority dated 4th April 1961 the trustees had authorised their solicitors to apply the £170,000 receivable on their behalf from Harlox to the order of Coventry. By a memorandum of the same date the trustees had confirmed their willingness to advance to Coventry the sum of £170,000 on terms that it was to bear interest at 6 per cent and to be repayable on demand. The memorandum was endorsed on the same date by Mr Higgs (on behalf of Coventry), accepting the terms, and again on 5th April 1961 by Mr Higgs (on behalf of Coventry), acknowledging receipt of the £170,000. At the date of the hearing of the appeal the loan was outstanding in full.

(16) The witnesses who gave evidence concerning all those transactions were Mr Higgs, Mrs Higgs and Mr Jenkins. (a) The general idea of the transactions was first suggested to Mr Higgs by his brother-in-law's solicitors; he then consulted his own solicitors, who presented him with the detailed arrangements. He did not understand all the details but he relied on advice that the arrangements would be advantageous from a tax point of view and that the properties would be developed by Coventry. Down to the date of the hearing he had received nothing from the trustees. (b) Mrs Higgs stated that she knew a lot about the transactions at the time, and had discussed them with Mr Higgs and his solicitors. In consequence she went into the partnership, and on advice she made the settlement. She had implicit faith in the trustees and was aware that they could distribute everything to her husband. The commissioners obtained the impression that it was pre-arranged that she should enter into the partnership and make the settlement. Down to the date of the hearing she had derived no financial benefit from any of the transactions except the sum of £180, her share of partnership profits prior to the date of the settlement. (c) Mr Jenkins had been a friend of Mr and Mrs Higgs for 20 years. He stated that he knew his obligations when he became trustee of the settlement and fully understood what was involved. He was advised to accept the offer of £170,000 by his accountants and bank manager. The commissioners obtained the impression that it was prearranged that the trustees should sell the 90 per cent partnership interest to Harlox and lend the proceeds to Coventry.

(17) (a) Mr Higgs's background was as follows. For many years he was employed by the Co-operative Permanent Building Society. In October 1945 he left that employment and went into business on his own account as a mortgage broker, and joined with a builder in forming a building and development company. Since the year 1950-51 any property dealing or development with which he had been concerned was carried out through companies, and he had not personally engaged in any property deals, except to sell two out of some 20 houses which he had acquired and held for 15 years as investments. (b) Mrs Higgs had never dealt in land in her own name, except for selling two out of some 18 houses which she had acquired and held for about 16 years as investments, and except during her partnership venture.

a 6. It was contended on behalf of Mr Higgs; (a) that Mr Higgs had never carried on the trade of a dealer in land or a land developer at any material time; (b) that Mrs Higgs had never carried on such a trade during her life; (c) that the sum of £170,000 sought to be assessed was not a receipt of a trade carried on by either Mr Higgs or Mrs Higgs; (d) that the appeal should be allowed and the assessments discharged.

b 7. (1) It was contended on behalf of the Crown: (a) that all the transactions referred to in sub-paras (3) to (15) inclusive of para 5 above were carried out in pursuance of a single scheme and had to be considered as such; (b) that the operation of the scheme constituted a trading venture in land dealing and development by Mr Higgs; (c) that the profit made from that trading venture amounted to the £170,000 received by the trustees and was assessable on Mr Higgs; (d) that the assessment for whichever was the appropriate year of assessment should be confirmed and the other assessment discharged. (2) *Associated London Properties Ltd v Henriksen (Inspector of Taxes)*¹ was cited on behalf of the Crown.

c 8. The appeal was heard by agreement between the parties at the same time as an appeal² by the trustees against an assessment to income tax for the year 1960-61 in the amount of £170,000. At the hearing the commissioners were requested by the Crown's representative to deal with the assessment on the trustees as an alternative to the assessments on Mr Higgs.

d 9. The commissioners who heard the appeal took time to consider their decision and gave it in writing on 9th January 1969 as follows:

e 'I The formal question for our decision is whether a sum of £170,000 arising from the sale of Mrs. Higgs' interest in the partnership (H.L.N. Properties) represents: a trading profit of her husband, the Appellant in the first appeal: alternatively, the income of the Trustees of Mrs. Higgs' Settlement, the Appellants in the second appeal.

f 'II For the Appellants in both appeals it was broadly contended that none of them had engaged in any trade, and that Mrs. Higgs had only traded in respect of her partnership activity (but not in respect of her partnership interest).

g 'III For the [Crown, it was] contended that all the transactions amounted to a single scheme, which was a trading venture. It was no part of the [Crown's] case that the transactions were a sham, but that viewed as a whole they revealed an organised scheme for profit making. In reply [counsel for Mr Higgs] submitted that it was not enough to show a scheme from which profits emerged: it must also be shown that each participant had engaged in trade.

h 'IV In this decision we use the following terms with the following meanings: By "the Higgs companies" we mean what were called the Higgs Vendor Companies and Coventry Homesteads. By "the Harlox companies" we mean Laurt-pins, Nuduch, Harlox, Harley Street, Downry and Palatine. By "the Higgs interest" we mean Mr. Higgs, Mrs. Higgs, the Trustees and the Higgs companies.

i 'V We draw the following inferences of fact from the nature of the transactions before us as evidenced by the documents and from the oral evidence: (1) all the said transactions were planned in advance at one and the same time, and each was carried through upon the understanding that all subsequent ones would be carried through; (2) the broad object was that properties belonging to Higgs companies would be profitably developed by a Higgs company, but in such a manner that (it was hoped) a large slice of the expected profit would escape Tax. This escaping of Tax explains the complicated chain of transactions and was the reason for the participation therein of the Harlox companies, for

¹ (1944) 26 Tax Cas 46

² See *Motley (Inspector of Taxes) v Higgs's Settlement Trustees*, p 667, post

which the Harlox group was to receive £30,000; (3) the person who put the scheme into operation and was in control of it throughout was Mr. Higgs; we do not mean by this that he planned or even understood the details, which he left to his professional advisers; what we mean is that we regard the whole scheme as his operation. We regard Mrs. Higgs and the Trustees, as well as the Higgs companies, as persons who acted at his behest and in accordance with his wishes, and we regard the Harlox companies as participating with his agreement and because he was prepared to make it profitable to them. a
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'VI (1) To our minds the questions we have to decide are (a) whether the part played by Mr. Higgs constituted a trade or an adventure in the nature of trade carried on by him, the profits of which are assessable to Income Tax under Case I of Schedule D. (We would here say that in our view the Trustees are not themselves engaged in any trade within the meaning of the Income Tax Acts); (b) if so, whether a profit emerged assessable to Income Tax for 1960/61 or 1961/62. (2) On the documents, Mr. Higgs was not himself a party to any of the transactions in the chain; he was however the person who initiated and controlled them, and so far as concerned the parties who constituted the Higgs interest he procured them to act as they did. The scheme as a whole has the flavour of trade; the properties in question were at the outset, we were told, for the most part trading stock of various Higgs companies, and at the conclusion were being developed by a Higgs company. If the development should turn out profitably, the overall profit (using that word in a broad sense) would be retained by one or other of the persons constituting the Higgs interest, after the Harlox companies had received £30,000. If it turned out unprofitable, the position of the Harlox companies would seem to be secure, and the loss would fall on the Higgs interest. (3) If we understand the scheme correctly, the overall profit would emerge in the following way: (a) Coventry would receive remuneration under Clause 11 of its agreement with Downry, and perhaps further remuneration under Clause 14. It was not contended that this would be a profit to Mr. Higgs, and we are not concerned with it. (b) Coventry would expect to receive £257,135 in the manner provided in Clause 13 and Part III of the said agreement. Of this (i) £87,135 would appear to represent the value at which the properties were passed out of the books of the Vendor companies: it was not contended that this would be a profit of Mr. Higgs, and we are not concerned with it. (ii) £170,000 would appear to represent the sum which the Trustees were entitled to receive from the sale of the H.L.N. interest, which sum they advanced to Coventry. It is this which the Crown alleges is a profit to Mr. Higgs. (4) It was urged that Mr. Higgs was not entitled to this £170,000 or to any part of it. Assuming that £170,000 is or will be received by Coventry, and that it is repaid by Coventry to the Trustees, the position is that Mr. Higgs will have placed £170,000 where it suited him to place it, and we do not regard the circumstances that it is not his money as having much weight. (5) In approaching the question whether, in all this, Mr. Higgs embarked on an adventure in the nature of trade, we think it immaterial that part of the object was to avoid tax on £170,000; that was the explanation of the method employed, but the substance of the matter is that what we have in front of us is Mr. Higgs' chosen method of making £170,000 out of the exploitation of the properties. (6) Apart from one small piece of land, Mr. Higgs did not venture any property or capital of his own; it all belonged initially to Higgs companies, but as we see it, it was in reality he who ventured it, and he did so for the purpose of this scheme. There seems to us no other explanation of the action of the Higgs companies in selling the land at what was quite patently a very substantial under-value; no other explanation was offered to us. There is here undoubtedly a background of trade. Although the reported cases afford no example of an activity of this nature being held to be trading, they do indicate that a wide c
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a variety of different methods of money-making may constitute trades. (7) Our conclusion is that Mr. Higgs engaged in an adventure in the nature of trade in exploiting the properties in this manner.

b 'VII The Crown's contention was that the £170,000 which the Trustees became entitled to receive was profit assessable for either 1960/61 or 1961/62. We do not agree. As we see it, the Trustees received the £170,000 on the understanding that they would pass it on for the purpose of the scheme; if the exploitation of the properties should not turn out as profitable as expected there is no knowing whether they would ever get it back in full. Looking at the scheme as a whole, and on our understanding of the agreement between Coventry and Downry, we think that the development of the properties must yield £30,000 for the Harlox Group and £87,135 (vide VI (3) above) before Mr. Higgs' trading venture produces a profit. We do not know whether this happened in the years before us, but in case it did we uphold the assessments on Mr. Higgs in principle and leave the figures for further examination. The assessment on the Trustees we discharge.'

d 10. Figures were agreed between the parties on 20th June 1969 and on 16th July 1969. The commissioners determined the assessments as follows: 1960-61 assessment reduced to nil; 1961-62 assessment reduced to nil.

11. Immediately after the determination of the appeal the Crown declared their dissatisfaction therewith as being erroneous in point of law and required the commissioners to state a case for the opinion of the High Court. Mr Higgs also required the commissioners to state a case but subsequently withdrew his demand.

e 12. The question of law for the opinion of the court was whether the commissioners' decision reducing both of the assessments under appeal to nil was correct in law.

f On 26th November 1971 Megarry J¹ allowed the Crown's appeal holding that the scheme as a whole had the flavour of trade and that Mr Higgs, having initiated and controlled the various transactions in the scheme, was liable to be assessed to income tax on the profit of £170,000. Mr Higgs appealed.

(14) *Motley (Inspector of Taxes) v Higgs's Settlement Trustees*

The Commissioners for the Special Purposes of the Income Tax Acts (B James Esq and R A Furtado Esq) stated the following case for the opinion of the High Court.

g 1. At a meeting of the commissioners held on 3rd December 1968, Gwendoline Stella Pickersgill and Harold Josiah Jenkins, the trustees of a settlement dated 29th March 1961 and made by Freda Gwendoline Higgs ('the trustees'), appealed against an assessment to income tax made on them under Sch D for the year 1960-61 in the amount of £170,000 in respect of 'Profits in connection with Partnership Interest in H.L.N. Properties'.

h 2. Shortly after the question for decision was whether the sum of £170,000 arising from the disposal of the partnership interest settled by the settlement dated 29th March 1961 was income assessable on the trustees for the year 1960-61.

i 3. The appeal was heard by agreement between the parties at the same time as an appeal by Alan Edward Higgs ('Mr Higgs', husband of Freda Gwendoline Higgs) against assessment to income tax for the years 1960-61 and 1961-62, both in the amount of £170,000 in respect of profits as 'land dealer and developer' in relation to certain properties. At the hearing the commissioners were requested on behalf of the Crown to deal with the assessment on the trustees as an alternative to the assessment on Mr Higgs.

4. In the event the commissioners reduced the assessment on Mr Higgs to nil and allowed the appeal by the trustees.

5. The commissioners stated a case, as required by the Crown, in relation to the appeal by Mr Higgs. Paragraphs 3 to 9 inclusive of that case¹ were incorporated in this case, with the following additional contentions (to paras 6 and 7 respectively):

(i) On behalf of the trustees it was contended that so far as the trustees were concerned, they had only sold an asset and there was no evidence to support any inference that the trustees had at any time carried on trade of any kind.

(ii) On behalf of the Crown it was contended that, if Mr Higgs was engaged in the year 1960-61 in the trading venture of land dealing and development in relation to the properties but was not assessable in respect of the profits thereof by reason of the trustees having received them, then, under s 148 of the Income Tax Act 1952 the trustees were properly assessable in respect thereof.

6. Immediately after the determination of the appeal the Crown declared their dissatisfaction therewith as being erroneous in point of law and required the commissioners to state a case for the opinion of the High Court.

7. The question of law for the opinion of the court was whether the decision of the commissioners, allowing the appeal by the trustees, was correct in law.

On 26th November 1971 Megarry J, having held that Mr Higgs was liable to be assessed to income tax on the profit of £170,000, upheld the commissioners' decision to discharge the assessment on the trustees. The Crown appealed.

(9) *Dickinson (Inspector of Taxes) v Downes*

The Commissioners for the Special Purposes of the Income Tax Acts (G R East Esq and H G Watson Esq) stated the following case for the opinion of the High Court.

1. At a meeting of the commissioners held on 19th and 20th March 1969 Albert James Downes ('Mr Downes') appealed against an assessment to income tax made on him under Sch D for the year 1961-62 in the sum of £75,000 in respect of profits of himself and his wife as property dealers.

2. At the same time the commissioners heard appeals by A J Downes & Sons Ltd, building contractors ('Downes'), against assessments made on that company to income tax under Sch D for the year 1962-63 in the sum of £75,000 and to profits tax for the chargeable accounting period ended 31st March 1962 in the sum of £11,302 4s 0d tax; by Kilmorie (Aldridge) Ltd ('Kilmorie') against an assessment to income tax made on that company under Sch D for the year 1964-65 in the sum of £19,240 in respect of profits arising from property development; and by the trustees of Mrs M J Downes's 1962 settlement ('the trustees') against an assessment to income tax made on them under Sch D for the year 1961-62 in the sum of £60,000 in respect of 'Profits in connection with sale of interest in partnership D.P.R. Properties & Co. and development of Landywood Estate'.

3. In the course of the hearing it was agreed that the appeals by Downes against the assessment made on that company should be allowed, and those assessments were accordingly discharged. The commissioners stated separately two cases for the opinion of the High Court relating to the appeals by Kilmorie³ and the trustees⁴.

4. Shortly stated the question for decision on the appeal by Mr Downes was whether he and/or his wife were engaged in the year ended 31st March 1962 in property dealing constituting a trade or adventure or concern in the nature of trade.

[Paragraphs 5-9 of the case were in all material respects identical to paras 5-9 of the case stated in *Kilmorie (Aldridge) Ltd v Dickinson (Inspector of Taxes)*⁵.]

10. It was contended on behalf of Mr Downes: (1) that neither he nor his wife had personally in the course of the transactions relating to the Landywood Estate either acquired or sold any property; (2) that neither of them had been personally engaged

¹ See pp 662 to 667, ante

² [1972] 2 All ER 817

³ See *Kilmorie (Aldridge) Ltd v Dickinson (Inspector of Taxes)*, p 670, post

⁴ See *Grant (Inspector of Taxes) v Downes's Settlement Trustees*, p 669, post

⁵ See pp 671 to 676, post

a in the year 1961-62 in any property dealing trade or adventure or concern in the nature of trade; (3) that the transactions did not constitute a scheme controlled by Mr Downes; (4) that (except for the profit of £394 made by Mrs Downes as a partner in DPR Properties) neither Mr or Mrs Downes made any profit directly or indirectly from any of the above-mentioned transactions.

b 11. It was contended on behalf of the Crown: (1) (a) that the transactions relating to the Landywood Estate were carried out in pursuance of a scheme which should be considered as a whole; (b) that the whole of the scheme commencing with the original building agreement and ending with the development by Kilmorie of the Landywood Estate had been put into effect by or/at the instigation and with the authority of Mr Downes; (c) that the operation of the scheme constituted the carrying on by Mr Downes of an adventure or concern in the nature of trade of property dealing; (d) that Mr Downes made a trading profit therefrom for the year 1961-62 of not less than £60,000 being the amount equal to that received by the trustees of his wife's settlement; (2) alternatively that Mr Downes by participating in the scheme in order that the £60,000 should be received by the trustees of the wife's settlement was carrying on an adventure or concern in the nature of trade of property dealing and made a trading profit of £60,000; (3) that the assessment made on Mr Downes was correct in principle, but should be reduced to the sum of £60,000.

d 12. [The commissioners' decision is set out in para 12 of the case stated in *Kilmorie (Aldridge) Ltd v Dickinson (Inspector of Taxes)*¹.]

13. Immediately after the determination of the appeal the Crown expressed their dissatisfaction therewith as being erroneous in point of law and required the commissioners to state a case for the opinion of the High Court.

e 14. The question of law for the opinion of the court was whether the commissioners' decision set out in para 12, sub-head 4, of the case stated in *Kilmorie (Aldridge) Ltd v Dickinson (Inspector of Taxes)*² was correct.

f On 26th November 1971 Megarry J³, reversing the decision of the commissioners, held that, as Mr Downes had placed the profit where it suited him, it could not be said that the scheme yielded no profit or that Mr Downes acted gratuitously, and that the assessment on Mr Downes to the extent of £60,000 should, therefore, be restored. Mr Downes appealed.

(13) *Grant (Inspector of Taxes) v Downes's Settlement Trustees*

The Commissioners for the Special Purposes of the Income Tax Acts (G R East Esq and H G Watson Esq) stated the following case for the opinion of the High Court.

g 1. At a meeting of the commissioners held on 19th and 20th March 1969 Dr M J Lees and Mr K N Cooke, the trustees of Mrs M J Downes's 1962 Settlement ('the trustees') appealed against an assessment to income tax made on them under Sch D for the year 1961-62 in the sum of £60,000 in respect of 'Profits in connection with sale of interest in partnership D.P.R. Properties & Co. and development of Landywood Estate'.

h 2. At the same time the commissioners heard appeals by A J Downes & Sons Ltd, building contractors ('Downes'), against assessments made on that company to income tax under Sch D for the year 1962-63 in the sum of £75,000 and to profits tax for the chargeable accounting period ended 31st March 1962 in the sum of £11,302 4s 0d tax; by Kilmorie (Aldridge) Ltd ('Kilmorie') against an assessment to income tax made on that company under Sch D for the year 1964-65 in the sum of £19,240 in respect of profits arising from property development; and by Albert James Downes ('Mr Downes') against an assessment to income tax made on him under Sch D for the year 1961-62 in the sum of £75,000 in respect of profits of himself and his wife as property dealers.

i 1 See p 677, post

2 See p 678, post

3 [1972] 2 All ER 817

3. In the course of the hearing it was agreed that the appeals by Downes against the assessments made on that company should be allowed, and those assessments were accordingly discharged. The commissioners stated separately two cases for the opinion of the High Court relating to the appeals by Kilmorie¹ and Mr Downes².

4. Shortly stated the question for decision on the appeal by the trustees was whether Mr Downes and/or his wife were engaged in the year 1961-62 in property dealing constituting a trade or adventure or concern in the nature of trade; and whether, if that was so but Mr Downes was not assessable in respect of the profits thereof by reason of the trustees having received them, the trustees were so assessable for that year.

5. It was not argued for the Crown that the trustees themselves carried on any trade assessable to income tax, or that the assessment made on them should be upheld otherwise than as an alternative to an assessment on Mr Downes in the circumstances referred to in the latter part of the preceding paragraph.

[Paragraph 6 incorporated paras 5-9 of the case stated in *Dickinson (Inspector of Taxes) v Downes* which were in all material respects identical to paras 5-9 of the case stated in *Kilmorie (Aldridge) Ltd v Dickinson (Inspector of Taxes)*³.]

7. It was contended on behalf of the trustees that neither Mr nor Mrs Downes had been personally engaged in the year 1961-62 in any property dealing trade or adventure or concern in the nature of trade, and that the assessment made on the trustees, who had admittedly not themselves carried on any trade assessable to income tax, should accordingly be discharged.

8. It was contended on behalf of the Crown: (1) that Mr Downes or his wife was engaged in the year 1961-62 in an adventure or concern in the nature of trade of property dealing; (2) that he was assessable in respect of the profits of £60,000 resulting therefrom which, as part of the scheme which was put into operation, was paid to the trustees of his wife's settlement; (3) that, in the event of his being held not to be assessable in respect of the profits by reason of the fact that it was not himself or his wife but the trustees who received them, the trustees should be held to be so assessable, and (4) that the assessment made on them should accordingly be confirmed.

9. [The commissioners' decision is set out in para 12 of the case stated in *Kilmorie (Aldridge) Ltd v Dickinson (Inspector of Taxes)*⁴.]

10. Immediately after the determination of the appeal the Crown declared their dissatisfaction therewith as being erroneous in point of law and required the commissioners to state a case for the opinion of the High Court.

11. The question of law for the opinion of the High Court was whether the commissioners' decisions set out in para 12, sub-head 5, of the case stated in *Kilmorie (Aldridge) Ltd v Dickinson (Inspector of Taxes)*⁵ was correct.

On 26th November 1971 Megarry J⁶, dismissing the Crown's appeal, held that, as Mr Downes was assessable in respect of the profits, the trustees were not so assessable. The Crown appealed.

(8) *Kilmorie (Aldridge) Ltd v Dickinson (Inspector of Taxes)*

The Commissioners for the Special Purposes of the Income Tax Acts (G R East Esq and H G Watson Esq) stated the following case for the opinion of the High Court.

1. At a meeting of the commissioners held on 19th and 20th March 1969 *Kilmorie (Aldridge) Ltd* ('Kilmorie'), a property dealing company which before 27th September 1964 was called *Kilmorie (Torquay) Ltd*, appealed against an assessment to income

1 See *Kilmorie (Aldridge) Ltd v Dickinson (Inspector of Taxes)*, *infra*

2 See *Dickinson (Inspector of Taxes) v Downes*, p 668, *ante*

3 See pp 671 to 676, *post*

4 See p 677, *post*

5 See p 678, *post*

6 [1972] 2 All ER 817

a tax made on the company under Sch D for the year 1964-65 in the sum of £19,240 in respect of profits arising from property development.

2. At the same time the commissioners heard appeals by A J Downes and Sons Ltd, building contractors ('Downes'), against assessments made on that company to income tax under Sch D for the year 1962-63 in the sum of £75,000 and to profits tax for the chargeable accounting period ended 31st March 1962 in the sum of £11,302 4s
b tax; by Albert James Downes ('Mr Downes') against an assessment to income tax made on him under Sch D for the year 1961-62 in the sum of £75,000 in respect of profits of himself and his wife as property dealers; and by the trustees of Mrs M J Downes's 1962 settlement ('the trustees') against an assessment to income tax made on them under Sch D for the year 1961-62 in the sum of £60,000 in respect of 'Profits in connection with sale of interest in partnership D.P.R. Properties and Co. and development of Landywood Estate'.
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3. In the course of the hearing it was agreed that the appeals by Downes against the assessments made on that company should be allowed, and those assessments were accordingly discharged. The commissioners stated separately two cases for the opinion of the High Court relating to the appeals by Mr Downes¹ and the trustees².

d 4. Shortly stated the question for decision on the appeal by Kilmorie was whether payments totalling £19,240 made by that company to Opendy Building Co Ltd ('Opendy') in the year ended 31st March 1964 were admissible as deductions in computing for income tax purposes Kilmorie's trading profits for that year.

[Paragraph 5 listed the witnesses who gave evidence and para 6 the documents proved or admitted before the commissioners.]

e 7. The following facts were proved or admitted.

(1) On 21st March 1962 K J Roodhouse Ltd ('Roodhouse'), Downes and Mr Downes entered into an agreement ('the original building agreement'), the parties thereto being therein referred to as 'the lessor', 'the builders' and 'the guarantor' respectively in relation to the development of the Landywood Estate and the grant of underleases of plots thereon. Mr Downes was a director of, and a substantial shareholder in, Downes. Neither Mr Downes nor Downes was in any way associated with Roodhouse and the original building agreement was negotiated at arm's length. Downes was thereby licensed and authorised to proceed as provided therein with the development of the Landywood Estate and in consideration thereof agreed, inter alia, to pay the lessor the sum of £67,500—£1,000 on signature of the agreement, £4,000 within a month, £15,000 when planning approval was granted, and the balance at the rate of £300 contemporaneously with and on the grant of each of the first 75 underleases and at the rate of £225 contemporaneously with and on the grant of each of the remaining underleases until such time as the whole amount was paid. By cl 6 it was provided that Roodhouse should receive a minimum global yearly ground rent from the underleases of £5,325. Under cl 17 Downes also agreed to pay certain annual sums during the development of the estate (to be cancelled pro tanto against ground rents payable by the underlessees in respect of the same periods). By cl 26
f h Mr Downes as director and principal shareholder of Downes for himself and his personal representatives irrevocably agreed with and guaranteed to Roodhouse, inter alia, that Downes would pay the rents and other sums payable under the agreement, that Downes would duly perform and observe the several stipulations therein and that he, Mr Downes, would pay and make good to Roodhouse any losses sustained by it in respect of the default of Downes in respect of any of those matters.

j (2) The original building agreement stipulated (cl 21) that Downes 'shall not be entitled to assign the benefit of this Agreement'. By a memorandum supplemental thereto dated 29th March 1962 it was, however, agreed that the original building

1 See *Dickinson (Inspector of Taxes) v Downes*, p 668, ante.

2 See *Grant (Inspector of Taxes) v Downes's Settlement Trustees*, p 669, ante.

agreement should be assignable subject to certain restrictions. One such restriction was that no sale assignment or transfer of the original building agreement should be made without the prior written consent of Roodhouse as lessor. (The original building agreement and the memorandum supplemental thereto are hereafter referred to as the 'building agreement'.)

(3) On 30th March 1962 Downes sold the building agreement to Sproul Bros (Builders) Ltd (a company not connected with Mr and Mrs Downes or any company which they controlled) for the sum of £2,250 and gave the undertakings and accepted the obligations therein contained. The directors of Downes (Mr Downes, Mrs Downes and a Mr G F Southall) considered that that price was a good one fully reflecting the then value of the building agreement. On 31st March 1962, i.e. the next day, Sproul Bros (Builders) Ltd sold the building agreement together with the benefit of the ancillary undertakings and obligations on the part of Downes contained in the contract dated 30th March 1962 to the partnership called DPR Properties (the partners in which were Mrs Downes, Posthart Building Co Ltd ('Posthart') and Rebfrins Building Co Ltd ('Rebfrins')) for the sum of £2,500. By a memorandum dated 4th April 1962, i.e. a few days later, Roodhouse gave consent in writing to the sales of the building agreement to the above-mentioned purchasers and also to three further sales thereof culminating in a sale to Kilmorie.

(4) On 2nd March 1962 Mr Downes's wife settled £10 on the trusts set out in an irrevocable discretionary settlement. That settlement recited, inter alia, that the settlor or other persons might wish thereafter to cause to be paid or transferred to the trustees other sums of money or investments or other property to be by them held on the trusts thereof. The beneficiaries comprised Mr Downes, the children and remoter issue of Mrs Downes by Mr Downes and certain specified charities. The settlement expressly provided that nothing therein should authorise the trustees to carry on any trade or business.

(5) On 7th March 1962 Mrs Downes, Posthart and Rebfrins entered into articles of partnership in which it was agreed that the parties would become partners in the business of dealers in and/or developers of land and property on the terms specified therein. It was agreed, inter alia, that the partnership should be called DPR Properties, that the partners should be entitled to the capital and property for the time being of the partnership and to the goodwill of the business in the following shares, that is to say, Mrs Downes 90 per cent, and Posthart and Rebfrins each 5 per cent thereof, and that the net profits and losses of the business should be divided and borne in the same ratio. The agreement further provided that the partnership should commence forthwith and continue until determined as to any partner by such partner serving on the other seven days' written notice to that effect but that it should not be determined as between the other partners by such notice or by the death or retirement of any partner.

(6) By a deed of gift dated 29th March 1962 Mrs Downes gave her 90 per cent interest in DPR Properties and her other rights under the articles capable of transfer therewith, but excepting moneys (other than in respect of partnership capital) advanced by her to the partnership before or any profits earned before or any interest on capital, or on such moneys accrued before 29th March 1962, to the trustees to hold on the trusts contained in the discretionary settlement.

(7) On 31st March 1962 Messrs K Tompkins and Co, solicitors, wrote to the trustees as follows:

*'Trustees of Mrs. Margaret
Joan Downes' Settlement*

'Dear Sirs,

'D.P.R. Properties

'We act for a London Company whose name we are not yet permitted to disclose. Our clients understand that as Trustees of a Settlement of Mrs. Margaret Joan Downes you own her 90% share in D.P.R. Properties.

a 'Our Clients are interested in purchasing the Trustees interest on the basis of an immediate sale if terms can be agreed. Our Clients have been in communication with Posthart Building Co. Ltd. and Rebfrins Building Co. Ltd. and have obtained from them particulars of the prospects of this partnership and are prepared to offer, subject to contract, the sum of £60,000 for Mrs. Downes' interest in the partnership exclusive of her right to repayment of any monies (other than in respect of partnership capital) advanced to the partnership to date, and excluding her share of any profits earned to date or interest on her capital to date.

b 'We must make it clear that if the deal is to be concluded then it must be done at once as our Clients wish to acquire an interest in the partnership before it proceeds to sell any of its properties.

c 'Our Clients will wish to minimise their liabilities to ad valorem stamp duty payable on a contract for sale or formal assignment. They will, therefore, insist that the transaction is carried through, instead of on contract or assignment, by the trustees giving them an option for £10. to purchase at the price of £59,990 which option can be exercised orally.

d 'They will then arrange with the two above mentioned Companies to enter into the partnership with them and thus obtain the full benefit of what they have paid for without taking an assignment.

'We confirm however that this method of sale is adopted solely to avoid stamp duty.

'Yours faithfully,
K. Tompkins & Co.'

e (8) On 2nd April 1962 the trustees replied to that letter as follows:

'Dear Sirs,

*'Trustees M. J. Downes'
Settlement*

f 'We, the undersigned James McLintock Lees of Lansdowne, Gorway Road, Walsall and Kenneth Noel Cooke of 18 Lichfield Street, Walsall as Trustees of Mrs. Margaret Joan Downes' Settlement thank you for your letter of the 31st March and accept your Clients offer on the terms set out in your letter.

'Yours faithfully,
(Signed) J. McL. Lees
" K. N. Cooke.'

g (9) Following that offer and acceptance the trustees on 4th April 1962 by an undertaking in writing granted to Blakorne Building Co Ltd ('Blakorne') in consideration of the sum of £10 an option to purchase on the terms of the letter dated 31st March 1962 for the sum of £59,990 the share and interest owned by them in DPR Properties, such option to be exercised by Blakorne verbally within three days. On the same day the trustees by a receipt in writing acknowledged receipt from Blakorne of the sum of £59,990.

h (10) On the same day, i.e. 4th April 1962, Mrs Downes resigned as from that date as a partner in DPR Properties, with the consent of Posthart and Rebfrins, and acknowledged the receipt of the sum of £238 1s 8d in full settlement and discharge of all liabilities of the partnership to her. The net profit shown by the trading and profit and loss account of DPR Properties for the period from 7th March 1962 to 4th April 1962 was £437 17s 1d, Mrs Downes's 90 per cent share thereof thus being £394 1s 5d.

j (11) By a memorandum of agreement between Posthart, Rebfrins and Blakorne, also entered into on 4th April 1962, it was agreed that following the retirement of Mrs Downes from the partnership Blakorne, having acquired her share in the partnership, should be admitted to the partnership in substitution for Mrs Downes,

and that the partnership should continue on the terms of the articles dated 7th March 1962 under the same style of DPR Properties. a

(12) On 4th April 1962 further agreements were also entered into as follows. (a) An agreement for sale between DPR Properties and Harlox Equities Ltd. By that agreement Harlox Equities Ltd purchased from DPR Properties for the sum of £3,000 the building agreement together with the benefit of the ancillary undertakings and obligations on the part of Downes referred to in sub-para (3) above. (b) An agreement between Blakorne and Harlox Equities Ltd. By that agreement Harlox Equities Ltd purchased from Blakorne at the price of £60,250 the 90 per cent share and interest and all rights of the vendor (formerly belonging to Mrs Downes) in DPR Properties (excluding, however, rights in respect of moneys advanced and interest thereon, if any, and the 90 per cent share of the profits earned to 3rd April 1962, if any). (c) An agreement between Harlox Equities Ltd and Harley Street Securities Ltd. By that agreement Harley Street Securities Ltd purchased as one lot from Harlox Equities Ltd for the price of £76,000 the assets purchased by the latter company under the agreements referred to in (a) and (b) above. b

(13) On the same day, i.e. 4th April 1962, the trustees offered to advance to Kilmoreie the sum of £60,000 on the terms that it would bear interest calculated on a day to day basis at the rate of 6 per cent and be repayable in full or in part on demand. Kilmoreie on that day accepted that advance on those terms, and received it on the following day. c

(14) On that day, i.e. 5th April 1962, an agreement was entered into between Opendy Building Co Ltd ('Opendy') and Kilmoreie relating to the development of the Landywood Estate. That agreement recited, inter alia, that Opendy was entitled to the building agreement, and that it had been agreed between Opendy and Kilmoreie that Kilmoreie would carry out the building and other works thereafter mentioned in conformity with the agreement, and contained the following provisions: Part I (cll 1 to 8 inclusive)—provisions as to estate development; Part II (cll 9 to 12 inclusive)—provisions as to sales/underleases and conveyancing; Part III (cll 13 to 18 inclusive)—financial provisions; Part IV (cll 19 to 23 inclusive)—provisions as to receipt and application of proceeds of letting sale and disposal. Part I of the agreement provided in cl 1 (b): d

'[Kilmoreie] shall exercise all the development rights granted by the agreement and hereby undertakes with [Opendy] to pay all monies becoming due thereunder and observe and perform all the obligations on the part of [Kilmoreie] therein contained and indemnify [Opendy] in respect thereof.' e

Parts III and IV of the agreement included, inter alia, the following provisions: f

'13 (a) The prices/premia payable to [Opendy] for all the lots/plots by [Kilmoreie] or its nominated purchasers/underlessees shall be in aggregate the sum of Seventy-seven thousand two hundred and fifty pounds plus interest and costs in connection with monies borrowed with the consent of [Kilmoreie] by or any other payments incurred by [Opendy] in connection with the property and its development and disposal or arising out of these presents plus all sums payable pursuant to the agreement including the balance unpaid of the global premium and all interim and global rents thereunder and all other outgoings or obligations involving expenditure thereunder (in these presents called "the grand price"). (b) The grand price shall be apportioned to each lot/plot at the rate of Two hundred and sixty pounds or as may be agreed from time to time with [Kilmoreie]. g

'14. In consideration of [Opendy] entering into this agreement, [Kilmoreie] has deposited with [Opendy] the sum of Sixty-two thousand two hundred and fifty pounds . . . h

'18. The said sum of Sixty-two thousand two hundred and fifty pounds shall i

a be repayable by periodical instalments as provided in Part IV hereof and in toto after [Opendy] shall have received the grand price.

b '19. [Kilmorie] will forthwith instruct irrevocably K. N. Cooke to act as sole Solicitors to [Opendy] and [Kilmorie] in connection with the sale and disposition of the property and all matters incidental to this agreement (or so far as [Opendy] may become entitled to any interest therein the building works) and shall give to him irrevocable instructions and authority to receive and deal with the proceeds of sales and disposals of the property in manner following and [Opendy] shall if required confirm such irrevocable instructions by Deed inter partes with such Solicitors (a) first in payment for the professional and other usual expenses of such sale or disposal (b) then in repayment of any sums secured on or owing to Bankers or others in respect of the property (c) then as to any balance from time to time remaining in their hands and any sums payable by [Kilmorie] under

c Clauses 13, 16 and 17 hereof in payment as to Fifty pounds per lot/plot to [Opendy] (as a payment on account of the grand price) and as to the balance to [Kilmorie] as an approximate proportionate return of the said sum of Sixty-two thousand two hundred and fifty pounds until [Kilmorie] shall have received a sum equivalent thereto.'

d (15) By a memorandum made between Downes and Kilmorie, also dated 5th April 1962, Kilmorie agreed to observe and perform all the obligations on the part of Downes contained in the original building agreement and gave Downes an indemnity in respect of any breach by Kilmorie of those obligations.

e (16) By a form of tender (undated) for the erection and completion of 302 dwellings for Kilmorie at the Landywood Estate Downes undertook to carry out the works required in that connection in accordance with specified bills of quantities for the sum of £550,622.

f (17) In the years ended 31st March 1963 to 31st March 1967 inclusive gross profits earned (a) by Downes on the development of the Landywood Estate for Kilmorie and (b) by Kilmorie on the development of that estate under agreement with Opendy were computed as follows:

				Gross Profits	
				Downes	Kilmorie
				£	£
Year ended 31st March 1963				752	—
" " " " 1964				40,596	16,565
" " " " 1965				36,554	66,885
" " " " 1966				30,779	12
" " " " 1967				1,036	-12
Total				109,717	83,450

h The gross profits of Kilmorie as set out above were arrived at after deducting premiums as follows:

				To Roodhouse	To Opendy
				£	£
Year ended 31st March 1963				20,000	—
" " " " 1964				35,475	19,240
" " " " 1965				12,475	46,329
" " " " 1966				—	11,681

j The premiums totalling £19,240 paid to Opendy in the year ended 31st March 1964 were the payments the treatment of which for income tax purposes was in issue between the parties on the appeal by Kilmorie.

(18) Mr and Mrs Downes were at all material times directors of, and shareholders in, a number of private companies carrying on business as builders and land developers, including Downes and Kilmorie, which were both engaged in estate development. Downes, which undertook the building work, had at all material times an issued share capital of £1,000, of which £495 was owned by Mr Downes and a further £495 by Mrs Downes. Kilmorie, which sold houses, had at all material times an issued share capital of £1,000, of which £900 was owned by Mr Downes and £100 by Mrs Downes.

(19) In the course of negotiations leading up to the original building agreement Mr Downes met Mr Meachem, a partner in the firm of solicitors, Tompkins & Co, and it was then suggested to him that a tax saving scheme might be brought into operation which would enable his family to benefit by making a capital profit. He authorised Mr Meachem to proceed with the preparation of such a scheme, and left it to him to evolve it. He did not concern himself with, or indeed fully understand, the details of the scheme as they were worked out, and knew little about the transactions involved in carrying it out subsequent to the sale of the building agreement to Sproul Bros (Builders) Ltd for £2,250. Apart from the fact that his wife was in partnership with them, he had no connection with Posthart or Rebfrins and he knew nothing of Blakorne, Harlox Equities Ltd or Harley Street Securities Ltd and had not been concerned with how Opendy came to be entitled to the building agreement. Mr Meachem, who had introduced him to Sproul Bros (Builders) Ltd, acted for Opendy, and settled with him the amount of the premiums to be paid by Kilmorie to that company. It was expected that Kilmorie would make a profit after deducting the premiums payable to Opendy but the actual profits made both by Downes and Kilmorie exceeded expectations.

(20) Apart from her association with DPR Properties, Mrs Downes was at no time engaged in carrying on any business in partnership. It was suggested to her by Messrs Tompkins & Co that it would be to the benefit of her family to form the partnership known as DPR Properties. She paid from her own bank account £90 in respect of her share of the partnership capital. When the trustees had sold her 90 per cent interest in the partnership to Blakorne she resigned from it because there did not then seem to be any point in her carrying on as a partner therein.

8. In the course of his evidence Mr Downes said, *inter alia*, that there were no arrangements as to what Sproul Bros (Builders) Ltd were to do with the building agreement, and that it was not necessarily the case that it was always clear that one of his companies would develop the land. The commissioners were not, however, satisfied, and did not accept, that it was not anticipated when Sproul Bros (Builders) Ltd acquired the building agreement that they would thereupon resell it to DPR Properties, or that it was contemplated that the development of Landywood Estate might be carried out otherwise than by a company or companies actually controlled by Mr Downes. On reviewing the evidence the commissioners drew therefrom the inferences of fact set out in sub-head 2 of their decision (see para 12 below).

[Paragraph 9 set out the cases referred to.]

10. It was contended on behalf of Kilmorie: (1) that the agreement between Kilmorie and Opendy dated 5th April 1962 was a proper commercial agreement entered into at arm's length between companies which were unassociated and was intended to and did in fact yield a substantial profit for Kilmorie from the conducting of its trade as an estate developer; (2) that the premiums paid by Kilmorie to Opendy thereunder were wholly and exclusively laid out or expended for the purposes of the trade of Kilmorie; (3) that the premiums were thus an admissible deduction in computing for income tax purposes the trading profits of Kilmorie for the year ended 31st March 1964.

11. It was contended on behalf of the Crown: (1) that the agreement between Kilmorie and Opendy dated 5th April 1962 was entered into for reasons which were not wholly commercial; (2) that the premiums paid by Kilmorie to Opendy thereunder

a were not wholly and exclusively laid out or expended for the purposes of the trade of Kilmorie; (3) that the premiums were not accordingly admissible as a deduction in computing for income tax purposes the trading profits of Kilmorie for the year ended 31st March 1964.

b 12. The commissioners took time to consider their decision on the appeal by Kilmorie and on the appeals by Mr Downes and the trustees which were also before them and gave it in writing on 2nd May 1969 as follows:

c '1. On these appeals the questions for our determination are whether payments by Kilmorie (Aldridge) Ltd. (hereinafter referred to as "Kilmorie") to Opendy Building Co. Ltd. (hereinafter referred to as "Opendy") totalling £19,240 in the year to 31st March 1964, fall to be deducted in computing the profits of the trade of property development carried on by Kilmorie assessable to income tax for the year 1964/65; whether Albert James Downes (hereinafter referred to as "Mr. Downes") is assessable to income tax for the year 1961/62 on profits from property dealing in respect of a sum of £75,000 arising from the sale and purchase of a building agreement to develop Landywood Estate (an estate thereafter developed by Kilmorie); and whether if he is not so assessable the Trustees of Mrs. M. J. Downes 1962 Settlement (hereinafter referred to as "the Trustees") are chargeable to income tax for the year 1961/62, as persons receiving or entitled to income in respect of which tax under Schedule D is directed to be charged, in respect of a sum of £60,000 being part of the sum arising from the sale and purchase of the said building agreement.

e '2. These questions arise out of transactions relating to the development of Landywood Estate which took place shortly before the end of the income tax year 1961/62. Having carefully reviewed the evidence before us, both documentary and oral, regarding these transactions, we draw the following inferences of fact therefrom:—(1) The whole series of transactions was planned from the outset and each of the transactions in the series was carried through in the expectation that all subsequent ones would also be carried through. (2) The said transactions were planned with a view to enabling the development of Landywood Estate to be carried out by a company or companies controlled by Mr. Downes and at the same time to so arranging matters that if as a consequence of such development a substantial profit arose a large slice of that profit would not attract liability to income tax. (3) Mr. Downes, having authorised the preparation of such a scheme, left its detailed working out to his professional advisers. The scheme as it was worked out involved arrangements whereby certain companies not controlled by Mr. Downes participated in it.

g '3. As regards the question before us relating to Kilmorie, the agreement entered into by that company with Opendy in relation to the Landywood Estate building agreement was an essential prerequisite to the carrying out by Kilmorie of the development of the estate. It proved, moreover, in the event to be very much to the advantage of Kilmorie to enter into the first-mentioned agreement (hereinafter referred to as "the Kilmorie/Opendy agreement") on the terms specified therein. We have, however, to consider the position at the time when the Kilmorie/Opendy agreement was made, and against the background of the series of transactions which led up to it. So approaching the matter we are of opinion that the Kilmorie/Opendy agreement was entered into by Kilmorie with the object both of enabling that company to develop the Landywood Estate and of facilitating the scheme for avoiding liability to income tax referred to in paragraph 2 (2) above. In our view the latter object was on the facts of the case one of the main purposes, and not a mere secondary consequence, of the entering into by Kilmorie of the agreement, and the outlay totalling £19,240 was thus incurred by Kilmorie for dual purposes being purposes one of which was, and one of which was not, a trading purpose. We find accordingly that that

outlay is, having regard to the provisions of Section 137 (a) of the Income Tax Act, 1952, not allowable as a deduction in computing the profits of the trade of Kilmorie. We therefore conclude that the appeal made by that company fails, and hereby confirm the additional assessment to income tax against which it was made, that is to say, the additional assessment on the company for the year 1964/65 in the sum of £19,240. a

'4. As regards the question before us regarding Mr. Downes, it does not appear that he or his wife at any time undertook personally any sale or purchase in connection with the transactions affecting Landywood Estate. He authorised the preparation of the scheme referred to in paragraph 2 above and so was concerned in putting in train transactions which led to the receipt by the Trustees of a substantial slice of the profits derived from the development by Kilmorie of the Landywood Estate. Viewing the facts as a whole, however, it seems to us that while he was interested personally (as distinct from as a director or shareholder in companies controlled by him) in this aspect of the matter neither he nor his wife was at any time engaged in carrying on personally in relation to the estate any trade or adventure or concern in the nature of trade. We hold therefore that his appeal succeeds, and hereby discharge the assessment to income tax against which it was made, that is to say, the assessment on him for the year 1961/62 in the sum of £75,000. b

'5. As regards the question before us regarding the Trustees, it was not sought on behalf of the Crown to contend that they themselves carried on any trade assessable to income tax, or to support the assessment against which they appealed otherwise than in the event of Mr. Downes or his wife being held to have been carrying on personally a trade or adventure or concern in the nature of trade but of Mr. Downes nevertheless not being held to be assessable in respect of the profits thereof by reason of such profits having been received by the Trustees. Following our decision set out above on the appeal made by Mr. Downes we accordingly hold also that the appeal made by the Trustees succeeds, and hereby discharge the assessment to income tax against which it was made, that is to say, the assessment on them for the year 1961/62 in the sum of £60,000.' c

13. Immediately after the determination of the appeal Kilmorie declared its dissatisfaction therewith as being erroneous in point of law and required the commissioners to state a case for the opinion of the High Court. d

14. The question of law for the opinion of the court was whether the commissioners' decision set out in para 12, sub-head 3, above, was correct in law. e

On 26th November 1971 Megarry J¹ held that the contract between Kilmorie and Opendy had a dual purpose, one of which was to avoid liability to tax, and hence premiums paid by Kilmorie to Opendy under the contract were not deductible expenses from Kilmorie's profits, and dismissed the appeal. Kilmorie appealed. f

C N Beattie QC, Raymond Walton QC and Barry Pinson for the taxpayers in appeals (10) and (14). g

Raymond Walton QC, D C Potter QC and A R Thornhill for the taxpayers in appeals (8), (9) and (13).

R A MacCrimdale QC and Patrick Medd for the Crown. h

12th April. The following judgments were read.

Cur adv vult

ROSKILL LJ read the first judgment at the invitation of Russell LJ. Two matters at least are clear in relation to the first four of these five appeals. First, in relation to what I shall for brevity call 'the Higgs transactions' a profit of £170,000 emerged for i

a the benefit of the Higgs interests. This was always the object of these transactions. Secondly, in relation to what I shall for brevity call 'the Downes transactions' a profit of £60,000 emerged for the benefit of the Downes interests. This was always the object of these transactions. The two complex and ingenious schemes which have been considered over many days in this court were devised not only so as to enable those large sums by way of profit to be earned but also to ensure that those large sums were if possible earned in a manner which would secure that there would be no resultant liability to income tax on them. The question to be determined in the first four appeals is whether that objective has been achieved. The fifth appeal which also arises in relation to the Downes transactions raises an entirely separate question. I do not propose to set out or discuss the details of these schemes which will be found fully described in the relevant special cases.

c The Crown contend that each of these large sums attracts income tax under Case I of Sch D by reason of s 122 (1) (a) (ii) and s 123 (1) of the Income Tax Act 1952. Section 122 (1) provides (so far as relevant) as follows:

d 'Tax under this Schedule shall be charged in respect of—(a) the annual profits or gains arising or accruing . . . (ii) to any person residing in the United Kingdom from any trade . . . whether carried on in the United Kingdom or elsewhere . . .'

Section 123 (1) provides (so far as relevant):

e 'Tax under Schedule D shall be charged under the following Cases respectively, that is to say—Case I—tax in respect of any trade carried on in the United Kingdom or elsewhere . . .'

Section 526 (1) defines trade as including 'every trade, manufacture, adventure or concern in the nature of trade'. Section 148 provides:

f 'Tax under Schedule D shall be charged on and paid by the persons receiving or entitled to the income in respect of which tax under that Schedule is in this Act directed to be charged.'

The Crown argued that these profits were profits of trade, the relevant trade having been carried on by Mr Higgs in the year 1960-61 and by Mr and Mrs Downes in the year 1961-62. Nothing turned on the fact (as counsel for the Higgs interests accepted at a very early stage of the argument in these appeals) that no assessment had been sought to be made on Mr Higgs in respect of alleged trading by both Mr and Mrs Higgs whereas in the case of the Downes transactions the assessment was in respect of alleged trading by both Mr and Mrs Downes. In the case of the Higgs transactions, the Crown argued that there had been trading or an adventure or concern in the nature of trade by Mr Higgs in 1960-61 which had yielded this profit and that Mr Higgs was the person receiving or entitled to the income in respect of which the tax was directed to be charged. Alternatively the Crown argued that if it were a fact that Mr Higgs had been trading but by reason of the provisions of the Higgs transactions Mr Higgs was not the person receiving or entitled to the income and for this latter reason only was not chargeable to tax under s 148, the Higgs trustees were the persons so receiving or entitled to the income and were thus properly chargeable to tax under that section. Similarly in the case of the Downes transactions the Crown argued that there had been trading or an adventure or concern in the nature of trade by Mr and Mrs Downes in 1961-62 which had yielded this profit and that they were the persons receiving or entitled to the income in respect of which the tax was directed to be charged and that in those circumstances the assessment had been properly raised against Mr Downes. Alternatively the Crown argued that if it were the fact that Mr and Mrs Downes had been trading but by reason of the provisions of the Downes transactions were not the persons receiving or entitled to the income and for this

latter reason only Mr Downes was not chargeable to tax under s 148, the Downes trustees were the persons so receiving or entitled to the income and were thus properly chargeable to tax under that section.

No attempt was ever made to claim that either the Higgs trustees or the Downes trustees had themselves been trading or engaged in an adventure or concern in the nature of trade and counsel for the Crown properly accepted that this contention was not open to the Crown in this court. It follows that if there were no trading by either Mr Higgs or by Mr and Mrs Downes the entire claim for tax in the first four appeals fails. The alternative claim against each set of trustees is dependent on proof of trading by Mr Higgs in the one case and by Mr and Mrs Downes in the other case. The Special Commissioners in Mr Higgs's case concluded that he had been engaged in an adventure in the nature of trade and upheld the assessments on him in principle but reduced the assessment to nil and left the figures for further examination. They discharged the assessment on the Higgs trustees. The Special Commissioners in Mr Downes's case, who were differently constituted from the Special Commissioners in Mr Higgs's case, took a different view. They held that neither Mr nor Mrs Downes had personally undertaken any relevant sale or purchase in connection with the transactions in question and that accordingly neither was at any time engaged in carrying on personally any trade or adventure or concern in the nature of trade. They accordingly allowed Mr Downes's appeal and discharged the assessment on him. Consistently with that conclusion they also discharged the assessment on the Downes trustees.

Mr Higgs appealed. The Crown cross-appealed against the reduction of the assessment on Mr Higgs to nil and also against the Higgs trustees. The Crown appealed against both Mr Downes and against the Downes trustees. Megarry J¹ dismissed Mr Higgs's appeal, allowed the Crown's appeal against the reduction of the assessment to nil but consistently with his view of the matter dismissed the Crown's appeal against the Higgs trustees. He allowed the Crown's appeal against Mr Downes but—again consistently with his view—dismissed the Crown's appeal against the Downes trustees.

Thus the crucial question is whether either Mr Higgs or Mr and Mrs Downes were at the material times engaged in any trade or in any adventure or concern in the nature of trade. It was to this issue that the greater part of the argument in this court was directed.

Before dealing with this question, it will be convenient to dispose of another matter which is peculiar to Mr Higgs's appeal. Counsel for Mr Higgs challenged a number of the conclusions or inferences of fact contained in para 9 V and VI of the special case in Mr Higgs's case². I list only the more important of those conclusions or inferences of which he complained as unwarranted or unsupported by the evidence. 1. Mr Higgs was the person who was in control of the scheme throughout. 2. Mrs Higgs, the Higgs trustees and the Higgs companies all acted at Mr Higgs's behest and in accordance with Mr Higgs's wishes. 3. The Harlox companies participated with Mr Higgs's agreement and because Mr Higgs was prepared to make it profitable for the Harlox companies to do so. 4. Mr Higgs was the person who initiated and controlled the transactions and procured the parties who constituted the Higgs trustees to act as they did. 5. The scheme as a whole had the flavour of trade. 6. As the result of the Higgs transactions Mr Higgs succeeded in placing £170,000 where it best suited him to place it. 7. The substance of the matter was that what was before the Special Commissioners was Mr Higgs's chosen method of making £170,000 out of the exploitation of the properties. 8. In reality it was Mr Higgs who ventured the property and capital of the Higgs companies for the purposes of the scheme. 9. The Higgs companies sold the land at what was quite patently a very substantial under-value.

¹ [1972] 2 All ER 817

² See pp 665, 666, ante

a Counsel argued that there was no evidence to justify these various conclusions or inferences of fact and it was therefore not only open to the court but it was the duty of the court to ignore these findings. Reliance was placed by both counsel, Mr Beattie and Mr Walton, in this connection on the speeches in the House of Lords in *Cameron v Prendergast*¹ per Viscount Maugham and in *Edwards (Inspector of Taxes) v Bairstow*² per Viscount Simonds³ and Lord Radcliffe⁴. But, as counsel for the Crown pointed out, in both those cases their Lordships were concerned with findings, conclusions or inferences (whichever word be used) of a very different kind from those here sought to be challenged. In *Edwards (Inspector of Taxes) v Bairstow*² the Special Commissioners had (as the House of Lords ultimately held, wrongly) reached a conclusion that the transaction there in question was not an adventure in the nature of trade which was quite contrary to the remainder of their findings. It was, in Lord Radcliffe's phrase⁵, a 'determination obviously erroneous in point of law' having regard to the facts found. Counsel for the Crown also drew our attention to two decisions of Devlin J, *Nello Simoni v A/S M/S Straum*⁶ and *Royal Greek Government v Minister of Transport*⁷. In the latter case the learned judge clearly expressed the view that all conclusions of fact including inferences of fact were for the tribunal of fact. In the former case, he observed, that if a party thinks that a tribunal of fact may reach a conclusion of fact which there is no evidence to support, he can ask that tribunal to leave as a question of law whether there is any evidence to justify that conclusion. In the field of commercial arbitration this has long been recognised as the position: see *Gillespie Bros & Co v Thompson Bros & Co*⁸ per Atkin LJ, and *Tersons Ltd v Stevenage Development Corpn*⁹ per Upjohn LJ—both decisions of this court. It would also seem to have been recognised as the position in Revenue cases for even longer: see *New Zealand Shipping Co Ltd v Stephens (Surveyor of Taxes)*¹⁰ per Moulton LJ¹¹ and Farwell LJ¹², another decision of this court which does not appear to have been cited in this connection either in Revenue or in commercial arbitration cases until the present appeals. In *Tersons Ltd v Stevenage Development Corpn*¹³ Pearson LJ said in terms that normally it would be conclusions inferred or deduced from primary findings which could properly be made the subject of such a special case.

f The principles laid down in these cases are well established and nothing said in *Edwards (Inspector of Taxes) v Bairstow*², which was considered by this court in *Tersons Ltd v Stevenage Development Corpn*¹⁴ contradicts them. If it is desired to contend on the hearing of a special case that there was no evidence to justify a particular conclusion of fact then a party must ask for the case to include the question whether there was any evidence to justify such a conclusion. If he does not do so then that question is not before the court because the court does not know what evidence was called before the tribunal of fact, and if that question is not before the court then the conclusion sought to be complained of can only be attacked if other findings in the case make it perverse or manifestly wrong in law. That clearly is not so in the present case. The Special Commissioners heard evidence (see para 5 (16) of the case¹⁵). We

1 [1940] 2 All ER 35 at 40, [1940] AC 549 at 558, 23 Tax Cas 122 at 146

2 [1955] 3 All ER 48, [1956] AC 14, 36 Tax Cas 207

3 [1955] 3 All ER at 54, 55, [1956] AC at 30, 31, 36 Tax Cas at 225, 226

4 [1955] 3 All ER at 56, 57, [1956] AC at 33-36, 36 Tax Cas at 227-229

5 [1955] 3 All ER at 57, [1956] AC at 36, 36 Tax Cas at 229

6 (1949) 83 Lloyd LR 157

7 (1949) 66 (pt 1) TLR 504, 83 Lloyd LR 228

8 (1922) 13 Lloyd LR 519 at 524

j **9** [1963] 3 All ER 863 at 869, 870, [1965] 1 QB 37 at 51

10 (1907) 5 Tax Cas 553

11 (1907) 5 Tax Cas at 566, 567

12 (1907) 5 Tax Cas at 567

13 [1963] 3 All ER at 872, 873, [1965] 1 QB at 56

14 [1963] 3 All ER 863, [1965] 1 QB 37

15 See p 664, ante

do not know what that evidence was. Very properly it is not exhibited to the special case. The Special Commissioners were not asked to exhibit that evidence nor indeed fully to summarise it. a

In Revenue cases the parties have the advantage, denied to parties in commercial arbitrations, of seeing a draft of the special case in advance. There should therefore be no practical difficulty in seeking the statement of the requisite question of law, if necessary as an additional question, whether there was any evidence to justify a particular conclusion at which the Special Commissioners proposed to arrive. This was not done in the present case. Though in my judgment it is clearly open to the Higgs interests to argue on the facts found that there was no relevant trade or adventure in the nature of trade being carried on, it is not in my judgment open to them now to challenge the findings, conclusions or inferences of fact of which counsel for Mr Higgs sought to complain in this court or to seek to argue the question whether or not there was any trade or adventure in the nature of trade carried on by Mr Higgs otherwise than by reference to the facts, conclusions and inferences found or drawn by the Special Commissioners. b

I would only add that there is no reflection in the judgment of Megarry J¹ of this issue having been discussed before him though we were told by counsel for Mr Higgs that it had been raised at the hearing in that court. c

I therefore turn to consider the crucial issue of 'trade' in relation to the Higgs transactions. It is important to observe certain basic facts which underlie this highly ingenious scheme. If the Higgs companies had themselves developed the properties in question, there could be no doubt that each of those companies would have been liable to tax on any relevant profit which each made. It was of the essence of this scheme that the companies, instead of themselves realising these properties for gain, should be required to part with them at what the Special Commissioners found was 'quite patently a very substantial under-value'. The reason for this is obvious. The potential profit to which the development of these properties would lead was not to be taken by their original owners. The profit was to be taken at a different and later point in the transactions as a result of which the trustees, who had paid nothing for the 90 per cent partnership interest which had been settled on them gratuitously by Mrs Higgs, would receive £170,000 from the sale of the partnership interest to a Harlox company. The trustees were then to hold that sum on discretionary trusts for beneficiaries of whom Mr Higgs was one while Harlox received £30,000 for their involvement in the scheme. Put in other words, the scheme in total threw up a profit of £200,000 divided in the proportions of £170,000 to the Higgs trustees and £30,000 to the Harlox interests. d

The essence of counsel for Mr Higgs's arguments was that the trustees derived £170,000 from the sale of an asset which had been settled on them on these discretionary trusts. It was not, they said, a Revenue profit. It was a capital profit. Still less, it was argued, was this a Revenue profit deriving from any trading by Mr Higgs. Mr Higgs had not traded at all. Nor had he engaged in any adventure or concern in the nature of trade. His part and the part played by Mrs Higgs had been limited to actions as directors and controlling shareholders in the Higgs companies. Those companies were in law separate and distinct entities from their directors and controlling shareholders. In these circumstances it was contended that it was impossible to say that Mr Higgs ever traded in anything at all let alone in property or land as the Crown had sought to assert. Mr Higgs had ventured nothing. The companies had ventured the properties. The Crown's case was an attempt either to charge a shareholder to tax in respect of something done by the company in which he held shares or to charge a director to tax in respect of transactions into which he had caused the company to enter. All the relevant acts were acts of the companies and not of Mr Higgs. e

a The Crown challenged that it was legitimate to break down this elaborate scheme to a large number of isolated component parts and then having done this to concentrate on a single element in the scheme, the receipt of the £170,000 by the trustees in return for the sale of the partnership interest and then to claim that that was an isolated sale by the trustees of a capital asset. The entirety of the scheme had to be regarded in the light of the findings of fact by the Special Commissioners and in particular their findings as to the precise part which Mr Higgs played in carrying the
b entire scheme through. The scheme was devised by Mr Higgs's professional advisers but on the findings he was the person who put the scheme into operation and was in control throughout. The Special Commissioners had regarded the scheme as his operation and everyone else as playing his or her allotted part at Mr Higgs's behest.

c Reliance was placed on behalf of the Crown on the approval by the House of Lords in *Ducker v Rees Roturbo Development Syndicate Ltd*¹ per Lord Buckmaster of the test earlier laid down by the Inner House of the Court of Session in *Californian Copper Syndicate (Limited and Reduced) v Harris (Surveyor of Taxes)*² per the Lord Justice-Clerk: '... is it a gain made in an operation of business in carrying out a scheme for profit-making?' It was argued that there was in the present case a gain and that the scheme was clearly one for profit-making and if possible for profit-making free of
d tax. That the scheme was designed to secure that any profit was free of tax seems to me to be irrelevant. The question—accepting this definition—is whether it was a gain in an operation of business in carrying out such a scheme and that brings one back to the crucial question whether or not Mr Higgs was trading or engaged in an adventure or concern in the nature of trade.

e The question may be put in slightly different language. On the facts found did Mr Higgs organise a commercial adventure designed to produce a profit? The companies which he and Mrs Higgs controlled owned this land and property. The assets were potentially extremely valuable. It was desired to exploit those assets. If those assets were to be exploited most advantageously to the companies, tax would be payable on the companies' profits. But it was thought that there was a way of exploiting the land and the properties in a way less advantageous for the companies because
f they would have to sell at an under-value but more advantageous to the Higgs interests. This potential profit could be earned provided Mr Higgs and others at his behest did or concurred in doing certain acts beneficial to themselves or to their intended beneficiaries though not to the companies. Mr Higgs and the others at his behest did or concurred in doing those acts. Those were acts of exploitation of the companies' assets designed to produce these profits out of dealings in land and property which the implementation of the scheme as a whole involved.

g Counsel for the Crown invited us to consider an imaginary conversation between Mr Higgs and a representative of the Harlox interests at the time of the inception of the scheme. He suggested that Mr Higgs would say that he was in a position to arrange a deal whereby the Harlox group for an outlay of some £275,000 would get land or property worth some £287,000 with a resale price underwritten by Coventry to the extent of £257,000 down. Mr Higgs's return would be that the Harlox interests
h would devote £170,000 of the outlay to purchasing from trustees acting at his behest a partnership interest to be vested in those trustees for nothing for the purpose of selling that interest to the Harlox interests for £170,000. Counsel for the Crown stressed that if the Harlox interests had asked Mr Higgs how this could be done, Mr Higgs would have replied 'by exploiting my interests and getting my wife to exploit her interests in the companies of which we are the directors and controlling
i shareholders'.

To my mind the crucial factor in this case is that the acts of the companies which were an essential prerequisite to the achievement of the scheme were not in any real

1 [1928] AC 132 at 140, 13 Tax Cas 366 at 397, [1928] All ER Rep 682 at 689

2 (1904) 5 Tax Cas 159 at 166

sense acts of the companies carried out in those companies' own interests. They were acts forced on or enjoined on the companies by Mr Higgs and those acting with him against the companies' own interests but in the interests of those who controlled the companies. The dominating actor was Mr Higgs. He was exploiting the companies and his necessary fellow actors are found to have been acting at all times at his behest.

Much reliance was placed in argument before us on two recent decisions of the House of Lords, *F A & A B Ltd v Lupton (Inspector of Taxes)*¹ and *Thomson (Inspector of Taxes) v Gurneville Securities Ltd*². It is not necessary to consider the highly complex facts of those two cases. Suffice it to say that in neither case was the taxpayer held entitled to offset under s 341 of the Income Tax Act 1952 losses said to have been incurred, on the ground that the transactions in question, having been entered into for fiscal purposes, were not trading transactions, the relevant trade being said by the taxpayer to have been that of a dealer in shares. It was argued on the basis of those decisions that because dividend stripping operations had there been held not to be normal trading by way of dealing in shares, the Higgs transactions (which like the Downes transactions it was accepted were stock stripping transactions) could not in law be held to be trading or an adventure or concern in the nature of trade. With all respect to this argument which was so strongly pressed on us, the question is not what were or were not trading transactions in other cases but whether on the facts found by the Special Commissioners Mr Higgs was in relation to the Higgs transactions engaged in trade or in an adventure or concern in the nature of trade.

Mr Walton, following Mr Beattie in relation to the Higgs appeal, insisted that none of the transactions bore any badges of trade on the part of Mr Higgs. All Mr Higgs did was first to persuade his wife to go into partnership with others and make a settlement of that 90 per cent partnership interest; secondly, to persuade or 'cajole' (the word was counsel's) the Higgs companies into selling the land and property at an under-value, and thirdly to make the relevant arrangements with the Harlox group and with Coventry. But, counsel argued, every relevant act by Mr Higgs was an act done as a director of or shareholder in the Higgs companies acting in concert with the other directors and shareholders concerned. Each crucial act, he said, was the act of the company concerned and not the act of Mr Higgs. Even the final act by Coventry, he said, was the act of that company and not of Mr Higgs. No single step taken was a trading step by Mr Higgs who was not paid for anything he did. All he did was to induce others to join with him in getting the various companies to implement the scheme which was not and could not be trading or an adventure or concern in the nature of trade.

Counsel for the Crown compared the activities of Mr Higgs with those of a broker arranging a deal between two other parties from which the broker derived a profit of £170,000. He submitted that the reality of the totality of the scheme must be looked at and that reality, he claimed, shone through when the scheme was regarded as a whole. For my part I venture to doubt whether analogies are of assistance in seeking to solve the crucial problem. But I accept that the scheme must be looked at as a whole. So looked at it was a scheme for realising the values of these properties in a manner which attracted for the benefit of the Higgs interests a profit of £170,000. Mr Higgs was, as I have already said, the main actor, everyone else concerned acting at his behest. Mr Higgs was in a position to secure and did secure that the exploitation of these properties, which the owning companies were required to sell at a substantial under-value as part of the scheme, produced this profit at the point in the implementation of the scheme at which it most suited him and the Higgs interests that that profit should arise. Mr Higgs was the only person embraced in the phrase 'the Higgs interests' who stood to gain any benefit from the transactions. The vendor companies were losers. The trustees were a mere vehicle for the implementation

1 [1971] 3 All ER 948, [1972] AC 634

2 [1971] 3 All ER 1071, [1972] AC 661

a of the scheme. Mrs Higgs did not stand to gain at all. On the contrary she settled her 90 per cent partnership interest gratuitously. And Coventry was Mr Higgs's final chosen means whereby the exploitation of these properties was to be accomplished.

The question was repeatedly asked during the argument: if this were trading by Mr Higgs or an adventure or concern on his part in the nature of trade, what was the name of this trade or adventure or concern in the nature of trade? I accept that the difficulty in naming the trade may be a reason for doubting whether such a trade, b adventure or concern is being carried on. But the difficulty is to my mind in no way conclusive against the carrying on of a trade, adventure or concern. The important question is not the name but whether the acts in question amount to trading or to an adventure or concern in the nature of trade. If a name has to be found, I do not see why it should not be said that Mr Higgs was on the facts found trading in the exploitation of the properties owned by the Higgs companies or engaged in an adventure or c concern in the nature of trade of that description.

In *Barry v Cordy (Inspector of Taxes)*¹, a case much canvassed in argument, the Crown did not seek to say that the taxpayer was dealing in life insurance policies but the Court of Appeal had no difficulty in reaching the conclusion that what the taxpayer was doing in relation to his acquisition and disposal of such policies came within d the words 'trade' and 'adventure'. I cannot find anywhere in the judgment of this court delivered by Scott LJ that a name was given to the trade or adventure in which the taxpayer was held to have been engaged.

Many authorities were referred to in the course of the argument where questions of trade had arisen. In some of them the Crown succeeded. In others the taxpayer succeeded. I do not find it necessary to review these authorities each one of which e turns on its own facts as found by the tribunal of fact concerned. The question is not whether this case is like another case or is unlike another case. The question is whether on the facts as found the Crown has proved that Mr Higgs was engaged in trading or an adventure or concern in the nature of trade in 1960-61, and that the profit of £170,000 was a profit accruing from that trade or adventure. This question has to be answered by applying the facts as found to the sections of the statute which I have f quoted.

In many cases the question which side of the line a particular case falls will be entirely or almost entirely a question of fact or degree for the tribunal of fact and in such cases the court will not interfere with the conclusion of that tribunal even though the court itself or a differently constituted tribunal of fact might have reached a different conclusion. In the present case the relevant facts have been found against Mr Higgs, but I do not regard that as conclusive against him if he can show that on g the facts so found the Special Commissioners have reached a conclusion unjustified by those facts or a wrong conclusion in point of law. I have already indicated the arguments in support of the view that their conclusions were unjustified by the facts found and wrong in law and I need not repeat them.

I am of the clear opinion that on the facts found the Special Commissioners were entitled in law to hold that Mr Higgs was engaged in trading or in an adventure h in the nature of trade. In essence my reasons for that conclusion are: 1. The Higgs transactions must be looked at as a whole and not broken down into a number of separate component parts. 2. It is wrong to regard the profit of £170,000 which emerged from the Higgs transactions solely as the proceeds of sale of a capital asset by the Higgs trustees. 3. It is wrong to regard the actions of Mr Higgs solely as the actions of a director of or shareholder in the Higgs companies. 4. Mr Higgs was the dominant i actor and it was his personal action under professional advice which enabled the assets of the companies which he and Mrs Higgs controlled to be exploited for the benefit of the Higgs interests and not for the profit of those companies who in order to further the interests of Mr Higgs and others immediately concerned were obliged to

sell properties owned by them substantially beneath their true value. 5. Everyone concerned was acting at Mr Higgs's behest. 6. The reality of the Higgs transactions which shines through when they are regarded as a whole was that the profit of £170,000 was to be taken at that particular point in the transactions where it suited Mr Higgs best that it should be taken.

I would only add that while I fully accept the argument of counsel for Mr Higgs that it is not legitimate to disregard the separate legal entities involved—Mr Higgs on the one hand and the Higgs companies on the other: see *Inland Revenue Comr v Europa Oil (NZ) Ltd*¹ per Lord Wilberforce—in my judgment the reason why Mr Higgs is to be held to have been trading or engaged in an adventure in the nature of trade is because of what he personally did and procured and not because of what the Higgs companies did or were procured to do by him and those acting with him.

I therefore reach the same conclusion on this issue as did the Special Commissioners and Megarry J².

The question then arises whether the relevant assessments should be raised against Mr Higgs or against the Higgs trustees. The Special Commissioners and Megarry J² thought the former. I greatly hesitate to differ from them but I do not think that this is correct. Counsel for the Crown sought to argue that even if Mr Higgs were never legally entitled to the £170,000, he nonetheless received that sum within the meaning of s 148 because he procured the money to be placed where he wanted it, namely in the hands of the Higgs trustees. But Mr Higgs plainly never 'received' this money and under the scheme I do not see now it can be said that he was 'entitled' to the £170,000. Indeed it was the essence of the scheme that he should neither receive it nor be entitled to receive it. 'Entitled' in s 148 must mean 'legally' entitled. Mr Higgs was never legally entitled to that money. The trustees were legally entitled to that money. I think therefore the correct assessment was that raised against the trustees and not against Mr Higgs.

The question arose during the argument whether the assessment should have been on the full £170,000. This question seems never to have been properly investigated before the Special Commissioners on behalf either of Mr Higgs or of the trustees. The Crown might well therefore have argued successfully in this court that it was now too late for this issue to be raised for the first time. However, in the circumstances counsel for the Crown very properly sought and obtained authority to agree to the matter being remitted to the Special Commissioners if this court were of the opinion that Mr Higgs had been trading, in order that the question whether any and if so what expenses were properly deductible might further be considered by them. He emphasised (though counsel for Mr Higgs did not agree) that this was a matter of concession and must not be regarded as a precedent in any other case. I say no more than is necessary to record the terms in which counsel on behalf of the Crown agreed to remission. I express no view whether there are any expenses which are properly deductible since this is not an issue which is before the court.

In the result I would allow Mr Higgs's appeal and discharge the assessment against him but I would also allow the Crown's appeal against the trustees and uphold in principle the assessment raised against them and remit the matter to the Special Commissioners for determination on the expenses issue in order that the proper quantum of tax payable may be determined by them.

I now turn to Mr Downes's appeal against the assessment in respect of the alleged profits of himself and Mrs Downes which are said to have arisen from trading in the year 1961-62. The original assessment was in the sum of £75,000 but it was ultimately limited by the Crown to £60,000. I can deal with this appeal more shortly than with Mr Higgs's appeal for many of the issues are the same as those already discussed. Counsel for Mr Downes accepted that basically the scheme in question was the same as in Mr Higgs's case but pointed out that there were two differences. First, the

¹ [1971] AC 760 at 771, [1971] 2 WLR 55 at 62

² [1972] 2 All ER 817

a subject-matter of the Downes transactions was not land or property owned by companies controlled by Mr and Mrs Downes. It was a newly negotiated building agreement dated 21st March 1962 between K J Roodhouse Ltd and A J Downes & Sons Ltd, a company controlled by Mr and Mrs Downes. I shall call this the Roodhouse agreement. It is found by the Special Commissioners to have been negotiated at arm's length. The agreement licensed A J Downes & Sons Ltd to develop an estate called the Landywood Estate in consideration of payment of the sum of £67,500 and certain other payments for which that agreement made provision. It was this chose in action which was the subject of the Downes transactions.

b Secondly, the Special Commissioners concerned decided the crucial issue of trading in favour of Mr Downes. Their decision was reversed by Megarry J¹. It is to be observed that the sum of £60,000 which the Crown claimed to attract tax was the sum payable to the Downes trustees for the sale by them to a Harlox company of the partnership interest settled on the trustees gratuitously by Mrs Downes. Once again it is not necessary to relate the complex details of the Downes transactions. They will be found set out in the special case. By various steps the benefit of the Roodhouse agreement reached a Harlox company called Opendy who made an agreement with a Downes company called (for short) Kilmorie which was in substance an agreement by Kilmorie to comply with the terms of the Roodhouse agreement, Kilmorie paying, inter alia, £77,250 for the privilege of so doing. Kilmorie had to carry out the developers' obligations under the Roodhouse agreement in return for getting the benefit of that contract. Kilmorie had to deposit £62,500 with Opendy of which £60,000 was obtained by borrowing that same amount from the Downes trustees.

c In essence the Crown's case was the same as in the Higgs case. The Roodhouse agreement was an asset of A J Downes & Sons Ltd. Mr Downes obviously appreciated that it was an asset capable of producing large future profits. He with his advisers considered how that asset might most profitably be exploited for the benefit of himself and his family but not for the company which possessed the benefit of the Roodhouse agreement. His objectives under professional advice were achieved by requiring that company to part with the asset for £2,250 to a third party, that asset to be ultimately repurchased from that third party for £77,250, a share of the profit being handed over to the Downes trustees and represented as the purchase price of an asset.

d The Crown argued that in the Downes case as in the Higgs case what made the activities trading or an adventure or concern in the nature of trade was the activities of Mr Downes in procuring the conclusion of all these arrangements including the procurement of the Downes company to act as it did in relation to the Roodhouse agreement solely in the interests of Mr Downes and his family.

e Counsel for Mr Downes urged that this case was stronger from the taxpayer's point of view than was the Higgs case. He pointed out that there was only a single asset here involved, namely the Roodhouse agreement. There were here no badges of trade, no repetition or frequency of transaction. Whatever difficulty there was, he said, in naming Mr Higgs's trade, it was impossible to find a name for what Mr Downes did for he did nothing which could conceivably be called trading. Counsel attacked Megarry J's conclusion¹, reversing the Special Commissioners for two reasons. First, he said that the judge, having decided the Higgs case against the taxpayer, decided this case against the taxpayer on some supposed principle of uniformity. Secondly, he said the judge was wrong in the way in which he dealt with the repeated use by the Special Commissioners of the adverb 'personally' in para 12 (4) of the special case².

1 [1972] 2 All ER 817

2 See p 678, ante

As to the first, I think with respect counsel for Mr Downes has misunderstood what the judge meant regarding uniformity¹. I think the judge meant no more than that it was unsatisfactory to have differing decisions in two different cases arising under closely similar schemes. I do not think he meant that because he decided one case in favour of the Crown he must decide the other the same way. In principle this would be wrong since every case must turn on the facts found and in legal theory at least different findings of fact could lead to different decisions even under closely similar schemes. I think all the judge meant was that the schemes were so similar that it would be unsatisfactory for the two decisions to differ. But I do not think he intended to say that for that reason alone he must decide the two cases alike. As to the second point, I agree with the learned judge that the use of the word 'personally' by the Special Commissioners is of the greatest importance. They used it to justify the conclusion in point of law that Mr and Mrs Downes were not trading or engaged in an adventure or concern in the nature of trade. The Special Commissioners would seem to have thought that while Mr Downes had a personal interest as a director or shareholder in the Downes companies, neither he nor his wife was personally engaged in relation to the Landywood Estate in carrying out any trade or adventure or concern in the nature of trade.

Counsel (Mr Potter following Mr Walton) boldly argued for Mr Downes that what was done was incapable of being trading because the scheme was—and I quote his words—'the execution of a planned raid on the Revenue'. This phrase was borrowed from the speech of Lord Donovan in *F A & A B Ltd v Lupton (Inspector of Taxes)*². Because, as counsel did not shrink from arguing, the Downes transaction was a planned raid on the Revenue, it was remote from trade and indeed could not be trade. With respect, there is a non sequitur in this argument. Clearly those who plan raids on the Revenue, at least where the object is to make a profit and not, as in the *Lupton* case³, a loss, are unlikely to plan on the basis that the taxpayer will make a profit from trade or an adventure or concern in the nature of trade or the chosen scheme is unlikely to achieve its avowed objective. But it may well be that one untoward consequence of a tax avoidance scheme aimed at making a tax free profit is that the profit in fact made will prove to have been made albeit inadvertently as the result of trade or an adventure or concern in the nature of trade, and thus, contrary to the hopes and intentions of those responsible for the scheme, to be taxable.

In truth Mr Downes was in the same position as Mr Higgs. This scheme must be looked at as a whole. It was planned as a whole. It was carried out as a whole. Mr Downes used his controlling position to make his companies conclude agreements not for the benefit of those companies but for the benefit of him and his family. Artificial prices were fixed. And it was prearranged with the Harlox interests that those interests, having acquired the benefit of the Roodhouse agreement from one Downes company, would in turn pass a large part of the consequent gain, after retaining a part for themselves, to a nominated recipient, the trustees for Mr Downes and his family. I accept that this was in one sense an isolated transaction but I do not think that that of itself prevents it being trading or an adventure or concern in the nature of trade especially as the so-called isolated transaction contained so many complex transactions within itself. In truth this is another case of choosing a method of exploiting a valuable asset and it was the personal activity of Mr Downes and of Mrs Downes which enabled that asset to be exploited as it was. Where I respectfully disagree with the Special Commissioners is in their conclusion that, although Mr Downes was interested personally, he and Mrs Downes were not engaged personally in carrying on any trade or adventure in the nature of trade in relation to the development of the estate. The Special Commissioners have looked at the matter as if the

1 See [1972] 2 All ER at 847

2 [1971] 3 All ER at 963, [1972] AC at 657

3 [1971] 3 All ER 948, [1972] AC 634

a crucial question were whether Mr or Mrs Downes were engaged as individuals in actual estate development. What they have not regarded is the true character of their, and in particular of Mr Downes's, activities as revealed by the facts found. Those facts so found, as I have already said, show procurement of the exploitation of the Roodhouse agreement for the benefit of Mr Downes and of his family and, for the same reasons as I have given in the Higgs case, I think that amounts to a trade or adventure or concern in the nature of trade. Once again I do not think the difficulties of nomenclature prevent this being the position. Counsel for Mr Downes also sought to support the Special Commissioners' decision on the ground that there was a conclusion of fact in Mr Downes's favour. The answer to this submission is that I think on the facts found the Special Commissioners have reached a wrong conclusion in point of law.

c But also for the reasons given in the Higgs cases I think that the proper assessment was that raised against the Downes trustees and not against Mr Downes. I would therefore allow Mr Downes's appeal and the Crown's appeal against the trustees. I would discharge the assessment against Mr Downes and uphold the assessment on the trustees. There is no question of remission in this case.

d I now turn to the fifth appeal, that by Kilmorie. Kilmorie made substantial gross profits in the years ended 31st March 1964 and 31st March 1965 out of the exploitation of the benefits of the Roodhouse agreement. So did A J Downes & Sons Ltd—see para 7 (17) of the special case¹. The figure for the year to 31st March 1964 was £16,565 and for that to 31st March 1965 was said to be £66,885. These figures were arrived at after deducting premiums payable and paid by Kilmorie to Opendy amounting in the year to 31st March 1964 to £19,240 and in the year to 31st March 1965 to £46,329. The total of those premiums and of the premiums also paid for the ensuing year to 31st March 1966, namely £11,681, was £77,250. But the present appeal was concerned only with the figure of £19,240 which it was claimed to deduct for the year to 31st March 1964. In addition to these sums so paid by Kilmorie to Opendy, Kilmorie for the same financial year also paid sums totalling £67,950 to K J Roodhouse Ltd. The Crown has not sought to dispute that these payments made to this company were admissible deductions.

f The crucial question is whether the premiums totalling £19,240 paid by Kilmorie to Opendy for the year to 31st March 1964 were admissible as deductions for the purpose of computing Kilmorie's taxable trading profits for the year 1964-65. Kilmorie claimed that they were. The Crown disputed this. The Special Commissioners accepted the Crown's contention. Megarry J² dismissed Kilmorie's appeal against that decision.

g Section 137 of the Income Tax Act 1952 provides:

h 'Subject to the provisions of this Act, in computing the amount of the profits or gains to be charged under Case I or Case II of Schedule D, no sum shall be deducted in respect of—(a) any disbursements or expenses, not being money wholly and exclusively laid out or expended for the purposes of the trade, profession or vocation . . .

i Counsel for Kilmorie contended that these payments fell precisely within the language of the subsection because the liability to pay them as also the liability to pay the other sums to K J Roodhouse Ltd arose under cl 13 of the Kilmorie-Opendy agreement. Counsel went so far as to say that it was 'nonsense' to seek to tax the payments to Opendy and not the payments to K J Roodhouse Ltd. It is important to observe the findings of the Special Commissioners in para 3 of the final decision of the special case³. After stating that they were considering the Kilmorie-Opendy

1 See p 675, ante

2 [1972] 2 All ER 817

3 See pp 677, 678, ante

agreement against the background of the series of transactions which led up to it, the Special Commissioners continued¹:

'So approaching the matter we are of opinion that the Kilmore/Opendy agreement was entered into by Kilmore with the object both of enabling that company to develop the Landywood Estate and of facilitating the scheme for avoiding liability to income tax referred to in paragraph 2 (2) above. In our view the latter object was on the facts of the case one of the main purposes, and not a mere secondary consequence, of the entering into by Kilmore of the agreement, and the outlay totalling £19,240 was thus incurred by Kilmore for dual purposes being purposes one of which was, and one of which was not, a trading purpose.'

In other words the Special Commissioners clearly took the view that the factual position was not that this was a case of payments made under a trading agreement which happened also to carry with them incidental fiscal advantages but payments which, though made pursuant to the provisions of the trading agreement, had as 'one of their main purposes' the avoidance of liability to income tax in accordance with the objective of the Downes scheme as a whole. Thus, the Special Commissioners concluded, one of the main purposes of the making of the payments in question being tax avoidance, even though the agreement also had as its objective the development of the Landywood Estate, it could not be said that these payments were admissible as a deduction under s 137 (a).

Counsel for Kilmore vigorously challenged this reasoning. He argued that if once a trading concern entered into a contract under which it could earn profits and intending to earn profits thereunder and that contract required that trading concern to make any outlay or payments without the making of which it could not earn those intended profits, those outlays or payments were made for the purpose of earning those profits and were thus wholly and exclusively laid out or expended for the purposes of the trade in question. The mere existence of a double motive was not sufficient to prevent these payments to Opendy being admissible deductions and they did not cease to be admissible deductions because there was a tax advantage to be thereby gained. Motive, he argued, was irrelevant at least in the case of expenditure of this kind. If the trading concern had to spend the money or to make the payment in question in order to earn the profits, then the expenditure in question was properly deductible.

Counsel for Kilmore referred us to many well-known authorities on this topic such as *Smith's Potato Estates Ltd v Bolland (Inspector of Taxes)*² and *Bentleys, Stokes and Lowless v Beeson (Inspector of Taxes)*³. But I would venture respectfully to repeat the warning given both by Viscount Simon who was in the minority and by Lord Porter who was in the majority in the former case that in cases of this kind it is 'better' (per Viscount Simon⁴) or 'safer' (per Lord Porter⁵) to have regard to the language of the statute and then apply to that language the facts of a particular case rather than rely too greatly on the language used in some of the judgments in cases arising under this section. Counsel for Kilmore emphasised—correctly—that there is no reference to motive in s 137 (a). He also sought to draw a distinction between what he called 'overhead' expenditure and 'trading' expenditure, a distinction which perhaps merits the comment that it too finds no mention in the relevant statutory provision. I would agree with counsel when he said that the Crown has no right to rewrite a trader's contract so as to produce a different fiscal result from that produced by the contract as actually concluded by the trader. Any trader must be free to make

1 See p 677, ante

2 [1948] 2 All ER 367, [1948] AC 508, 30 Tax Cas 267

3 [1952] 2 All ER 82, 33 Tax Cas 491

4 [1948] 2 All ER at 369, [1948] AC at 517, 30 Tax Cas at 285

5 [1948] 2 All ER at 371, [1948] AC at 520, 30 Tax Cas at 288

a his own contracts on his own terms as he thinks it is best in his interests to do: see *Craddock (Inspector of Taxes) v Zevo Finance Co Ltd*¹ per Lord Wright. But to accept that submission does not without more involve acceptance of the submission that everything payable under such a contract is of necessity admissible as a deduction under s 137 (a). Were it otherwise I think that *Littlewoods Mail Order Stores Ltd v McGregor (Inspector of Taxes)*² would have been differently decided. Yet in that case both Sachs LJ and Karminski LJ emphasised that the court must look at the true nature and purpose of the expenditure claimed to be deductible. And I am unable to accept counsel's suggested distinction of that case on the ground that the expenditure there in question was of an overhead rather than of a trading nature, for the statute prescribes a single universal criterion for determining whether the expenditure is deductible or not.

c It is a striking fact that when Mr and Mrs Downes on 5th April 1962 caused Kilmore to enter into the agreement with Opendy and pay Opendy sums which in the event totalled £77,250 for the benefit of the Roodhouse contract, they were requiring Kilmore to pay those sums for an asset which six days earlier, namely on 30th March 1962, they had caused A J Downes & Sons Ltd to sell to a Harlox company for £2,250. It is not perhaps surprising in those circumstances that the Special Commissioners took the view that there were two elements in the sums which Kilmore was thereby committed to pay, first a sum of £2,250 which apparently represented the genuine value of this contract on 30th March 1962 and secondly an element of what counsel for the Crown described as 'bounty' in favour of those who were intended to benefit from the transactions when viewed as a whole. There is a finding in the special case³ that the directors of A J Downes & Sons Ltd considered the price of £2,250 'was a good one fully reflecting the then value of the building agreement'. It is true that the Special Commissioners do not go on to find that that was in fact the then value of the building agreement but it must, I think, be taken to be their conclusion that this had been the view of the Downes directors at the material time. If this is right, then of the figure of £77,250 agreed to be paid six days later, it is difficult to see how more than £2,250 can truly be said to represent the arm's length value of the Roodhouse agreement. There is thus ample evidence to justify the Special Commissioners' conclusion that a second main motive in agreeing that these payments should be made was to benefit the Downes family rather than Kilmore. In truth of course the provision for these payments by Kilmore to Opendy was designed not to benefit Kilmore by enabling Kilmore to earn large profits but to diminish the large profits which it was hoped Kilmore might one day earn—as in fact Kilmore did one day earn—for Kilmore was required to pay to Opendy what that Harlox company had agreed to pay in order to produce what it was hoped would prove to be a tax free profit for the Downes family.

g What to my mind is virtually fatal to the arguments of counsel for Kilmore on this appeal is the recent decision of the Judicial Committee of the Privy Council in *Inland Revenue Comr v Europa Oil (NZ) Ltd*⁴. That appeal to the Privy Council arose under the corresponding section of the New Zealand Land and Income Tax Act 1954, s 111. Though the language of that section is different from that of s 137 (a) of the 1952 Act, its effect is not different so far as concerns the present appeal. The facts of that case were highly complex and do not require repetition here. Their Lordships were divided in opinion but I do not read the minority opinion of Lord Donovan and Viscount Dilhorne as differing on any matter of principle. The minority opinion differed in the application of the complex facts of the case to principles which were not in dispute.

1 (1946) 27 Tax Cas 267 at 289, 290

2 [1969] 3 All ER 855, [1969] 1 WLR 1241, 45 Tax Cas 519

3 See para 7 (3), p 672, ante

4 [1971] AC 760, [1971] 2 WLR 55

The crucial question was whether the respondents were entitled to off-set certain expenditure incurred by them under what was called 'the products contract' as having been exclusively incurred for the purchase of Europa's trading stock. There was no right, it was said, to deny to the respondents a trader's normal right to deduct from his revenue the whole expenditure which he incurred in purchasing his trading stock. The majority of their Lordships accepted that it was not for the Crown or the court to say how much he had spent. But as Lord Wilberforce said¹ delivering the opinion of the majority:

'For a claim to disallow a portion of expenditure incurred in purchasing trading stock to succeed, the Crown, in their Lordships' judgment, must show that, as part of the contractual arrangement under which the stock was acquired some advantage, not identifiable as, or related to the production of, assessable income, was gained, so that a part of the expenditure, which can be segregated and quantified, ought to be considered as consideration given for the advantage. Taxation by end result, or by economic equivalence, is not what the section achieves.'

Applying that test to the present case, that in my judgment is precisely what the Crown on the facts found is able to show. Here a part of the expenditure sought to be deducted can clearly be isolated. It was not expenditure made for the purpose of Kilmorie making profits. It clearly does not fall within the language of s 137 (a). It was expenditure which Kilmorie was required to make reducing its own profits, in order that others, parties to different individual transactions which were part of the main scheme, might gain. I would only add with reference to counsel for Kilmorie's argument that it was 'nonsense' to tax Kilmorie on the Opendy payments but not on the Roodhouse payments that the latter were clearly made because Kilmorie took over the obligations originally assumed by A J Downes & Sons Ltd under the Roodhouse agreement which was (as found) an arm's length agreement. These payments were therefore altogether in a different category from the Kilmorie payments to Opendy. They were, it would seem, payments which A J Downes & Sons Ltd had to agree to make in order to get the benefit of the Roodhouse agreement. Kilmorie having assumed that obligation previously resting on A J Downes & Sons Ltd had similarly to make those payments. But the payments to Opendy were, as I have already sought to show on the facts found, quite different in their nature purpose and intent. I therefore think that the Special Commissioners and Megarry J² were plainly right on the fifth appeal and I would dismiss Kilmorie's appeal.

STAMP LJ (read by Roskill LJ).

The Higgs transactions

Mr Alan Edward Higgs appealed to the Special Commissioners against assessments to income tax made on him under Case I of Sch D in respect of the profits of the trade of land dealer and developer for each of the years 1960-61 and 1961-62 in the sum of £170,000. There was only one sum of £170,000 and the taxed assessments were alternative assessments. Heard, by agreement, with those appeals was an appeal by the trustees of a settlement made by Mrs Higgs, who received it, against an assessment in a like sum for the year 1960-61.

The commissioners who heard the appeals concluded that Mr Higgs engaged in an adventure in the nature of trade but that the sum of £170,000, having been received by the trustees on the understanding that they would pass it on for the purpose of the scheme which they described, and, taking the view the trustees might never get it back in full concluded that the sum of £170,000 was assessable for neither 1960-61 nor 1961-62 and they reduced the assessments to nil.

1 [1971] AC at 772, [1971] 2 WLR at 63

2 [1972] 2 All ER 817

a From these decisions the Crown appealed. The appeals came before Megarry J¹ who held that there was ample evidence on which the commissioners could reach the conclusion that Mr Higgs had engaged in an adventure in the nature of trade, that it mattered not the trustees having received the £170,000 (in 1960-61) were bound in advance to lend it for the scheme and that Mr Higgs was assessable in that sum for that year. From that decision Mr Higgs appeals to this court. Inevitably as the result of that decision, Megarry J dismissed an appeal by the Crown against the decision of b the Special Commissioners allowing the appeal of the trustees. The inspector of taxes now appeals against Megarry J's decision contending that if Mr Higgs was not properly chargeable in respect of the £170,000 the assessment made on the trustees in that sum for 1960-61 should be restored. What is said in relation to the latter appeal is that the trustees were the persons who received, or were entitled to, the income derived from the adventure and consequently, by virtue of s 148 of the c Income Tax Act 1952, they were chargeable.

The facts found by the commissioners as a result of the evidence, both oral and documentary, adduced before them are set out in para 5 of the stated case² and for the purpose of this judgment I will treat myself as having read them at this point in full. I will only remark as to the detailed findings, because at one point it had seemed to me this might be material, that there is no finding as to the number of shares in the d Higgs companies owned by Mr and Mrs Higgs respectively. What emerges is this:

(1) On 30th March 1961 properties belonging to companies controlled by Mr and Mrs Higgs were sold to the partnership in which Mrs Higgs had a 90 per cent interest, and which had been formed a month earlier for the purpose of buying them, for £86,825. At the same time two small parcels of land needed to give access to one of the properties were sold by Mr Higgs to the partnership for £310 making a total e purchase price of £87,135.

(2) A week later on 5th April 1961 the properties so sold were under the so-called agency agreement of that date agreed to be developed by Coventry, a property dealing f company controlled by Mr Higgs, on terms under which, shorn of trimmings, over a period of three years Coventry was to pay Downry, a company in the Harlox Group in which Mr and Mrs Higgs had no interest, the sum of £287,135. The difference between the £87,135 paid on 30th March and the sum of £287,135 agreed to be paid on 5th April, namely £200,000, had, as a result of the intermediate transactions set out in the stated case, emerged indirectly in the form of £30,000 retained or to be received by the Harlox Group as their 'cut' on the transaction and £170,000 paid to the trustees of the settlement made by Mrs Higgs.

(3) Of the sum of £287,135 agreed to be paid by Coventry, over the three year period g during which it was contemplated that the properties would be developed or realised, £257,135 was pursuant to the agreement between Downry and Coventry paid in advance or deposited with Downry. To facilitate this payment in advance the trustees lent their £170,000 to Coventry. There is no finding by the Special Commissioners how the £87,135, the balance of the £257,135 deposit, was found and h it cannot be taken to have been lent to Coventry by the Higgs vendor companies out of the purchase moneys received by them.

(4) It is not clear, and is I think immaterial, whether the £200,000, being the difference between the price to the Higgs vendor companies on 30th March (less the £310 paid to Mr Higgs, which can, I think, be ignored) and the sum agreed to be paid by the other Higgs company, Coventry, emerged as the result of sale at an under-value by the former companies or an acquisition by the latter at an over-value i or partly by each. The fact remains that as a result of the transactions which took place the properties of the former companies were exploited in such a way that £200,000 emerged at the expense of the former or the latter or both, and was paid;

1 [1972] 2 All ER 817

2 See pp 662-664 ante

as to £170,000 to the trustees of a settlement for the benefit of Mr Higgs and his children. a

The commissioners drew certain inferences of fact from the nature of the transactions before them (to which they had referred in detail) as evidenced by the documents and from the oral evidence: first (and this is not challenged), that all the transactions were planned in advance at one and the same time, and each was carried through on the understanding that all subsequent ones would be carried through; b
secondly (and this is not challenged), that the broad object was that properties belonging to the Higgs companies would be profitably developed by a Higgs company, but in such a manner that (it was hoped) a large slice of the expected profit would escape tax. This escaping of tax, remarked the commissioners, explained the complicated chain of transactions and was the reason for the participation therein of the Harlox companies, for which the Harlox Group was to receive £30,000; and c
thirdly, that the person who put the scheme into operation and was in control of it throughout was Mr Higgs: they did not mean by this that he planned or even understood the details, which he left to his professional advisers; what they meant was that they regarded the whole scheme as his operation. They regarded Mrs Higgs and the trustees, as well as the Higgs companies, as persons who acted at his behest and in accordance with his wishes, and they regarded the Harlox companies as participating with his agreement and because he was prepared to make it profitable for them. d

It was submitted to this court that Mr Higgs did not trade in anything. The subject-matter of the transactions which took place—the properties and the 90 per cent share in the partnership—were never the property of Mr Higgs. He never dealt with them. He did not make the settlement. He ventured nothing. Neither did he receive nor did he ever become entitled to any part of the £170,000 and he never had any interest in it except as a discretionary object under the settlement which was e
made by Mrs Higgs. To no single one of the complicated series of transactions which took place was Mr Higgs a party. What put the £170,000 in the hands of the trustees were acts done by companies of the Harlox Group and Mrs Higgs; for it was obtained as the result of the acquisition by the trustees by way of gift of a share in the partnership of nominal value and its sale for £170,000 a few days later after the partnership had acquired the properties for £87,135. At that time Mrs Higgs had ceased to have a f
financial interest in the partnership. If you pick out and examine each transaction separately you accordingly find that the £170,000 was 'made' by the trustees at the expense of the Harlox Group. If you look at them together and as a whole you find it was made at the expense of one or more Higgs company as the result of a series of acts done by Higgs companies (in which I include Coventry), Mrs Higgs, the Harlox Group and the trustees. There were, it is urged, no facts found by the commissioners on which any reasonable tribunal properly directed as to the law could have reached the conclusion that Mr Higgs was engaged in an adventure in the nature of trade. And in the course of the debate the rhetorical question was asked: what was the trade or adventure in the nature of trade? Far from being a trade or an adventure in the nature of trade the transactions were, so the argument runs, simply an exercise in the avoidance of tax which is not a trade. h

I will deal with the last submission first. It is true that if you find that transactions which would otherwise be trading transactions have been entered into for the purpose of either suffering a trading loss and setting off for the purposes of income tax that loss against other profits, or extracting money from the Revenue by way of a loss claim those transactions may be held not to be trading transactions: see e.g. *F A & A B Ltd v Lupton (Inspector of Taxes)*¹. It does not, however, in my judgment, follow that because a transaction or series of transactions is dictated by the desire to make a profit which is tax free there is no trading transaction. If there are two ways of exploiting a property at a profit, one of which is simple and will attract income tax j

a and the other of which is complicated and will, so it is hoped, avoid tax, it would be an untenable argument that because the more complicated way has been chosen for the sole purpose of avoiding tax, the exploitation of the property was not a trading transaction. The fact that in this case the avoidance of tax was the motive for exploiting the Higgs companies' properties in the way it was done is in my judgment nothing to the point.

b As I have said the commissioners found, and the finding is not contested, that all the transactions were planned in advance at one and the same time and each was carried through on the understanding that all subsequent ones would be carried through. So it was part of the plan that Mr and Mrs Higgs should, and they did, use their position as directors and shareholders of the Higgs companies to procure the sales to the partnership for £86,825. It was part of the plan that Mr Higgs should use his control of Coventry to procure that company to agree to pay a Harlox company c £287,135 for what had been sold by the Higgs companies for £86,825 a week earlier. It is true that Mr Higgs did not sell or acquire any properties; but he procured the Higgs companies to sell the properties and he procured Coventry to enter into the agreement with Downry. Either the Higgs companies could, by entering into a direct agreement with Coventry, have obtained for their properties a sum greatly in excess of the sum paid for them, or Coventry could have obtained them for a sum d far less than it was required to pay. By the effect of the dealings which took place the Higgs companies and Coventry were between them stripped by £200,000. Mr Higgs used his position as a director to procure them to do the acts which had this result and he contrived that of this sum of £200,000, £170,000 should be paid to trustees for the benefit of himself and his children.

e If a man being in control of one company procures it to sell its property to him for £87,000, and then a few weeks later procures another company controlled by him to purchase that same property from him for £277,000, I would conclude, whatever breach of his fiduciary duty he might have committed, that he had concerned himself in an adventure in the nature of trade; and if he so arranges it that the first sale is made to another party and the second sale by a third party and that there shall be intermediate transactions from which he, or a trustee for himself and his family, f acquires part of the difference of £200,000 which so emerges, it is I think open to commissioners properly to find that he has carried on an adventure in the nature of trade. In my judgment not only did the commissioners properly find that Mr Higgs engaged in an adventure in the nature of trade but no other conclusion was properly open to them. I accept the remark of Megarry J to the effect that the categories of trading are not closed and while remembering that the words of judges are not to be taken out of their context or construed as if they were contained in an Act of Parliament, I derive comfort for my conclusion from the remarks of Lord Buckmaster in *Ducker v Rees Roturbo Development Syndicate Ltd*¹ where he spoke of 'a gain made in an operation of business in carrying out a scheme for profit-making'. Counsel for the Crown in the course of his argument remarked that no doubt what was done was odd and unusual, but, as he said, no doubt more odd and unusual schemes to make money will come before the courts.

g I would, however, if necessary answer the rhetorical question, what was the adventure in the nature of trade in which Mr Higgs engaged himself? by holding that it was the exploitation by Mr Higgs (and perhaps Mrs Higgs), by arrangement and in collaboration with the Harlox Group, of the properties belonging to Mr Higgs's companies with a view to extracting from those companies or another company a profit or sum h of £200,000, which ought to have been theirs, and of which £30,000 accrued to the Harlox Group as the price of their participation in the venture and £170,000 was paid to the trustees for the benefit of Mr Higgs and his children.

j It was the Crown's contention before the commissioners that the £170,000 which

the trustees, as the commissioners put it, became entitled to receive was profit assessable for either 1960-61 or 1961-62. Taking the view that since it was the understanding that the trustees should pass on the £170,000 which they might not get back, or might not get back in full, and that on their understanding of the agreement between Coventry and Downry the development of the properties must yield £30,000 for the Harlox Group and the £87,135 payable to the Higgs vendor companies before Mr Higgs's trading venture produced a profit, the commissioners determined the assessments on Mr Higgs at nil and discharged the assessments on the trustees.

I share the view of Megarry J, though I would put the matter somewhat differently, that the fact that the trustees were expected or bound to lend the £170,000 at interest for the purpose of the scheme does not prevent it from being a realised profit of the adventure. Where a taxpayer engaged in the trade of buying and selling land sells a plot of land at a profit but on the terms that part of the price is left on loan to the purchaser at interest the profit falls to be assessed regardless of the fact that in the end the loan or part of it may be irrecoverable. Indeed the contrary was hardly argued in this court. Had Mr Higgs, the person engaged in the adventure, received the £170,000 on the terms that he should lend it at interest it would in my judgment have been properly brought into account as a receipt of the trade in the year it was received.

In my judgment, however (and the Crown hardly argued to the contrary), the trustees and not Mr Higgs are the parties to be assessed. I accept the submission that Mr Higgs never received the profit and never became entitled to it. The trustees on the other hand became entitled to and did receive it within the meaning of s 148 of the Income Tax Act 1952. It was argued before the Special Commissioners that if there was an adventure in the nature of trade the assessment ought to have been on Mr and Mrs Higgs jointly; for Mrs Higgs, as one of the two persons controlling the Higgs vendor companies, was a necessary party to the sale of the properties to the partnership and played a more active part than her husband. But Mrs Higgs like her husband never became entitled to nor received the £170,000, so that whether the adventure be regarded as a separate venture by Mr Higgs or as a joint venture by Mr and Mrs Higgs the trustees are in my judgment the proper persons to be assessed.

The Downes transactions

In one of the cases arising out of the Downes transactions Mr Albert James Downes appealed to the Special Commissioners against an assessment to income tax made on him under Sch D for the year 1961-62 in the sum of £75,000 in respect of profits of himself and his wife as property dealers. Heard, by agreement, with that appeal was an appeal by the trustees of a settlement made by Mr Downes's wife, Mrs M J Downes in the sum of £60,000 in respect of profits in connection with the sale of their interest in the partnership referred to in the case stated.

The Special Commissioners held that neither Mr nor Mrs Downes was at any time engaged in carrying on personally in relation to the property concerned any trade or adventure or concern in the nature of trade and they discharged the assessment on Mr Downes.

Because it was not sought on behalf of the Crown to contend that the trustees themselves carried on any trade or to support the assessment on the trustees otherwise than in the event of Mr Downes or his wife being held to have been carrying on personally a trade or adventure or concern in the nature of trade and because the assessment on the trustees was made against the event of Mr Downes and Mrs Downes nevertheless not being held to be assessable in respect of the profit thereof by reason of the profit having been received by the trustees, the assessment on them was also discharged.

The Crown appealed against both decisions. The appeals came before Megarry J¹ along with other appeals including that in *Ransom v Higgs* to which the scheme

a adopted in the instant case bore certain resemblances. He reversed the decision of the Special Commissioners, holding that on the primary facts found by the commissioners it seemed to him that the true and only reasonable conclusion contradicted the conclusion that neither Mr Downes nor Mrs Downes was carrying on an adventure in the nature of trade. He directed that the assessment on Mr Downes should be restored but in the sum of £60,000 and not £75,000. Because the assessment on the trustees was alternative he upheld the decision by the commissioners in this regard.

b The facts found by the commissioners as the result of the evidence both oral and documentary adduced before them are set out in the stated cases. The documents have been made available as part of the case. What emerges is this.

(1) Immediately prior to 30th March 1962 A J Downes & Co Ltd, building contractors (hereinafter called 'Downes') were entitled under a building agreement dated 21st March 1962 to develop an estate known as 'the Landywood Estate' belonging to the concern called K J Roodhouse Ltd on terms as to payment by Downes of £67,500 therein mentioned.

(2) On 30th March 1962 Downes, a company of which Mr and Mrs Downes and one Southall were directors, sold the benefit of the building agreement to Sproul Bros Builders Ltd for £2,250. The commissioners had before them evidence that this sum fully reflected the value of the agreement.

d (3) A week later, on 5th April 1962, the benefit of the agreement so sold was resold by a company referred to as Opendy to a company referred to as Kilmorie, a property dealing company in which Mr and Mrs Downes were the sole shareholders, on terms under which, shorn of their details, Kilmorie was to undertake the obligations under the building agreement (including the payment of £67,500 to be made thereunder) and pay £77,250 and interest which was to be paid over the period of the development of the properties. The difference between the £2,250 paid on 30th March and the sum of £77,250 agreed to be paid for the benefit of the building agreement had, as a result of the intermediate transactions set out in the stated case, emerged indirectly in the form of £60,000 paid to the trustees of the settlement made by Mrs Downes, and as to the balance by companies participating in the schemes not controlled by Mr and Mrs Downes.

f (4) Under the Kilmorie agreement £62,500 was to be deposited or paid in advance by Kilmorie with or to Opendy. To facilitate this deposit the trustees lent Kilmorie the £60,000 they had received the previous day at interest.

The scheme bore a similarity to that adopted 12 months earlier in the Higgs cases; but it is clear that in this case it was Kilmorie which was exploited, for that company incurred a liability to pay £77,250, for an asset which had been sold a week earlier for £2,250.

g As appears from the case the commissioners did not accept the evidence of Mr Downes that there was no arrangement as to what Sproul Bros Ltd were to do with the building agreement or that it was not necessarily the case that it was always clear that one of his companies would develop the land. On reviewing the evidence they drew therefrom inferences of fact including: (1) The fact that the whole series of transactions was planned from the outset and that each of the transactions in the series set out in the case was carried through in the expectation that all subsequent ones would also be carried through. (2) The transactions were planned with a view to enabling the development of the Landywood Estate to be carried out by a company or companies controlled by Mr Downes and at the same time to so arrange matters that if as a consequence of such development a substantial profit arose a large slice of that profit would not attract liability to income tax. (3) Mr Downes, having authorised the preparation of such a scheme, left its detailed working out to his professional advisers. The scheme as it was worked out involved arrangements whereby certain companies not controlled by Mr Downes participated in it.

j I share the view in effect expressed by Megarry J that the essential features of the dealings which took place were substantially the same as those to which I have

referred in the Higgs cases and would hold on grounds similar *mutatis mutandis* to those I have expressed in that case that on the primary findings of fact of the commissioners Mr and Mrs Downes engaged themselves in an adventure in the nature of trade. I find the rhetorical question, what was the adventure in the nature of trade in which Mr and Mrs Downes engaged themselves? less susceptible to a simple description. Doing the best I can I would describe it as the exploitation of an asset owned by Downes by procuring or contriving, in collaboration with other companies, the sale to Kilmorrie at an over-value in excess of £60,000 with a view to obtaining a profit which would not enure to Downes but to the trustees of a settlement for the benefit of Mr and Mrs Downes, their children and remoter issue. a
b

The Special Commissioners acceded to the submission that because neither Mr nor Mrs Downes at any time undertook personally any sale or purchase in connection with the transactions affecting the Landywood Estate, neither of them was at any time engaged in carrying on personally in relation to the estate any adventure or concern in the nature of trade. That was the ratio of their decision and in my judgment it was wrong in law. One who by virtue of his shareholding is in control of two companies and procures the sale of an asset by one company to another on the terms that there shall be paid to himself a commission on the deal may be just as much carrying on an adventure in the nature of trade as any broker; and the fact that the payment is made or emerges in the course of a complicated series of transactions which have been planned in advance by him but to which he is not a party can in my judgment make no difference. Nor in my judgment is the venture any the less an adventure in the nature of trade because the commission is planned to emerge, and emerges, as a payment to trustees holding on trust for himself and his family. I cannot accept that directors of a company who use their votes to commit the company to a sale to another concern, but with a view to exploiting the asset sold for their own advantage, are not acting 'personally' but merely as directors. The acts done by Mr and Mrs Downes as directors of Downes and Kilmorrie cannot in my view be regarded as not done by them also in their personal capacity. I would reject the conclusion of the commissioners that neither Mr nor Mrs Downes personally undertook any of the transactions which took place. To hold otherwise would be to conclude that a director who procured one of his companies to sell a property to another of them on the terms that a commission was paid to a trustee for the director could never be held to be engaged in an adventure in the nature of trade. c
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For the reasons I have given in the Higgs case I would discharge the assessment on Mr and Mrs Downes and allow the Crown's appeal against the trustees.

Arising out of the Downes transactions was an assessment to income tax on Kilmorrie under Sch D for the year 1964-65 in the sum of £19,240 in respect of profits arising from property development. The Special Commissioners, in effect disallowing the deduction, upheld the assessment, and Kilmorrie's appeal against the assessment was dismissed by Megarry J. g

Pursuant to the agreement with Opendy of 5th April 1962 Kilmorrie during the years ended 31st March 1963, 1964 and 1965 made the payments to K J Roodhouse Ltd which Downes had contracted to make under the building agreement dated 21st March 1962. No question arises regarding these payments which amounted in the aggregate to £67,950. In addition Kilmorrie pursuant to its agreement with Opendy, made payments to Opendy amounting in the aggregate to £77,250, this sum representing the difference between the sum agreed to be paid by Downes to K J Roodhouse Ltd for the benefit of the building agreement on 21st March 1962, and the price agreed to be paid by Kilmorrie to Opendy on 5th April 1962, for the benefit of the same building agreement. That difference by the effect of the transaction described in the stated cases found its way as to £60,000 into the hands of the trustees of Mrs Downes's settlement and as to the balance was absorbed by the companies h
i

a not controlled by Mr and Mrs Downes which took part in those transactions. Of that difference £19,240 was paid by Kilmorie to Opendy in the year to 31st March 1964 and was sought to be deducted by Kilmorie in computing its profits arising from property development as money wholly and exclusively laid out or expended for the purposes of Kilmorie's trade, and is the subject-matter of the controversy. That the payments made by Kilmorie to Roodhouse in accordance with the Roodhouse building agreement are deductible is not in question.

b It was submitted on behalf of the taxpayer that if a trader enters into what is from his point of view a trading agreement and this provides for the taxpayer to make certain payments all those payments to whomsoever made and for whatsoever purpose must of necessity be paid exclusively for the purposes of his trade. The Revenue cannot, so it is urged, dissect the payments made under a single agreement.

c This submission, if well founded, would as I see it lead to absurdities: e.g. a trader enters into an agreement to purchase goods at an excessive price on the terms that part of that price is paid to a relation of the purchaser to whom he wishes to make a gift. This submission was made as well before Megarry J as before this court and because I can find no fault in the careful reasoning by which he rejected it, which I would gratefully borrow, I would dismiss the appeal. That in a sense results in double taxation, but it is a commonplace of income tax law that a payment made by a trader—e.g. sums paid to a builder for building a factory—may not be deductible in computing the profits of his trade but must nevertheless be brought into account in computing the profits of the builders' trade.

RUSSELL LJ. The judgments that have just been delivered deal comprehensively with the complex facts and wide range of debate in these cases. In saying that I entirely agree with their conclusions I wish to make only one general observation. As I see it the critical question is one of approach. Is it right to regard each episode in a complex scheme as a separate event in which the only actors are the direct participants in that episode? In such cases as these I think not. In each case the spouses were in a position of command over the assets and profitability of a company, and in one of them, on the findings of the commissioners, where the assessment was in respect only of an alleged trade of the husband, he was also in command of his wife's decisions. Suppose one person to be in such a position of command, and the company to occupy a position from which it appears that in the ordinary course of direction by the board its trading activities would throw up a profit of £x. Suppose a scheme of the character that we have seen in these cases, expressly designed and carried through by the person able to control the company in order to siphon off a profit of £y (leaving £x-y to the company) into a container, whether his own pocket or a settlement desired by him. It may well be that no one, the company remaining solvent and profitable, can complain. But it can in my view be fairly said that that person has carried out a profitable adventure in the nature of trade notwithstanding that the assets that he has turned to his own account were not his assets but those of the company. The analogy may be, as analogies so often are, imperfect; but the conductor of an orchestra is responsible for the performance of the symphony although he plays no instrument. Even more so if he happens to control the performing rights in the work.

Appeal (8) dismissed.

j *Appeals (9) and (10) allowed.*

Appeal (13) allowed; assessment restored.

Appeal (14) allowed; case remitted to Special Commissioners.

Solicitors: Pickering, Kenyon & Co (for the taxpayers); Solicitor of Inland Revenue.

Rengan Krishnan Esq. Barrister.

Ford-Hunt and another v Raghbir Singh

CHANCERY DIVISION

BRIGHTMAN J

20th FEBRUARY, 7th MARCH 1973

Judgment – Order – Supplemental order – Jurisdiction to make supplemental order – New facts – Plaintiffs obtaining order for specific performance – Subsequent application by plaintiffs for supplemental order for enquiry into damages – Supplemental order limited to damage arising after date of order for specific performance.

By an agreement in writing made on 7th February 1972 between the plaintiffs and the defendant, the defendant agreed to sell and the plaintiffs agreed to purchase certain freehold property, the completion date to be 7th March. On 11th April the plaintiffs issued a writ against the defendant in which they claimed specific performance of the agreement and, further or alternatively, damages for breach of contract. On 21st July an order was made in favour of the plaintiffs that the agreement should be specifically performed and carried into execution, the completion date to be 16th August. The order did not include a direction for an enquiry as to damages although, had the plaintiffs then sought such an enquiry, a direction would have been included in the order. On 5th September the plaintiffs issued a summons, as a result of which a further order was made on 7th December nominating a Master of the Supreme Court to execute the transfer and also directing the defendant to deliver up vacant possession to the plaintiffs. On 29th December the plaintiffs issued a notice of motion in which they sought an order, supplemental to the order of 21st July, that there should be an enquiry whether the plaintiffs had sustained any and what damages by reason of the defendant's delay in completing the agreement.

Held – The court had power to make a supplemental order if and so far as the order was sought on new facts. Accordingly an order would be made, supplemental to the order of 21st July, that there should be an enquiry as to damages sustained by reason of the defendant's delay but the order would be limited to damage which arose after 21st July (see p 703 e and f, post).

Re Scowby, Scowby v Scowby [1897] 1 Ch 741 applied.

Glasier v Rolls (1889) 59 LJCh 63 distinguished.

Note

For the amendment of orders after drawn up, see 22 Halsbury's Laws (3rd Edn) 785, 786, para 1665.

Cases referred to in judgment

Glasier v Rolls (1889) 59 LJCh 63, 62 LT 305, CA, 50 Digest (Repl) 531, 1976.

Hall v Burnell [1911] 2 Ch 551, [1911-13] All ER Rep 631, 81 LJCh 46, 105 LT 409, 39 Digest (Repl) 470, 209.

Jacques v Millar (1877) 6 Ch D 153, 37 LT 151, sub nom *Jacques v Millar* 42 JP 20, 44 Digest (Repl) 155, 1346.

Jones v Gardiner [1902] 1 Ch 191, 71 LJCh 93, 86 LT 74, 44 Digest (Repl) 155, 1350.

Munro v Finlinson (1903) 116 LT Jo 109, 50 Digest (Repl) 431, 1335.

Scowby, Re, Scowby v Scowby [1897] 1 Ch 741, 66 LJCh 327, 76 LT 363, CA, 51 Digest (Repl) 870, 4211.

Cases also cited

Marshall v Berridge (1881) 19 Ch D 233, [1881-5] All ER Rep 908, CA.

Phillips v Lamdin [1949] 1 All ER 770, [1949] 2 KB 33.

Motion

- a** By notice of motion dated 29th December 1972, the plaintiffs, Holman Lancelot Ford-Hunt and his wife, Edith Mabel Ford-Hunt, sought against the defendant, Raghbir Singh, an order, supplemental to an order for specific performance made against the defendant on 21st July 1972, 'that there be an inquiry whether the plaintiffs have sustained any and what damages by reason of the defendant's delay in completing the agreement in the said order mentioned'. The facts are set out in the judgment.

b *Alan Steinfeld* for the plaintiffs.

The defendant appeared in person.

Cur adv vult

- c** 7th March. **BRIGHTMAN J** read the following judgment. The issue on this application is whether an enquiry as to damages ought to be added, by supplemental order, to an order for specific performance made in July 1972. Despite the frequency of specific performance decrees, legal reporting does not instance a similar application for almost 70 years.

- d** On 7th February 1972 an agreement in writing was made for the sale by the defendant, Raghbir Singh, to the plaintiffs, Holman Lancelot Ford-Hunt and his wife, Edith Mabel Ford-Hunt, of a property known as 7 Upper Holly Hill Road, Bexley, at the price of £5,750. The date fixed for completion was 7th March 1972. The plaintiffs state that they intended to raise the purchase money by means of a building society mortgage. The contract not having been completed on the due date, on 11th April 1972 the plaintiffs issued a writ against the defendant for specific performance
- e** of the contract and damages. The defendant did not enter an appearance.

- On 21st July 1972 an order was made that the sale agreement should be specifically performed and carried into execution. The date named in the order for completion was 16th August 1972, on which date the plaintiffs were to pay to the mortgagees the amount owing to them and were to pay the balance of the purchase money as the defendant might direct or, in default of any such direction, into court to the credit
- f** of the action. The defendant neglected to execute an instrument of transfer as required by the order, and therefore a further order was made on 7th December 1972 nominating a Master of the Supreme Court to execute the transfer, and also directing the defendant to deliver up vacant possession to the plaintiffs. That direction also was disobeyed, in consequence of which a writ of possession was issued. In the end the plaintiffs obtained possession in mid-January 1973, or thereabouts.

- g** One effect of the defendant's delay in giving up possession, it is said, was that the plaintiffs were unable to obtain, at the time when they first needed it, the building society finance which they had arranged. The building society would not advance the money until vacant possession was given. In the result, the plaintiffs say that they were compelled to arrange a bridging loan at considerable cost to cover the period between the time when they had to part with their purchase money and the time
- h** when they obtained vacant possession. They also claim to have suffered certain other damage by reason of the delay.

- The decree of specific performance did not direct an enquiry as to damages. Accordingly, on 29th December 1972 the plaintiffs issued a notice of motion asking for an order, supplemental to the order of 21st July 1972, that there be an enquiry whether the plaintiffs had sustained any and what damage by reason of the defendant's delay
- j** in completing the sale agreement.

A vendor who seeks specific performance is entitled to damages for delay, if he can prove that he has suffered damage: see *Jaques v Millar*¹, to which I shall refer later, and *Jones v Gardiner*². There is no doubt that, if the plaintiffs had asked, an

¹ (1877) 6 Ch D 153

² [1902] 1 Ch 191

enquiry as to damages would have been added to the order for specific performance. The question is whether an enquiry can be directed now. a

The plaintiffs do not rely on RSC Ord 20, r 11—the 'slip' rule. There was no clerical mistake in the order and no error arising from an accidental slip or omission. The plaintiffs rely on a principle which is stated thus in the Supreme Court Practice¹ in the notes to RSC Ord 20, r 11: 'There is jurisdiction to make upon proof of new facts an order supplemental to an original order . . .' This observation is almost a verbatim quotation from a passage in the judgment of A L Smith LJ in *Re Scowby, Scowby v Scowby*², although strangely enough that case is not noted in the Supreme Court Practice³ against the proposition which I have cited. The facts in *Re Scowby, Scowby v Scowby*⁴ were shortly as follows. In 1883 and 1884 a testator's estate became involved in administration and other proceedings instigated by a solicitor called Miller, whose purpose was to make costs. The parties to the administration proceedings included Mrs Scowby and her brother, John Coward, who became trustees of the estate and were the tools of Miller. In 1887 the taxed costs of the parties to the administration proceedings, amounting to £3,500 and almost all payable to Miller, were directed to be raised by Mrs Scowby and John Coward and paid into court. In 1892 two further orders were made, displacing Mrs Scowby and John Coward as trustees, but directing that certain costs should be paid to them. It later transpired that the £3,500 had not been paid into court but had been used by Miller for his own purposes. The new trustees issued a summons to vary the 1892 orders so that the costs thereby directed to be taxed should be disallowed to Miller. Kekewich J held that he had no jurisdiction to vary the 1892 orders, but that he could make a supplemental order directing the present trustees not to make any payment to Mrs Scowby or John Coward pursuant to the 1892 orders until the money directed by the 1887 order to be paid into court should have been duly lodged. Coward appealed. The jurisdiction to make such a supplemental order was upheld, as it was grounded on facts not available at the time when the 1892 orders were made, and did not alter the 1892 orders. b
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Another instance of a supplemental order is to be found in *Hall v Burnell*⁵. That was a vendor's action for specific performance. In 1911 Eve J made an order for specific performance. The purchaser failed to complete in accordance with the order. So the plaintiff moved for an order that the sale agreement should be rescinded and the deposit forfeited to the plaintiff. The order was made as asked. This was clearly a supplemental order based on facts occurring after the date of the previous order, as distinct from facts (as in *Re Scowby, Scowby v Scowby*⁴) occurring before but discovered after the date of the previous order. f

Counsel for the plaintiffs was not able to refer me to any reported case where an order for specific performance was varied by the later addition of an enquiry as to damages. Nor indeed, as he tells me, has the Chief Master had experience of such a case in chambers. g

The general rule is that a court has no jurisdiction to vary its order after the order has been passed and entered. For example, in *Glazier v Rolls*⁶ a question arose whether there could be added to an order, which had already been passed and entered, a direction that the costs to be taxed and paid by the unsuccessful party should include a transcript of the shorthand note of the evidence before the trial judge. The application failed, and Bowen LJ said this⁷: h

1 Supreme Court Practice 1973, vol 1, p 345, para 20/11/5, note-(3) i

2 [1897] 1 Ch 741 at 754

3 Supreme Court Practice 1973

4 [1897] 1 Ch 741

5 [1911] 2 Ch 551, [1911-13] All ER Rep 631

6 (1889) 59 LJCh 63

7 (1889) 59 LJCh at 65

a 'To seek to alter the judgment by asking that something may be embodied in it, the demand for which was not even thought of at the time, and was never brought to the attention of the Court, is really to ask us to make a different judgment from that which has already been perfected.'

The question before me is whether the case with which I am concerned falls within any recognised exception to that general rule.

b A case somewhat similar to the present came before Farwell J in 1903; it was a vendor's specific performance action, *Munro v Finlinson*¹. The only report which seems to exist is the extremely brief note that is to be found in the Law Times Journal. It reads as follows:

c 'In a specific performance action the vendors in their statement of claim claimed damages as well as the specific performance of the agreement. At the hearing the court ordered specific performance in the event of a good title being shown on inquiry, and gave the plaintiffs their costs if it appeared on inquiry that a good title could have been made before the action was brought. Nothing was said in the order as to an inquiry as to damages, nor were they asked for at the hearing. The certificate found that a good title could have been made before action brought; and on further consideration the plaintiffs asked for an inquiry into the damages sustained by them owing to the delay. All the facts were in the plaintiff's knowledge when the action was heard. Held, that under the circumstances the plaintiffs, not having made their demand when the original order was drawn up, were not now entitled to such inquiry.'

e In my view *Re Scowby*, *Scowby v Scowby*² is an authority which would justify my making the order which is desired in the present case if and so far as such order is sought on new facts. *Munro v Finlinson*¹ is too briefly reported to be of much value as a precedent, but the decision appears to be consistent with the reverse proposition, namely, that I ought not to make the order which is sought so far as it is based on facts which were known at the date when the decree of specific performance was made.

f In my judgment I am entitled to, and should, direct an enquiry as to damages sustained by reason of the delay, limited to damage which arose after 21st July 1972, the date of the decree for specific performance. Any such damage would be a new fact sufficient to ground a supplemental order.

g I shall, therefore, make an order, supplemental to the order of 21st July 1972, that there be an enquiry whether the plaintiffs have suffered any and what damage after that date by reason of the defendant's delay in completing the sale agreement. The damages so recoverable will be confined in the usual way³ to—

h 'the damages which may be reasonably said to have naturally arisen from the delay, or which may be reasonably supposed to have been in the contemplation of the parties as likely to arise from the partial breach of the contract.'

I express no view whether such damages would include the additional expense of bridging finance, over and above what would have been payable under a building society mortgage. That may be a matter for argument on the enquiry.

i The costs of the enquiry will be reserved in accordance with the normal practice. The plaintiffs also ask for the costs of this application. Clearly they would not be entitled to an order for such costs now, because if no damage is proved, this application ought not to have been made. The most that the plaintiffs could seek would be

1 (1903) 116 LT Jo 109

2 [1897] 1 Ch 741

3 Per Fry J in *Jacques v Millar* (1877) 6 Ch D at 160.

that the costs of this application be reserved until the enquiry is concluded. I will hear argument if requested, but I am at present minded to make no order as to the costs of this application on the ground that an enquiry as to damages would have been included in the order of 21st July 1972 if the plaintiffs had asked, but they failed to do so. The expense of this application could, therefore, have been avoided by the plaintiffs, and it would be wrong to throw on the defendant costs which the plaintiffs need not have incurred.

Order accordingly. No order as to costs.

Solicitors: *Wellers*, Bromley (for the plaintiffs).

Susan Corbett Barrister.

Nash v Nash

COURT OF APPEAL, CIVIL DIVISION

DAVIES, CAIRNS AND STAMP LJJ

16th FEBRUARY 1973

Divorce – Custody – Access – Taking child out of jurisdiction – Leave – Application for leave by parent having custody – Mother having custody of child – Mother obtaining appointment at South African university – Mother wishing to teach at university level and unable to obtain appointment within jurisdiction – Father holding strong views hostile to policies of South African government – Views expressed in print – Father fearing child would be indoctrinated – Fearing also that he would not be allowed into South Africa – Whether grounds for refusing to grant mother leave to take child out of jurisdiction.

The parties were married in March 1967 and had a daughter later that year. In May 1968 the mother left the father taking the child with her. In December 1969 she was awarded custody of the child by a court of summary jurisdiction and in November 1972 she was given leave to file a petition for divorce. She herself had a degree in art and taught for a while at a comprehensive school. She had wanted to teach art at university level but when her attempts to obtain a post of that kind in the United Kingdom failed she left the comprehensive school and took a job in an antique shop in London. In 1972 she was offered a two year appointment as an art teacher at a university in South Africa. The father, who was concerned in educational matters and wrote about education, disapproved strongly of the apartheid policy of the South African government. He feared that if the child went with the mother to South Africa (i) the child might become infected and even indoctrinated with the country's racist doctrines; (ii) that the mother, who had said that she was not interested in such matters, would take no steps to warn the child against those doctrines; (iii) that he might not be admitted into the country to see the child because of his strong views on its racialism expressed in his writings. The mother, who had said that she would not go to South Africa if prevented from taking up the appointment, applied for, and was granted, leave to take the child out of the jurisdiction. When asked about her attitude to apartheid she had said: 'I feel completely open about it. I shall judge for myself when I get there. I do not think one can always appreciate a country's present circumstances from newspaper reports. I think it is better to go and see for yourself'. She had also said she would not influence the child; she would let her make up her own mind. The father appealed.

Held – The appeal would be dismissed; it was a very strong thing for the court to make an order which would prevent a parent granted custody of a child following

- a her chosen career and in the circumstances it would be quite wrong for the court to debar the mother from taking up her appointment on account of fears of the father (see p 706 h and p 708 e and h, post).

Dictum of Sachs LJ in *P (LM) (otherwise E) v P (GE)* [1970] 3 All ER at 662 applied.

Notes

- b For leave to take child out of jurisdiction, see 12 Halsbury's Laws (3rd Edn) 392, para 869, and for a case on the subject, see 27 (2) Digest (Reissue) 913, 7315.

Cases referred to in judgment

P (LM) (otherwise E) v P (GE) [1970] 3 All ER 659, sub nom *Poel v Poel* [1970] 1 WLR 1469, CA, 27 (2) Digest (Reissue) 913, 7315.

- c *T v T* (1970) 114 Sol Jo 909, [1970] Bar Library transcript 404A, CA.

Appeal

- The father appealed against an order made by Finer J on 17th January 1973 ordering that the mother should have leave to remove the child of the family born on 16th August 1967, permanently out of the jurisdiction of the court to reside in the Republic of South Africa on her undertaking to return the child to the jurisdiction if so ordered by the court. The facts are set out in the judgment of Davies LJ.

S Tumin for the father.

P M J Slot for the mother.

- e **DAVIES LJ.** This is an appeal by a father against an order of Finer J made on 17th January 1973 whereby he gave leave to the mother to take the only child of the marriage, a girl some 5½ years old, to Grahamstown in South Africa, I will not say necessarily permanently, but in order to allow the mother to take up an appointment as an art teacher at the School of Fine Art at Rhodes University in Grahamstown.

- f The two main grounds of the father's appeal are: first of all, the long distance that the mother and child will be away from the father (he has been having monthly access to the girl); that the cost of his going to South Africa, or I suppose of the mother bringing the child back, would be very great; and that, owing to the strong views that he holds about the racist approach of the South African government to the natives there, which views he has expressed in writing, he might very well not be permitted to enter South Africa, and that in any event he would dislike intensely to be in that country. Secondly, and arising out of that last point, he expresses a lively fear that, if this little girl goes to and is brought up in South Africa, even if only for two years, which is the length of the mother's present appointment, the child might be infected with the doctrines that the government in that country favour, and indeed to some extent become indoctrinated. The third ground of substance that is put forward by counsel for the father is that the mother has expressly in her evidence stated that she is not interested in matters of that kind and would, save in exceptional circumstances, take no steps to warn the little girl or to bring her up in views opposed to the South African regime.

- h The parties—still very young—were married in March 1967 when the father was 23 and the mother 21. The father has a doctorate of philosophy of Edinburgh University and he is concerned in educational matters; he writes about education and has written at least one book. The mother, who has a degree in art, is, by profession, an art teacher, though presently she has been employed in an antique shop in Mayfair, having previously been teaching in comprehensive schools. The girl was born on 16th August 1967. The marriage proved very short-lived, the mother leaving on 20th May 1968 taking the child. In December 1969 the court of summary jurisdiction in Brighton awarded custody to the mother and made a small order of

maintenance for the child of £1 a week. That no doubt was because at that time the father was probably earning very little indeed. a

In January 1971 the mother filed a petition on the ground of the father's unreasonable conduct; and the case at one time was being defended, the father alleging desertion on the part of the mother. Eventually, on 30th November 1972, the mother was given leave to file a fresh petition, on the ground of two years' living apart; and in December of that year Faulks J by consent granted an injunction to prevent the mother from taking the child out of the jurisdiction until the summons as to custody and for leave to take the child out of the jurisdiction was heard. As I have said, it came before Finer J on 17th January when he made the order allowing the mother to take the child out of the jurisdiction and gave leave to appeal, which I do not think was necessary. He did not deal with an application by the father, who, on the basis of the judge's order allowing the child to be taken out, wished to have what, I suppose, he thought was a final visit to the girl, in the absence of the mother. The judge said that this court would have to deal with that application; and eventually we may have to have a discussion with counsel about that. b

In the forefront of his grounds of appeal the father complains that the learned judge put too much emphasis on some observations made in this court in *P (LM) (otherwise E) v P (GE)*¹. It is not necessary for me to discuss the facts in that case but just to make two short quotations, the first being from the judgment of Winn LJ²: c

'His right [i.e. the stepfather's right in that case] to do what he chooses with his life and to live where he chooses is, of course, in conflict, as the matter stands at this very moment, with the view of the court expressed by [the judge], since that order will prevent freedom for the stepfather in this particular respect.'

Then in Sach LJ's judgment³: d

'When a marriage breaks up, then a situation normally arises when the child of that marriage, instead of being in the joint custody of both parents, must of necessity become one who is in the custody of a single parent. Once that position has arisen and the custody is working well, this court should not lightly interfere with such reasonable way of life as is selected by that parent to whom custody has been rightly given. Any such interference may, as Winn LJ has pointed out, produce considerable strains which would be unfair not only to the parent whose way of life is interfered with but also to any new marriage of that parent.'

Our attention was also called to a similar observation by myself in *T v T*⁴. e

Counsel for the father has rightly pointed out that the facts in *P (LM) v P (GE)*¹ were vastly different from those in the present case. I entirely agree. One does not, I think, need to make comparisons between the facts of the two cases. But I emphasise once more that when one parent has been given custody it is a very strong thing for this court to make an order which will prevent the following of a chosen career by the parent who has custody. In the present case, if the mother is not permitted to take up her appointment in South Africa, she has declared her intention of not going there at all. She welcomes the appointment. She has been trying for a long time to get an art teaching job other than in a comprehensive school in this country and has failed; and that is why she went to take the job in the antique shop. She does not want to continue in that: she wants to teach art. So far as finance is concerned, she has been earning in the antique shop some £1,200 a year; and in South Africa her salary, though the cost of living is apparently higher, will be in the neighbourhood of £2,500. f

¹ [1970] 3 All ER 659, [1970] 1 WLR 1469

² [1970] 3 All ER at 661, [1970] 1 WLR at 1471

³ [1970] 3 All ER at 662, [1970] 1 WLR at 1473

⁴ (1970) 114 Sol Jo 909.

a Counsel for the father has forcefully put before us all the matters which are contained in his long and elaborate notice of appeal; but I do not propose to go through all of those. It is said by counsel that the father would not mind the mother going almost anywhere else in the world, but he says she has chosen the one country—I think this is probably hyperbole—of which the father so violently disapproves and to which in all practicability he thinks he will be unable to go and visit his little daughter.

b He says that the mother has made no proper enquiries about the cost of living and living accommodation and conditions in South Africa. I cannot agree with that observation. We have had put before us two letters, one of which is a letter from a Professor Bradshaw, who is at the School of Fine Art in Rhodes University, explaining quite fully the conditions that the mother is likely to find if and when she goes out to this university. That was a letter of 3rd October 1972. We have also before us a

c letter of 27th November from the registrar of the university dealing in a good deal of detail with schooling in South Africa, the possibility of getting a servant or a nanny to help with the daughter, and travelling arrangements; and so on and so forth. In addition to that, Professor Bradshaw was over in this country in December and the mother had the opportunity of having a conversation with him about conditions and opportunities if she goes out.

d Then, coming back to the apartheid question, I have already pointed out that the father is afraid that the child will be infected or indoctrinated with the views held by many people in South Africa. One would have thought that possibly the reaction might be the opposite; but one does not know. Then it is said with great emphasis by counsel for the father that the mother has expressly said that she will not take any steps to disabuse the child or make her dissatisfied with conditions and doctrines in South Africa. We were referred to one or two passages in her evidence in that

e regard with reference to her attitude to apartheid and her attitude in that connection to her little daughter. She was asked, right at the end of her evidence-in-chief: 'Have you ever been roused to an interest in the subject, or is your mind absolutely open?' This is with regard to the South African doctrines, of course. The answer was:

f 'I feel completely open about it. I shall judge for myself when I get there. I do not think one can always appreciate a country's present circumstances from newspaper reports. I think it is better to go and see for yourself.'

It seems to me that there is considerable force in that answer and that it is a sensible answer. She said that she had not read any books on the subject: all she had read about South Africa was in certain publications which she had had from the High

g Commission here. Then another passage to which we were referred in cross-examination:

'Q You realise, and now you must realise, do you not, that [the little girl] will be brought up at school to regard blacks as essentially inferior to whites? A Well, she is an intelligent child. She can make up her own mind when she is of age.'

h 'Q What sort of lead would you give her? A I would not influence her.'

'Q You would not influence her on that; I see. A No. I would not influence her on anything. I would let her make up her own mind.'

Later on the mother did say that if there were some special circumstances she would, if I may use the phrase, have a word with the girl about it.

i Another point made by counsel for the father is with regard to the mother's mother. She is some 61 years of age and has been divorced by, or more probably has divorced, her husband. We were not told the facts of that. Apparently she has no money except for the periodical payments which she gets from her former husband. It is pointed out that she was not called as a witness, though she was available to be called; so the judge had no opportunity of seeing her and estimating her character, and she is quite an unknown quantity. And, says counsel for the father, it is a part

of the mother's plan that that lady should go out to South Africa with them and live with them and, I suppose, be available to keep an eye on the little girl when the mother is at work. I see the force of that, and perhaps it would have been better if the grandmother had been called. But, save that it is suggested by the father, somewhat faintly, that the grandmother has been a disturbing influence during periods of access, there really is, as I see it, no suggestion of any weight at all against the mother's mother, and I do not think that that is a matter that should properly be taken into consideration in this case.

At the end of it all, one comes back to the principles enunciated by Sachs LJ in the case to which I have referred¹. The mother has been unable to get a job that suits her in this country. Her teaching job was in a comprehensive school, and she does not want to teach art to children of that kind; she wants to teach art at university level. She disliked the teaching that she was doing in this country so much that she took this job in the oriental antique shop that I have mentioned. She had the good fortune, having failed to get other jobs in this country, to see an advertisement which led to her being offered and accepting this appointment in Grahamstown. She was due to go there and start work on 1st January 1973, but that, of course, has had to be delayed pending the application to the learned judge and the appeal to this court.

I have, I think, considered everything that has been said to us by counsel for the father. One sympathises a great deal with the father, whose views obviously do not in anything like every respect correspond with those of the mother—not that there is anything against the mother at all. It does seem to me that it would be quite wrong for us to say to the mother that she cannot take this appointment because of the fears which the father has, some of them, I feel, somewhat unjustified, since the approach to this problem seems to be that as the result of the views held by the authorities in South Africa the whole place is completely uncivilised. I do not believe that that is the situation in a university town or that Grahamstown is anything like that at all. It seems to be an ordinary, civilised place, apart from this one very serious objection that the father has. I think that it would be wrong to prevent the mother on that ground from going out and taking the job which she has obtained.

This is not necessarily permanent. Of course, one cannot see ahead. It could turn into a long-term appointment in South Africa. It could, I suppose, result in the mother marrying again in South Africa. One just does not know. On the other hand, she might not like the job and not like conditions there and either give notice within her two year contract and get released from it or come back to this country at the end of the two year period.

In accordance with the views which the learned judge expressed in a very long and very careful judgment, in which he considered not only the matters to which I have adverted but all the many factors that came out in the affidavits and in the oral evidence of the parties, I agree with what he said and I agree with the order that he made. I think not merely that we ought not to interfere but that, in all the circumstances, it was the right and proper order; and I would dismiss the appeal.

CAIRNS LJ. I agree.

STAMP LJ. I agree.

Appeal dismissed.

Solicitors: *Donne, Mileham & Haddock* (for the father); *Ormerod, Morris & Dumont*, Croydon (for the mother).

F A Amies Esq Barrister.

Central Electricity Generating Board v Coleman and others

NATIONAL INDUSTRIAL RELATIONS COURT

SIR JOHN DONALDSON P, MR R DAVIES AND MR H ROBERTS

26th, 27th FEBRUARY, 5th MARCH 1973

Industrial relations – Trade union membership and activities – Rights of worker as against employer – Unfair industrial practice by employer – Discrimination by employer against worker by reason of exercise of such rights – Discrimination – Employers recognising four unions for negotiating and other purposes – Agreement for setting up of works committee – Committee consisting of representatives of management and of workers who were members of one of recognised unions – Two workers not being members of a recognised union seeking nomination for membership of works committee – Nomination papers rejected by employers because workers not members of a recognised union – Whether discrimination by employers against workers – Distinction in discriminating against workers and discriminating between workers – Industrial Relations Act 1971, s 5 (2) (b), (4).

The employers recognised four trade unions for the purposes of collective bargaining and negotiation on terms and conditions of employment. By virtue of an agreement between the employers and the four unions a works committee was established as part of the structure created for collective bargaining and the orderly settlement of disputes. The committee consisted of representatives of management and of certain elected workers. To qualify for election a worker had to be a member of one of the four recognised unions. A vacancy having occurred on the works committee, a notice was published inviting nominations to fill the vacancy. The notice stipulated that candidates for nomination had to be members of one of the recognised unions. Two employees ('the complainants') who were members of an unrecognised union submitted nomination papers which showed that they were not members of one of the recognised unions. The nomination papers were rejected by the employers. On a complaint of unfair industrial practice, an industrial tribunal found that the employers had discriminated against the complainants under s 5 (2) (b), (4)^a of the Industrial Relations Act 1971 and ordered (a) that the complainants had a right to be eligible for election to the works committee and (b) that the employers had no right to refuse to accept their nomination papers on the ground that they were not members of one of the recognised unions. The employers appealed.

Held – The appeal would be allowed as the employers had not 'discriminated against' the complainants within the meaning of s 5 (2) (b), (4) of the 1971 Act; those two subsections, which complemented one another, contemplated a detriment or a benefit suffered or enjoyed by a worker as an individual in the context of his contract of employment and were not aimed at discrimination in the sense of differentiation between certain groups of workers; the 1971 Act encouraged collective bargaining and the development of orderly procedures for settling disputes and it was inherent in the recognition of certain unions that for some purposes an employer would be obliged to discriminate between those of his employees who were members of the unions concerned and those who were not; since on the evidence the discrimination by the employers was between those workers who as members of a recognised union were eligible for election as union representatives and those who were not and was not discrimination against the complainants as members of the latter group, the qualifications applicable to candidates for election to the works committee did not involve

^a Section 5, so far as material, is set out at p 714 c to h, post

any unfair industrial practice and the employers were entitled to refuse nomination papers from either of the complainants (see p 715 a to g, post). a

Notes

For rights of workers in relation to trade union membership and activities, see Supplement to 38 Halsbury's Laws (3rd Edn) para 677B, 1.

For the Industrial Relations Act 1971, s 5, see 41 Halsbury's Statutes (3rd Edn) 2073. b

Case referred to in judgment

Electricity Supply Union v Central Electricity Generating Board [1972] ICR 418, NIRC.

Cases also cited

King v The Post Office [1973] ICR 120, NIRC.

Post Office, The v Ravyts, The Post Office v Cholmeley [1972] 3 All ER 485, [1972] ICR 174, NIRC. c

Appeal

This was an appeal by the Central Electricity Generating Board ("CEGB") against a decision of an industrial tribunal (chairman G M Smailes Esq) sitting in Leeds, dated 12th October 1972, on a complaint under ss 5 and 106 of the Industrial Relations Act 1971, that Roger Coleman and Ian James ('the complainants') had a right to be eligible as candidates for election to the works committee for Ferrybridge 'C' Power Station and that the CEGB had no right to refuse to accept a nomination paper from either complainant on the ground that he was not a member of a trade union which was a party to the agreement under which the works committee was established. The Electricity Council, the North of Scotland Hydro-Electric Board, the South of Scotland Electricity Board, the Amalgamated Union of Engineering Workers ('AUEW'), the Electrical, Electronic & Telecommunications Union/Plumbing Trades Union ('EET/PTU'), the National Union of General and Municipal Workers ('NUGMW') and the Transport and General Workers' Union ('TGWU') were added as parties to the proceedings under r 52 of the Industrial Court Rules 1971¹. The facts are set out in the judgment of the court. d
e
f

Richard Southwell for the CEGB.

Mr T Disken, solicitor, for the complainants.

Richard Havery for the Electricity Council, the North of Scotland Hydro-Electric Board and the South of Scotland Electricity Board.

The AUEW did not appear and were not represented. g

Alexander Irvine for the EET/PTU, the NUGMW and the TGWU.

Cur adv vult

5th March. **SIR JOHN DONALDSON P** read the following judgment of the court. In *Electricity Supply Union v Central Electricity Generating Board*² this court considered and rejected an application by the Electricity Supply Union ('ESU') for a reference to the Commission on Industrial Relations under s 45 of the Industrial Relations Act 1971, which deals with sole bargaining agencies. However, the judgment contained the following passage³: h

"There is, however, one observation which we make in conclusion. Paragraph (4) of the model constitution for works committees which is set out in schedule 3 to the [National Joint Industrial Council] agreement provides that no employee shall be eligible as a candidate for election to a works committee unless he is a i

¹ SI 1971 No 1777

² [1972] ICR 418

³ [1972] ICR at 428

- a member of [a National Joint Industrial Council] union. On the basis, which we accept as correct, that a works committee is not a negotiating body, it occurs to us to question whether this restriction is in conflict with section 5 of the Act of 1971. This section does not allow an employer to discriminate against a worker by reason of his exercising his right not to belong to a registered or unregistered trade union, save in special circumstances which do not apply here. We express no view on the answer to this question, because we have heard no argument and it is not an issue before us. We mention the question as one which the parties to the [National Joint Industrial Council] agreement might feel it right to consider.'
- b

In the event the parties had little opportunity of considering this question because the problem had already arisen in an acute form and the complainants made their application to the industrial tribunal within 48 hours of this court giving judgment.

- c The industrial tribunal sitting in Leeds unanimously found in their favour—
- 'that each of the complainants has a right to be eligible as a candidate for election to the Works Committee for Ferrybridge "C" Power Station and that the [Central Electricity Generating Board] have no right to refuse to accept a nomination paper from either complainant on the grounds that he is not a member of a trade union which is a party to the agreement under which the constitution of the Committee is established.
- d

From that decision the Central Electricity Generating Board ('CEGB') now appeals.

- The Electricity Acts of 1947 and 1957 imposed a statutory duty on the Electricity Council, the Scottish Electricity Boards and their respective predecessors to seek joint consultations with any appropriate organisation with a view to the conclusion of collective agreements for establishing and maintaining machinery for negotiating on terms and conditions of employment and allied matters. In pursuance of that duty an agreement was reached in March 1948 and this was replaced by the current agreement which was concluded on 31st August 1955. The latter agreement was made between the Central Electricity Authority (the predecessor of the Electricity Council in this context), the North of Scotland Hydro-Electric Board, the South of Scotland Electricity Board, the Amalgamated Engineering Union (now the Amalgamated Union of Engineering Workers [Engineering Section]), ('AUEW') the Electrical Trades Union (now the Electrical, Electronic & Telecommunications Union/Plumbing Trades Union) ('EET/PTU'), the National Union of Enginemen, Firemen, Mechanics and Electrical Workers (which is now part of the Transport & General Workers' Union), the National Union of General and Municipal Workers ('NUGMW') and the Transport and General Workers' Union ('TGWU').
- e
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- By s 12 (4) of the 1957 Act it is the duty of the CEGB, the appellants, to comply with any such agreement. The current agreement provides for the establishment of a National Joint Industrial Council ('NJIC'), District Joint Industrial Councils ('DJIC') and local works committees. The NJIC consists of 18 representatives of management and 13 representatives nominated by the four recognised trade unions, namely the AUEW, the EET/PTU, the NUGMW and the TGWU ('the recognised unions'). Its prime function is to settle by negotiation the terms and conditions of employment of manual workers engaged in the electricity supply industry. The DJICs consist of eight representatives of management and varying numbers of representatives of the four recognised unions, again nominated by those unions. Their prime functions are to implement at district level the various agreements reached in the NJIC and to establish and supervise the activities of works committees including elections to those committees. The works committees consist of representatives of management and representatives of the manual workers. The latter are not appointed but are elected by the general body of manual workers from amongst candidates nominated by any two electors. The only material qualification for becoming a candidate is membership of one of the recognised unions. The functions of the works committee
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are set out in the national agreement but can be summarised as follows: (a) To secure that the employees shall be given an interest in and responsibility for the conditions under which their work is performed (para 1). (b) To secure joint action to implement the national agreement and to deal with any problems in relation to working hours, payment of wages, holiday arrangements and the settlement of internal grievances, subject to the express proviso 'that the Works Committee shall not in any event have power to negotiate terms and conditions of employment' (paras 2 and 3). (c) To operate a differences procedure involving investigation, settlement or reference to the district council (para 6). (d) To operate a grievances procedure involving reference to the works committee if the grievance has not been settled by the employee directly with management or by subsequent discussions between the recognised trade union of which the employee is a member and management.

Through no fault of the tribunal, evidence of the events leading up to the complaints with which they were concerned was not as detailed as it might have been. The reason may have been that the basic facts were not in dispute. Before us, additional evidence was admitted with the consent of the complainants. It now appears that in June 1972 a vacancy occurred on the works committee for a representative of the electrical and instrument skilled group to which both the complainants belonged. The joint secretaries of the works committee (Mr Hancox of the EET/PTU and Mr Rowbotham, a management representative) posted a notice inviting nominations and stating that nomination forms could be obtained from the general office. The notice stated that candidates must be members of one of the recognised unions.

The nomination forms contain a declaration that the proposed candidate is such a member. The complainants asked for and were given these forms, which they completed in such a way as to suggest that they were not members of any of the recognised unions but were members of the ESU. When the completed forms were handed in at the general office, they were seen by a Mr Elstrop, who was a clerk employed by the CEEGB, and rejected by him on the grounds that the forms on their face showed that neither of the complainants was eligible for election. It now appears that Mr Elstrop should not have taken this action but should have handed the forms to the election scrutineers, who would have rejected them. The scrutineers are appointed annually and are drawn from the employees' side of the committee.

The tribunal concluded that the restriction of candidates for election to the works committee to manual workers who were members of one of the recognised unions constituted unlawful discrimination by the CEEGB and that this constituted discrimination against the complainants rather than against the ESU of which they were members. The tribunal also decided that the proviso as to union membership contained in the constitution of the works committee was severable and that accordingly the complainants were eligible for membership. Finally it decided that it was just and equitable to make the declaration of rights sought by the complainants.

It seemed to the court that the decision on this appeal would vitally affect the two Scottish Electricity Boards, the Electricity Council and the four recognised unions and that it was undesirable that it should be decided without their being given an opportunity for advancing argument. Accordingly the court exercised its powers under r 52 of the Industrial Court Rules 1971¹ to join all seven bodies as additional respondents. In the event all were represented with the sole exception of the AUEW.

The case for the complainants is that as between themselves and the CEEGB they have the right to be a member of such registered trade union as they may choose (see s 5 (1) (a) of the Industrial Relations Act 1971), and have in fact chosen to be members of the ESU, which is such a trade union. This is accepted by the CEEGB. Furthermore they have the right to refuse to be a member of any particular trade union or

a unions, whether registered or not (see s 5 (1) (b) of the 1971 Act) and have in fact chosen not to be members of any of the recognised unions. This again is accepted by the CEGB. The complainants then go on to allege that the CEGB has discriminated against them by reason of their having exercised their right not to belong to any of the recognised unions and to submit that this is an unfair industrial practice under s 5 (2) (b) of the 1971 Act. The discrimination alleged is that they are debarred from standing as candidates for election to the works committee.

b The arguments advanced on behalf of the employers and the recognised unions differed in detail, but nothing turns on these differences. The CEGB take three main points, namely that (a) the evidence does not disclose discrimination within the meaning of that word in s 5 of the 1971 Act, (b) any such discrimination was exercised by persons other than the CEGB and (c) in any event it would not be just or equitable to make the order asked for.

c We can dispose of the latter two submissions briefly. Whilst it may well be true that the clerk who rejected the complainants' nomination papers was exceeding his authority in an attempt to be helpful, the CEGB by its representative Mr Rowbotham was a party to giving notice of the forthcoming works committee election and to affirming that only members of the recognised unions were acceptable as candidates. We therefore have no doubt that the discrimination (if any) was exercised by the CEGB, although it did not act alone.

d Apart from cases in which the complainant has in some way induced the respondent to breach a right conferred on him by the 1971 Act, or the breach is purely accidental or technical and is not denied, it is difficult to think of circumstances in which it would not be just and equitable to make an order determining the rights of the respective parties. Suffice it to say that in the present case the tribunal was correct in expressing their view of the rights of the parties in the form of a determination of right.

e This leaves the main point of whether there was an unfair industrial practice consisting of discrimination of a kind prohibited by s 5 of the Industrial Relations Act 1971. The solicitor for the two complainants points out (possibly rightly) that they were unaware of the ramifications of the structure of NJIC and DJICs. His clients f just wanted to serve on their works committee. They were not allowed to do so, because they had exercised their right to refuse to belong to one of the recognised unions. They had been deprived of the opportunity of enjoying the job satisfaction which goes with membership of the works committee. In his submission this amounted to discrimination and constituted an unfair industrial practice under s 5.

g Counsel for the CEGB, with the support of counsel for the Electricity Council and the Scottish Electricity Boards and counsel for the unions, contended that there was no discrimination against the complainants and that if there was any discrimination at all, it was against the ESU. The works committee was an integral part of the collective bargaining machinery permitted and indeed encouraged by the 1971 Act and necessarily had to be composed of members of the recognised unions on the employees' side. In particular he pointed out that the agreement could have provided h for the employee members to be nominated by the recognised unions as was the case with the DJICs. Alternatively it could have provided for them to be elected by a ballot limited to members of the recognised unions. In neither case would there have been discrimination within the meaning of the section. It would therefore be odd that a widening of the franchise should create an unfair industrial practice.

i In our judgment the key to the problem lies in reconciling s 5 with the principles of collective bargaining and of developing orderly procedures for settling disputes. Both involve recognition of unions and the differentiation between the union which is recognised and those unions which are not. This in its turn can create an advantageous position for those employees who are members of the recognised union as compared with those who are members of an unrecognised union or are not members of any union.

The principle of collective bargaining freely conducted on behalf of workers and employers with due regard to the general interests of the community is the first of the 1971 Act's guiding principles (see s 1). The second is that of developing and maintaining orderly procedures in industry for the peaceful and expeditious settlement of disputes by negotiation, conciliation or arbitration, again with due regard to the general interests of the community. The fourth is the principle of freedom and security for workers, protected by adequate safeguards against unfair industrial practices on the part of employers and others. Part III of the 1971 Act deals in detail with collective bargaining (see ss 34-60). Part II of the Act deals with the rights of workers (see ss 5-33).

Section 5 of the 1971 Act, so far as is material, provides as follows:

'(1) Every worker shall, as between himself and his employer, have the following rights, that is to say,—(a) the right to be a member of such trade union as he may choose; (b) subject to sections 6 and 17 of this Act, the right, if he so desires, to be a member of no trade union or other organisation of workers or to refuse to be a member of any particular trade union or other organisation of workers; (c) where he is a member of a trade union, the right, at any appropriate time, to take part in the activities of the trade union (including any activities as, or with a view to becoming, an official of the trade union) and the right to seek or accept appointment or election, and (if appointed or elected) to hold office, as such an official.

'(2) It shall accordingly be an unfair industrial practice for any employer, or for any person acting on behalf of an employer,—(a) to prevent or deter a worker from exercising any of the rights conferred on him by subsection (1) of the section, or (b) to dismiss, penalise or otherwise discriminate against a worker by reason of his exercising any such right, or (c) except in accordance with the next following section, to refuse to engage a worker on the grounds that, at the time when he applied for engagement, he was a member of a trade union or of a particular trade union, or that he was not then a member of a trade union or other organisation of workers or of a particular trade union or other organisation of workers or of any of two or more particular trade unions or other such organisations.

'(3) For the purposes of subsection (2) (a) of this section an employer, or a person acting on behalf of an employer, shall not be regarded as preventing or deterring a worker from exercising the rights conferred on the worker by subsection (1) (b) of this section by reason only that (without any suggestion of reward for compliance or penalty for non-compliance) he seeks to encourage the worker to join a trade union which the employer recognises as having negotiating rights in respect of him.

'(4) Where an employer offers a benefit of any kind to any workers as an inducement to refrain from exercising a right conferred on them by subsection (1) of this section, and the employer—(a) confers that benefit on one or more of those workers who agree to refrain from exercising that right, and (b) withholds it from one or more of them who do not agree to do so, the employer shall for the purposes of this section be regarded, in relation to any such worker as is mentioned in paragraph (b) of this subsection, as having thereby discriminated against him by reason of his exercising that right.'

The complainants rely on sub-ss (2) (b) and (4) of s 5. Counsel for the Electricity Council and the Scottish Electricity Boards submitted that, on its true construction, sub-s (4) is not concerned with a case in which workers who in fact join, or remain members of, a particular union obtain a benefit which is denied to those who do not. It is concerned with a case in which the workers who obtain the benefit are those who have agreed with the employer that they will join, or remain members of, a particular union. We consider that this is too narrow a construction of the subsection, for it would enable an employer to render illusory the rights conferred

a by sub-s (1) by the simple expedient of giving substantial rewards to those who in fact refrained from exercising them. In our judgment, sub-s (4) is merely complementary to sub-s (2) (b). Subsection (2) (b) is concerned with the pressure by penalising the worker who exercises his rights. Subsection (4) is concerned with pressure by rewarding the worker who refrains from exercising his rights. Accordingly we think that sub-ss (2) (b) and (4) can be regarded as a composite whole.

b There is a real difference between 'discriminating', which is defined in the Shorter Oxford Dictionary as 'to make or constitute a difference in or between; to differentiate', and 'discriminating against' which is there defined as 'to make an *adverse* distinction with regard to' (our emphasis). There can be no doubt that the CEGB discriminated *between* those workers who were members of one of the recognised unions and those who were not. But this is not condemned by the 1971 Act. The unfair industrial practice consists of dismissing, penalising or otherwise discriminating against one group of workers or conferring a benefit on the remainder. In our judgment, what is contemplated is a detriment or benefit suffered or enjoyed by the worker as an individual in the context of his contract of employment. Examples spring readily to mind in the field of pay, promotion, holidays, choice of work or shift and grievance and disciplinary procedures. But that is not this case. Here the CEGB has recognised four trade unions, a step which much of the 1971 Act is designed to encourage. It is inherent in such recognition that for some purposes an employer will be obliged to discriminate between those of his employees who are members of the unions concerned and those who are not. Thus shop stewards and other local union representatives will be accorded the facilities usually accorded to holders of their offices. They will necessarily be members of the recognised unions and the facilities may be said to be a benefit. The vital distinction, however, is that they are benefits which are enjoyed by the worker qua union representative and not qua individual. Insofar as any discrimination is involved, it is a discrimination *between* workers who are union representatives and those who are not. It is not discrimination *against* the latter. Similarly in the present instance the discrimination is between those who are eligible for election as union representatives on the works committee and those who are not. It is not discrimination *against* the complainants as members of the latter group. For the sake of completeness we should add that we regard it as immaterial that the works committee has no direct negotiating rights. It is part of the structure which has been created for purposes of collective bargaining and the orderly settlement of disputes. Accordingly we do not consider that the restrictive qualifications applicable to candidates for election to the works committee involve any unfair industrial practice under s 5.

g For these reasons the appeal is allowed. The determination of the tribunal will be varied to provide that neither of the complainants has a right to be eligible as a candidate for election to the works committee for Ferrybridge 'C' Power Station unless and until he is a member of one of the trade unions which is a party to the agreement under which the constitution of the committee is established and that the CEGB was entitled on this ground to refuse to accept a nomination paper from either of the complainants.

h Although the CEGB has been successful in this appeal, we think that the parties to the NJIC agreement would be well advised to give further consideration to two of its provisions. The first is the limitation of membership of the works committee to those who are members of the NJIC unions. The second is the grievance procedure set out in para 7 of the functions section of the works committee constitution.

j Uniform recognition of trade unions on a national basis has much to commend it in the electricity supply and similar industries where there are few employers, all of whom are associated with one another and the nature of the business carried on by each is very similar. Nevertheless, it should be recognised that from time to time workers in a particular area may be less enthusiastic over the arrangement than are those in the rest of the country. Ferrybridge 'C' Power Station is or may be a

case in point. It is in the interests of good industrial relations that the system should allow those workers to express their lack of enthusiasm, both in order to draw attention to any remediable defects in the service provided by the recognised unions and in order to avoid the feeling of frustration which they would otherwise experience. For the reasons which we have already expressed we have no doubt that it is perfectly proper to restrict membership of the employees side of the works committee to members of the NJIC unions. But is it necessary or wise? The first function of such a committee is expressed to be 'to secure that the employees shall be given an interest in and responsibility for the conditions under which their work is performed'. This will not be achieved if the employees' representatives on the works committee can only be elected from members of the NJIC unions and for some reason or other those unions have temporarily lost the confidence of a significant proportion of the employees in the works. The removal of this restrictive qualification should pose no threat to the NJIC unions or to the national and district arrangements for collective bargaining. If they enjoy local support, their members will still be elected. If they are not elected, they will receive early warning that all is not well and they will be able to put matters right. Even if the result were that the NJIC unions were wholly unrepresented on a few works committees—and this seems a most unlikely eventuality—it would provide no grounds for re-opening the question of recognition on a district and national basis.

The individual grievance procedure raises a different issue. In the light of the rights of workers set out in s 5 of the 1971 Act it is desirable, and probably essential in order to avoid an unfair industrial practice on the part of the employer, that the procedure shall operate and be seen to operate equally fairly whether or not the employee concerned is a member of one of the NJIC unions.

Stage (a) of the agreed procedure involves discussions directly between the employee concerned and the appropriate officer of the board. This is in accordance with para 125 (1) of the Code of Practice¹. But it also provides that the employee 'may if he so desires be accompanied and assisted by his manual workers' representative'. Under the existing constitution such a representative will necessarily be a member of one of the NJIC unions which may not be satisfactory to an employee who is not such a member. It is for consideration whether it would not be better if this read 'and may if he so desires be accompanied and assisted by his manual workers' representative or other person of his choice'.

Stage (b), which applies if the grievance is not settled at stage (a), involves the employee remitting the matter 'to his Trade Union (being a party to the agreement under which this constitution is established) for further discussion with the appropriate officer of the Board'. This is plainly inapplicable in the case of an employee who is not a member of one of the NJIC unions.

Stage (c), which applies if the grievance is not settled at stage (b), involves the representative of either the board or the manual workers referring the matter to the works committee, the employee's NJIC trade union having a right to appear. This again is inapplicable in the case of an employee who is not a member of an NJIC union. He has no right to refer the matter to the works committee himself and, not being a member of an NJIC union, he may not be satisfied that his manual workers' representative will do so on his behalf. Finally he has no relevant trade union to appear before the works committee on his behalf.

It is for consideration whether it would not be preferable to combine and amend stages (b) and (c) to provide:

'Failing a settlement of the grievance, either the representative of the Board or the employee shall refer the difference to the Works Committee and the employee may if he so desires appear before the Committee and be accompanied and assisted by his manual workers' representative or other person of his choice.'

¹ The Code of Practice was brought into operation on 28th February 1972 by the Industrial Relations (Code of Practice) Order 1972 (SI 1972 No 179)

a Such an amended constitution would enable the NJIC unions to intervene on behalf of their members at either stage if the employee so wished, and even if the constitution of the works committee were altered it is unlikely that they would be unrepresented amongst the employees' side.

b It is not for us to decide whether any and, if so what, amendments should be made in the NJIC agreement and we do not seek to do so. Apart from the fact that such a decision would be outwith our jurisdiction, we have heard no argument from those concerned and we are not fully informed on all the relevant considerations. Some may say that if the court has no power of decision it should not comment. Indeed, this was said in the course of the hearing. We venture to disagree. The principal object of this court is to promote better industrial relations. No one who has the same object at heart should object to being asked to consider constructive suggestions for the improvement of the agreed procedure. This is all that we have done. We shall be surprised if any of the parties to this appeal take exception to our doing so. We shall be disappointed if they fail to think about the problem.

c *Appeal allowed.*

d Solicitors: A L Wright (for the CEGB); Disken, Wooler & Co, Dewsbury (for the complainants); J H S Geach (for the Electricity Council, the North of Scotland Hydro-Electric Board and the South of Scotland Electricity Board); Marcan & Dean (for the EET/PTU, the NUGMW and the TGWU).

Gordon H Scott Esq Barrister.

e R v Talgarth Justices, ex parte Bithell

QUEEN'S BENCH DIVISION

LORD WIDGERY CJ, ASHWORTH AND BRIDGE JJ

f 8th MARCH 1973

Magistrates – Procedure – Adjournment – Summary trial – Adjournment after conviction and before sentence – Disqualification – Conviction of accused in his absence – Restriction on disqualifying accused in his absence – Disqualification for holding driving licence – Justices imposing fine on accused and adjourning consideration of disqualification – Justices purporting to disqualify accused at subsequent hearing in his presence – Whether justices having power to adjourn question of disqualification after imposing fine – Whether purported disqualification valid – Magistrates' Courts Act 1952, s 14 (3) – Criminal Justice Act 1967, s 26 (2).

The applicant was charged with driving a motor vehicle without insurance. The case was due for hearing in November 1971. The applicant failed to appear before the justices either then or on four subsequent occasions. The justices finally dealt with the case in his absence and, having found it proved, imposed a fine on him, but, since they could not, by virtue of s 26 (2)^a of the Criminal Justice Act 1967, disqualify him from driving in his absence they adjourned the question of disqualification to a subsequent hearing. The applicant finally appeared on a warrant, after three further adjournments, in June 1972. His licence was produced and he was disqualified for six months. The applicant applied for an order to quash the disqualification.

Held – Under s 14 (3)^b of the Magistrates' Courts Act 1952 the justices' power to adjourn the case was limited to adjournment 'after convicting the accused and before

a Section 26 (2), so far as material, is set out at p 719 c, post

b Section 14 (3), so far as material, is set out at p 719 h, post

sentencing him or otherwise dealing with him'. Accordingly, if they were going to consider disqualification they were bound to adjourn the whole question of sentencing and disposal and to deal with it as one matter when the adjourned hearing took place. The disqualification order had therefore been made in excess of jurisdiction and should be quashed (see p 719 j to p 720 b, post). a

Notes

For the powers of a magistrate to adjourn a case for the attendance of an accused person convicted in his absence, see 25 Halsbury's Laws (3rd Edn) 199, para 361. b

For the Magistrates' Courts Act 1952, s 14, see 21 Halsbury's Statutes (3rd Edn) 198.

For the Criminal Justice Act 1967, s 26, see *ibid* 376.

Motion for certiorari

Philip Geoffrey Bithell applied to the Divisional Court of the Queen's Bench Division for an order of certiorari to remove into the court and quash an order made by the Talgarth justices on 6th June 1972 that the applicant should be disqualified from driving for a period of six months in accordance with s 5 (3) of the Road Traffic Act 1962. On 7th March 1972 the applicant had been convicted in his absence by the justices on charges of driving a motor vehicle without insurance and of driving a motor vehicle without a test certificate. The grounds of the application were, *inter alia*, stated to be as follows: following the applicant's conviction the justices purported to adjourn the question of disqualifying the applicant from driving, as they were obliged to do under s 26 (2) of the Criminal Justice Act 1967, having regard to the fact that the applicant was not present before them; the justices purported to adjourn the matter under s 14 (3) of the Magistrates' Courts Act 1952 but, rather than adjourning the matter before sentencing the applicant, the justices purported to sentence him to a fine of £15 before adjourning the matter for the question of disqualification to be considered; the justices were *functi officio* on 7th March and could not therefore consider the question of disqualification on 6th June as they purported to do. c

R A Payne for the applicant. d

The respondents did not appear and were not represented. e

LORD WIDGERY CJ. In these proceedings counsel moves on behalf of Philip Geoffrey Bithell for an order of certiorari to remove into this court with a view to its being quashed an order made by the Talgarth justices on 6th June 1972 when they purported to disqualify the applicant from driving for a period of six months. I take the facts from the affidavit of the clerk to the justices which shows that the applicant faced two charges, one for driving without insurance and one for driving without a Ministry of Transport certificate in relation to his vehicle. The case was first due for hearing as long ago as 7th November 1971, but the applicant, the defendant in those proceedings, did not appear and the case was adjourned for a month. In December 1971 again he did not appear, and again the justices adjourned the case for a month. Before the sitting of the court in January 1972 the applicant pleaded guilty by letter, but he did not send his driving licence, which was necessary in order that the court could exercise its powers of endorsement, so the case was put over until February 1972. Again there was a letter from the applicant; again he failed to send his driving licence and the matter was adjourned until March, the justices issuing a further summons against the applicant for failing to produce his licence to the court. On 7th March the applicant was again not before the court; no communication had been received from him. Proof was tendered that both the summonses had been served personally and the court decided to proceed with the case in the applicant's absence. They fined him certain sums in respect of the three offences, as they now were, which faced him, but they did not deal with any question of disqualification from holding a licence, saying that that must be adjourned to await the production of the licence. f

a April came and no driving licence, no fines had been paid, a warrant was issued for the applicant's arrest. In May the warrant had not been executed and the court was still without the driving licence. Finally in June 1972 the applicant appeared, having been arrested and allowed bail; his driving licence was at last produced, and he was disqualified from driving for six months. It is that matter which counsel seeks to have brought up into this court with a view to its being quashed.

b There is no dispute but that the justices acted quite properly at the sitting in March when they decided to try the case in the applicant's absence. The history which I have recounted is quite sufficient to show that the time had come when trial in his absence was a perfectly legitimate course for the court to take and the reason no doubt why they did not dispose of the case finally on that occasion was because they had in mind s 26 (2) of the Criminal Justice Act 1967, which provides:

c 'A magistrates' court shall not in a person's absence impose any disqualification on him, except on resumption of the hearing after an adjournment under section 14 (3) of the Magistrates' Courts Act 1952 . . .'

d In the face of that provision the justices no doubt appreciated that they could not make an order of disqualification in the absence of the applicant, and so they purported to make a split order. By this I mean they purported to impose a fine at their March sitting and stood over the question of disqualification until that order was eventually made at the sitting in June.

e The short question is whether the justices were in a position to make an order in June, or whether, as counsel contends, they were functi officio by virtue of the order which they had made in March. It would in any event, in my judgment, be bad sentencing practice to deal on different occasions with different elements in the disposal of a single case. Very often forfeiture or disqualification is related to penalty, and it is dangerous, to say the least of it, to embark on the disposal of any case without having all the matters available for decision by the same court at the same time. But I would not think that a decision would be quashed on certiorari merely because it was not in accordance with good sentencing practice. Here, however, it is said, f and I think with force, that the matter went beyond a breach of the rules of good sentencing practice, and was in fact illegal. When one looks at s 14 (3) of the Magistrates' Courts Act 1952, the reason becomes apparent. Under sub-s (1) of that section a magistrates' court is given power, whether before or after beginning to try an information, to adjourn the trial. That is a provision clearly restricted in my view to an adjournment which becomes necessary before the trial is finished, that is to say before a verdict has been returned. Subsections (3) and (4) of the same section provide:

h '(3) A magistrates' court may, for the purpose of enabling inquiries to be made or of determining the most suitable method of dealing with the case, exercise its power to adjourn after convicting the accused and before sentencing him or otherwise dealing with him; but, if it does so . . . the adjournment shall not be for more than three weeks at a time.

'(4) On adjourning the trial of an information the court may remand the accused . . .'

i That provision also does not suit the present case for two reasons. In the first instance, the three week time limit was not observed, but more fundamentally than that, the justices did not decide to adjourn after convicting the applicant and before sentencing him or otherwise dealing with him. They endeavoured instead partially to deal with him, and I think that that was outside the powers conferred by the section. It seems to me that however tiresome it must have appeared to these justices, in view of the behaviour of the applicant, that they were in fact in duty bound, if they were going to consider disqualification, to adjourn the whole question of sentencing

and disposal under s 14(3) and deal with this matter as one matter when the adjourned hearing took place. a

In the circumstances I think that they were in excess of their jurisdiction when they purported to make the disqualification order, and I would allow certiorari to go to quash the disqualification.

ASHWORTH J. I agree. b

BRIDGE J. I agree.

Application allowed.

Solicitors: *Edgley & Co* (for the applicant).

Jacqueline Charles Barrister. c

Centaploy Ltd v Matlodge Ltd and another d

CHANCERY DIVISION

WHITFORD J

22nd, 23rd, 24th, 25th, 26th, 29th, 30th, 31st JANUARY, 1st, 2nd, 5th, 16th FEBRUARY 1973

Landlord and tenant – Notice to quit – Validity – Periodic tenancy – Certainty of duration – Weekly tenancy – Written memorandum of agreement – Memorandum expressing tenancy ‘to continue until determined by the lessee’ – Whether lessor having right to determine – Whether tenancy void for uncertainty – Whether fetter on lessor’s right to determine void as being repugnant to nature of periodic tenancy. e

R Ltd, the registered proprietors of certain garage premises, granted the plaintiffs the use of those premises giving them a memorandum, signed on their behalf, in the following terms: ‘... Received from [the plaintiffs] the sum of £12-0-0 being one week’s rent on [the demised premises] and to continue until determined by the lessee. (CASH) £12’. The plaintiffs used the garages for the purpose of letting parking or garage space. Subsequently the defendants, who were the successors in title of R Ltd, purported to determine the plaintiffs’ tenancy. The plaintiffs claimed that under the terms of the tenancy granted only the lessee had the right to determine the lease. The defendants contended that the tenancy agreement, as expressed in the memorandum, was void for uncertainty. f

Held – (i) The tenancy was not void for uncertainty. The memorandum provided for a tenancy from week to week unless determined. The rule that, if a term was to be validly created, the maximum duration of the term must be ascertained before it took effect did not directly apply to periodic tenancies; it was sufficient if it was known when the term could be brought to an end even if it was not known when it would be brought to an end (see p 725 c e f and g and p 728 a, post); *Charles Clay & Sons Ltd v British Railways Board* [1971] 1 All ER 1007 applied; *Lace v Chandler* [1944] 1 All ER 305 distinguished. g

(ii) Although a fetter on the right to determine, even for a period of uncertain duration, was not necessarily repugnant to the grant of a periodic tenancy, it was nevertheless basic to a tenancy that at some stage the person granting the tenancy should have the right to determine; a tenancy under which the landlord would never have the right to determine was a contradiction in terms. On the evidence it was clear that the parties had intended to create a weekly tenancy and not a perpetually renewable lease; accordingly the fetter placed on the landlords’ right to h

- a* determine the tenancy was void as being repugnant to the nature of the tenancy granted (see p 725 g, p 728 g and h and p 729 c, post); *Doe d Warner v Browne* (1807) 8 East 165 followed; *Charles Clay & Sons Ltd v British Railways Board* [1971] 1 All ER 1007 distinguished.

Notes

- b* For the determination of periodic tenancies generally, see 23 Halsbury's Laws (3rd Edn) 530, 531, para 1185, and for cases on the subject, see 31 Digest (Repl) 480, 6055-6062.

Cases referred to in judgment

- Binions v Evans* [1972] 2 All ER 70, [1972] Ch 359, [1972] 2 WLR 729, CA.
- Breams Property Investment Co Ltd v Stroulger* [1948] 1 All ER 758, [1948] 2 KB 1, [1948] LJLR 1515, CA, 31 Digest (Repl) 154, 2918.
- Cheshire Lines Committee v Lewis & Co* (1880) 50 LJQB 121, 44 LT 293, 45 JP 404, CA, 31 Digest (Repl) 62, 2187.
- Clay (Charles) & Sons Ltd v British Railways Board* [1971] 1 All ER 1007, sub nom *Re Midland Railway Co's Agreement, Charles Clay & Sons Ltd v British Railways Board* [1971] Ch 725, [1971] 2 WLR 625, 22 P & CR 360, CA; *affg* [1970] 2 All ER 463, [1970] Ch 568, [1970] 2 WLR 1328, 21 P & CR 521.
- d* *Gladstone v Bower* [1959] 3 All ER 475, [1960] 1 QB 170, [1959] 3 WLR 815, 58 LGR 75; *affd* [1960] 3 All ER 353, [1960] 2 QB 384, [1960] 3 WLR 575, 58 LGR 313, CA, Digest (Cont Vol A) 13, 154.
- Lace v Chandler* [1944] 1 All ER 305, [1944] KB 368, 113 LJKB 282, 170 LT 185, CA, 30 Digest (Repl) 388, 330.
- e* *Northchurch Estates Ltd v Daniels* [1946] 2 All ER 524, [1947] Ch 117, [1947] LJLR 6, 176 LT 4, 31 Digest (Repl) 79, 2326.
- Saunders (Executrix of the estate of Rose Maud Gallie (deceased)) v Anglia Building Society (formerly Northampton Town and County Building Society)* [1970] 3 All ER 961, [1971] AC 1004, [1970] 3 WLR 1078, HL, Digest (Cont Vol C) 293, 510c.
- f* *Warner (Doe d) v Browne* (1807) 8 East 165, 103 ER 305; *subsequent proceedings* sub nom *Browne v Warner* 14 Ves 156, LC; (1808) 14 Ves 409, LC, 31 Digest (Repl) 64, 2212.

Cases and authorities also cited

- Allison v Scargall* [1920] 3 KB 443, [1920] All ER Rep 172.
- Forbes v Git* [1922] 1 AC 256, PC.
- Gibson v Barton* (1875) LR 10 QB 329, DC.
- g* *Gross v Lewis Hillman Ltd* [1969] 3 All ER 1476, [1970] Ch 445, CA.
- Hunt v Luck* [1902] 1 Ch 428, [1900-3] All ER Rep 295, CA.
- King v Eversfield* [1897] 2 QB 475, CA.
- King's Leasehold Estates, Re, ex parte East of London Railway Co* (1873) LR 16 Eq 521.
- Lewis v Stephenson* (1898) 67 LJQB 296.
- Simonds (H & G) Ltd v Heywood* [1948] 1 All ER 260.
- h* *Sykes (F & G) (Wessex) Ltd v Fine Fare Ltd* [1967] 1 Lloyd's Rep 53, CA.
- Threlfall, Re, ex parte Queen's Benefit Building Society* (1880) 16 Ch D 274, CA.
- Zimble v Abrahams* [1903] 1 KB 577, CA.
- Halsbury's Laws of England (3rd Edn), vol 1, pp 158, 173, 175, 178, paras 374, 407, 412, 418.
- i* *Spencer Bower and Turner's The Law Relating to Estoppel by Representation* (2nd Edn, 1966), pp 160, 161, para 165.
- Woodfall on The Law of Landlord and Tenant* (27th Edn, 1968), vol 1, pp 973, 974.

Action

The plaintiffs, Centaploy Ltd, issued a writ on 26th May 1971 which, in its amended form, sought relief against the defendants, Matlodge Ltd and Swordheath Properties

Ltd. By their statement of claim served on 24th June 1971 the plaintiffs claimed against the defendants: (i) a declaration that a notice to quit dated 20th May 1971, by which the first defendants purported to determine the plaintiffs' tenancies of premises situate at and known as 25 Ashburn Mews and 39/41 Ashburn Mews, London, SW 7, on 3rd June 1971, was bad in law and of no effect; (ii) a declaration that the plaintiffs held the premises on weekly tenancies which were determinable by the plaintiffs but not determinable by the defendants; (iii) alternatively, a declaration that the plaintiffs held the premises on perpetually renewable leases converted by s 145 of, and Sch 15, paras 1 and 2, to, the Law of Property Act 1922 and s 220 of the Law of Property Act 1925 into leases for 2,000 years. The defendants served a final defence and counterclaim on the plaintiffs on 21st November 1972. By their counterclaim the defendants sought: (1) an injunction to restrain the plaintiffs from interfering with the defendants' possession of the premises; (2) further or in the alternative, possession. In their final reply and defence to counterclaim dated 23rd November 1972, the plaintiffs stated that they would, if necessary, claim that their tenancies of the premises were business tenancies within the meaning of the Landlord and Tenant Act 1954, Part II, and protected by that Act, and that no notice had been served on the plaintiffs in respect of either of the premises, as required by or in accordance with the Act and denied that, in the circumstances, the defendants were entitled to the relief claimed or to any relief. In their reply to the defence to counterclaim dated 14th December 1972 the defendants asserted that if, which was denied, the tenancies were business tenancies within the meaning of the Landlord and Tenant Act 1954, Part II, the tenancies were pursuant to the provisions of the Act terminated by various acts and events (which were set out). The facts are set out in the judgment.

Charles Sparrow QC and Gavin Lightman for the plaintiffs.

W A B Forbes QC and Richard Scott for the defendants.

Cur adv vult

16th February. **WHITFORD J** read the following judgment. Ashburn Mews lies to the south of Cromwell Road between Ashburn Road on the west, from which the mews can be entered at its north-west end, and Gloucester Road on the east. The mews at its south-east end runs into Courtfield Road, a road which runs roughly parallel with Cromwell Road.

In February 1968 a company, Rawlings Bros Ltd, were the registered proprietors with title absolute of the mews and certain other adjacent properties not directly material to this action. At this date the mews consisted essentially of a number of flats above lock-up garages. The flats and garages were all let by Rawlings, but they were separately let. The letting of the garages was in the hands of a Mr Stratford, but he had nothing to do with the flats.

This action is concerned with the terms on which, on 8th February 1968 and 22nd February 1968 respectively, Rawlings granted the plaintiffs, Centaploy Ltd, the use of garages 39 and 41, and a company, Redshire Ltd, the use of garage 25. The plaintiffs assert that the interest granted to Redshire Ltd in garage 25 was assigned to them on 5th November 1968. The defendants, Matlodge Ltd and Swordheath Properties Ltd, did not in the end challenge the assignment of Redshire's interest. In brief, the plaintiffs claim that on 8th February there was an oral agreement reached between a Mr Strickland acting on their behalf, and Mr Stratford, acting for Rawlings, that the plaintiffs should have a weekly tenancy of garages 39 and 41 for £12 a week, the tenancy to be terminable only by the plaintiffs and not by Rawlings. They claim further that on 22nd February 1968 an agreement was reached between Mr Strickland, then acting for Redshire Ltd, and Mr Stratford, acting for Rawlings, relating to garage 25, on exactly the same terms save only that the rent was to be £1 15s a week.

a The plaintiffs say further in relation to garages 39 and 41 that on 8th February 1968 they were given and accepted a memorandum signed by Mr Stratford on behalf of Rawlins in the following terms:

'GROUND FLOOR GARAGE Received from Centaploy Ltd the sum of £12-0-0 being one week's rent on 39/41 Ashburn Mews S.W.7 and to continue until determined by the lessee. (CASH) £12'.

b They rely on this memorandum as a further tenancy agreement or, alternatively, as evidencing the agreement made orally, to which I have already referred. In the same way they say in relation to garage 25 that a similar memorandum was signed and dated 22nd February 1968 in these terms:

c 'RECEIVED FROM REDSHIRE LTD. THE SUM OF £1=15=0 BEING ONE WEEK'S RENT ON 25 (TWENTY FIVE) ASHBURN MEWS S.W.7. THE TENANCY TO CONTINUE THUS ON THE SAME TERMS UNTIL DETERMINED BY THE LESSEE.'

They rely on this memorandum as a further tenancy agreement or, alternatively, as evidencing the oral agreement which they say was reached on that day.

d The defendants assert that there was never an agreement for anything more than an ordinary weekly tenancy of the properties in question, that is to say a tenancy determinable by either side on one week's notice. The defendants say that Mr Stratford never agreed to the grant of tenancies determinable only by the plaintiffs. They challenge the authenticity of the documents produced by the plaintiffs: one is the document which the plaintiffs allege was signed by Mr Stratford on 8th February 1968; the other document which the defendants rely on is, they allege, a photocopy of a document which was originally signed by Mr Stratford on 22nd February 1968 and which was subsequently lost. The defendants say that these documents are forgeries, although they bear admittedly in the one case the signature of Mr Stratford and in the other case a photocopy of his signature. They assert that these documents were altered while in the custody of the plaintiffs and are in consequence of no effect. They further say that, if the documents were in the form in which it would appear from the exhibits that they were, and if they were not altered,

f Mr Stratford's signature to them was obtained by deceit, and on this ground, too, they are either void or voidable. Over and above this, the defendants assert that Mr Stratford had no authority, express or ostensible, to enter into such agreements as the plaintiffs contend for. If they are wrong on these issues of fact, all of which are in dispute, then the defendants claim that there are good grounds in law for saying that the agreements cannot have the effect for which the plaintiffs contend.

g The charges of forgery and deceit are serious, and I shall deal with them first. This case, originally estimated for five days, took twice as long as that, and much of the time was taken up, very understandably, by a most searching cross-examination on both sides. At the opening of his final address, counsel for the defendants urged this on me, that, although much of the hearing was taken up with evidence relating to the issues of deceit and forgery, a determination in favour of the plaintiffs on those issues could be in no sense conclusive; and I think this is right. Nonetheless, as I have said, these are charges of a serious character. It is, I think, right to deal with these matters first, for if the charges are made good then the plaintiffs must fail.

h It is, I think, only fair, having regard to the seriousness of the charges of forgery and deceit and the fact that a consideration of the evidence relating to them must take some time that I should at this stage give my conclusion, which is that there is no substance at all in either of these charges.

i Before I come to the events of 8th and 22nd February, which I must consider carefully, it is necessary to say just a little further about the properties in question. Garage 25 is a lock-up garage capable of accommodating two relatively small cars or one relatively large car. Garages 39 and 41 are in fact two garages, now in one. There is a door between the two garages that faces into the mews, and no doubt at

one time there was a partition between them, but at some date that partition was taken down, and there is now one single space, which is apparently able to accommodate some six cars, or possibly seven, or even eight if they are small ones. At one time Rawlings had been using garages 39 and 41 as a workshop in which they offered facilities for car service. This use by Rawlings ended in December 1967 and at that stage certain workshop fittings which had been installed were removed. In February 1968 there was still a hydraulic lift in position but not operable, as the gear that caused it to operate had gone, and there were still, apparently, some power points suitable for workshop use. There is a dispute whether at that time there may have been one or two work benches, but that is of so little importance that I do not propose to attempt to resolve it. Garages 25 and 39/41 are not of themselves worth an action of this magnitude. This action has, I imagine, been brought because in March 1968 Rawlings sold their interest in Ashburn Mews to a company, Kamvale Properties Ltd. I was told that Kamvale and certain of its directors ran into difficulties involving criminal proceedings. I am in no way concerned with that. Kamvale in March 1968 executed a first legal charge, including the mews property in question, in favour of a company, Trade Development Bank. In exercise of its power of sale Trade Development Bank sold the property in question to the first defendants in February 1971. The first defendants in their turn sold the property in question to the second defendants in June 1971. Ashburn Mews forms part of an area which can be described as ripe for development. Most, if not all, of the garages and flats other than garages 39/41 and 25 and the flats over them have already been knocked down. If the plaintiffs are right, if they have been granted tenancies of these garages which only they can determine, the plans for development of this area may be handicapped. [His Lordship then reviewed the evidence as regards the charges of forgery and deceit. He also reviewed the evidence concerning Mr Stratford's authority, and found that Mr Stratford had ostensible authority to conclude the bargains which were concluded on behalf of Rawlings. He continued:] If, as I find, the memoranda of 8th and 22nd February 1968 were signed by Mr Stratford, he having ostensible authority to sign them, what then is the effect in law? For this purpose it was not suggested on either side that any significant difference could be drawn between the two documents.

First, it was said on the defendants' side that this is a case of non est factum. I was referred to *Saunders v Anglia Building Society*¹. I am unable to see on the evidence in this case that it is in any way possible to make the plea good. Mr Stratford admittedly knew that he was signing an agreement for a weekly tenancy. His evidence is that he read the documents at the time. If, as I have found, they were in their present form, he agreed he would have had no difficulty in understanding their terms, in particular the disputed term, and on any basis he ought in fact at the relevant time to have read them and, if he had done, he would have known what the terms to which he was agreeing were.

The next point taken by the defendants is of more substance. They say that if there is a lease it is void because it lacks certainty. The defendants accept that a normal weekly tenancy was granted but submit that the memoranda do not in terms refer to a weekly tenancy at all. While the words 'weekly tenancy' do not appear in either case, in both these documents there are references to 'one week's rent' and the words 'to continue' are also to be found. The defendants say it is impossible to infer that there is a weekly tenancy under the memoranda because the provision for determination is inconsistent with such a periodic tenancy.

I was referred to *Gladstone v Bower*². In that case a question arose whether a particular agreement took effect as an agreement for the letting of a farm on a tenancy from year to year. Diplock J said³:

¹ [1970] 3 All ER 961, [1971] AC 1004

² [1959] 3 All ER 475, [1960] 1 QB 170

³ [1959] 3 All ER at 479, [1960] 1 QB at 178

a 'A tenancy from year to year at common law is an interest which does possess certain invariable characteristics without which it is not a tenancy from year to year and which constitute a standard by which the magnitude of other interests may be judged: it must last for one year and, unless determined at the end of the first year by notice (either six months' notice or whatever other length of notice, if any, is expressly provided for in the contract of tenancy), will be renewed by operation of law for successive periods of one year each, until determined at the end [of one] such yearly period by such a notice.'

It seems to me that on their true construction the documents in question provide for a tenancy from week to week unless determined, but the judgment of Diplock J to which I have referred makes it clear that there may be some variation in the terms on which a periodic tenancy may be determined without it ceasing to be a periodic tenancy. It cannot, in my view, be said that the term is uncertain on the basis of the finding of Lord Greene MR in *Lace v Chandler*¹, the next case to which the defendants referred. In that case the premises were let 'for the duration of the war', so that when the agreement took effect there was a lease for a single term the duration of which was wholly uncertain. No doubt in one sense it can be said that there is an artificiality in referring to certainty of term even, for example, in the case of what counsel for the defendants was prepared to describe as an ordinary weekly tenancy, a weekly tenancy at, for example, £12 a week with nothing said about determination. At the moment when the first £12 is paid over, unless one of the parties there and then gives notice to determine, the tenancy is going to run for two weeks, for if nothing is said the rule is that determination shall be on one week's notice on either side. Thereafter, if nothing is said on either side, the tenancy may run on for a wholly indefinite period, but it stands accepted that this fact does not lead to the result that the tenancy is void for uncertainty. The Court of Appeal has held in *Charles Clay & Sons Ltd v British Railways Board*² that the simple statement of the law that if a term is to be validly created the maximum duration of that term must be ascertained before the term takes effect cannot have direct application to periodic tenancies. It is apparently enough if you know when it could be brought to an end even if you do not know exactly when it will be brought to an end. The law is evolutionary. In the evolution of life it is common enough to find that forms which were at one time successful have died out completely or changed radically. The defendants accept that a fetter can be placed on the right to determine a periodic tenancy for a certain period. They also accept in this court, although they expressly reserve the point for a higher court, that on the authority of *Charles Clay & Sons Ltd v British Railways Board*² it must be accepted here that such a fetter can be placed on the right to determine for an uncertain period.

b The defendants base themselves further on a decision given by the Court of King's Bench in *Doe d Warner v Browne*³ where it was decided that it was repugnant to the nature of a tenancy from year to year that the right to determine should rest solely with the tenant, a decision approved by the Court of Appeal in *Cheshire Lines Committee v Lewis & Co*⁴.

c Uncertainty and repugnancy were the defendants' main grounds for attack assuming that the agreements were in other respects unimpeachable. The submission of the plaintiffs on repugnancy was basically that this must be considered to be a ghost of the past and I was urged to pass on unafraid. In fact both the plaintiffs and the defendants relied on the judgment in the Court of Appeal in *Charles Clay & Sons Ltd v British Railways Board*², a case in which there was a half-yearly tenancy determinable

¹ [1944] 1 All ER 305, [1944] KB 368

² [1971] 1 All ER 1007, [1971] Ch 725

³ (1807) 8 East 165

⁴ (1880) 50 LJQB 121

on either side on three months' notice with a provision that the landlords should not be entitled to determine until they required the premises leased for the purposes of their undertaking. The defendants, the British Railways Board, the successors in title to the Midland Railway Co, the original landlords, claimed that the agreement was void for uncertainty, and in the alternative that the fetter on the right to determine was repugnant to the nature of the tenancy and should be set on one side so that they would be left with a tenancy determinable on three months' notice on either side. The Court of Appeal¹ upheld the judgment of Foster J² based on a rejection of the defendants' submission.

I must refer to a major portion of the judgment in that case. The relevant passage in the judgment of the court, read by Russell LJ, is as follows³:

'It has been quite clearly and for long established that if a term of years is to be validly created the maximum duration must be ascertained before the term takes effect. A purported lease "for the duration of the war" is no lease (see *Lace v Chandler*⁴) because there is no present knowledge how many years will elapse while that undesirable situation continues. It is too late to enquire why this aspect of the particular estate was considered essential to its existence or to question the doctrine. A lease for life was outside the requirement, probably because this was recognised as an estate of freehold. Moreover, if it was desired to achieve a result in substance the same as a lease until an event the date of whose occurrence could not be forecast, this could be done by the grant of a lease for (say) 90 years determinable on the event. We mention this only to show that the subject-matter under consideration has an air of artificiality, of remoteness from practical considerations; and in such circumstances we think the court should be unwilling to be moved by some process of logic to travel further than authority compels in the direction of holding that what parties to a transaction in plain English agreed is something impossible in law and therefore void. In *Lace v Chandler*⁴ the landlord sought possession of a dwelling house. The county court judge ordered possession on grounds not presently material. The defendant tenant in terms pleaded that "The said dwellinghouse was let to the defendant for the duration of the war" The defendant appealed. This court obviously took the point—the respondent was not called on and the point had not been argued below—that the letting pleaded did not create a leasehold interest at all, since the maximum duration of the estate was quite uncertain when it purported to take effect. Now it appears to us that that decision is confined to a case in which that which was purported to be done was simply to create a leasehold interest for a single and uncertain period. The applicability of this matter of certainty to a periodic tenancy was not under consideration. If the case of *Lace v Chandler*⁴ had been one in which there was simply a periodic tenancy with a proviso that the landlord would not give notice during the continuance of the war, this court might not have concluded that such an agreement, which would of course have left the tenant free to determine on notice at any time, was inoperative to create a leasehold. There is nothing in the reasoning of the judgments to lead to the necessary conclusion that such must have been so. If one has an ordinary case of a periodic tenancy (e.g. a yearly tenancy), it is plain that in one sense at least it is uncertain at the outset what will be the maximum duration of the term created, which term grows year by year as a single term springing from the original grant. It cannot be predicated that in no circumstances will it exceed, for example, 50 years; there is no previously ascertained maximum

1 [1971] 1 All ER 1007, [1971] Ch 725

2 [1970] 2 All ER 463, [1970] Ch 568

3 [1971] 1 All ER at 1009, 1010, [1971] Ch at 731-733

4 [1944] 1 All ER 305, [1944] KB 368

a duration for the term; its duration will depend on the time that will elapse
before either party gives notice of determination. The simple statement of the
law that the maximum duration of a term must be certainly known in advance
of its taking effect cannot therefore have direct reference to periodic tenancies.
The question therefore is whether authority or principle should lead us to mould
or enlarge that simple statement of the law so as to adapt and apply it to such a
b tenancy. It is argued that the principle of avoidance through uncertainty is only
not applicable to an ordinary periodic tenancy because of the ability of either
party at any time to define the maximum by giving notice of determination.
This, it is suggested, provides the necessary degree of certainty; because of this
c power neither party is left in a state of unknowing what is his maximum commit-
ment to the other. But where (it is said) one or other party is, by the terms of
the document, deprived of that power until a future event or the fulfilment of a
condition the date of whose occurrence (if at all) is uncertain, that person is in
such a state of unknowing. Therefore it is said the term should be held void;
and reference is made to the statement in Hill and Redman, Law of Landlord
and Tenant¹ which suggests that an ordinary periodic tenancy does not conflict
d with the ancient doctrine, because although the maximum duration of the term
be originally indefinite, it can be made subject to a definite limit by either party
giving notice to determine. In the course of the argument we found this approach
logically attractive. Here is one term growing period by period and there is no
knowing (on one side) its maximum length, if (on that side) there is no power
to determine save in an event whose occurrence is in point of time uncertain.
Why logically should that differ from a lease directly for a term of which the
e maximum duration is uncertain? But in the end we are persuaded that, there
being no authority to prevent us, it is preferable as a matter of justice to hold
parties to their clearly expressed bargain rather than to introduce for the first
time in 1971 an extension of a doctrine of land law so as to deny the efficacy of
that bargain. We were referred to a number of decided cases, but in none of
f them was it held that a curb on the power to determine a periodic tenancy in-
fringed the principle that an estate of leasehold to be effective must be certain
in its maximum duration; rather they were cases in which the question in
debate was whether the curb was repugnant to the nature of a periodic tenancy.
Accordingly we hold that in the present case the proviso in cl 2 is not such as to
negative the tenancy on the ground of uncertainty of duration. Moreover, we
do this on the broad ground, and not on the narrow ground that the particular
g proviso leaves it open to the landlord by adjustment of the requirements of
its undertaking to assume the power to determine the leasehold interest.²

In the present case the position on uncertainty is somewhat different. Here we have
periods growing week by week and there is never going to be any possibility of know-
ing, on the landlords' side, their maximum length, for there is never going to be a
right in the landlords to determine. In *Charles Clay & Sons Ltd v British Railways*
h *Board*² counsel for the defendants submitted that a periodic tenancy is only an excep-
tion to the uncertainty rule, because if both sides are going to be able to determine
there is no relevant uncertainty. In the present case a stronger case can be made out
on the defendants' side than was made out in *Charles Clay & Sons Ltd v British Railways*
*Board*². It can be urged that as the landlords cannot ever be certain when the agree-
ment is going to be brought to an end there must be a relevant uncertainty. As I
j understand the judgment in the Court of Appeal² what has been held in relation to
the issue of uncertainty is that it is better to enforce a clearly expressed bargain than

1 15th Edn (1970), p 3

2 [1971] 1 All ER 1007, [1971] Ch 725

to attempt to introduce yet further refinements into a field where the lines have perhaps already been rather over-finely drawn. On this basis I have reached the conclusion, having regard to what was said in the Court of Appeal in *Charles Clay & Sons Ltd v British Railways Board*¹, that I must reject the defendants' argument on the basis of uncertainty which, but for *Charles Clay & Sons Ltd v British Railways Board*¹, I would have been prepared to accept.

In the judgment read by Russell LJ, repugnancy is next considered²:

'There remains the question whether the proviso must in law be rejected as repugnant to the nature of the estate created—a half yearly periodic tenancy. Our instinct, as previously indicated, is to give effect if possible to the bargain made by the parties. It may well be that if in a periodic tenancy an attempt was made to prevent the lessor ever determining the tenancy, that would be so inconsistent with the stated bargain that either a greater estate must be found to have been constituted or the attempt must be rejected as repugnant. But short of that we see no reason why an express curb on the power to determine which the common law would confer on the lessor should be rejected as repugnant to the nature of the leasehold interest granted. In *Breams Property Investment Co Ltd v Stroulger*³ a curb on the lessor for three years, unless they required the premises for their own use, was upheld in this court, notwithstanding the earlier cases of *Doe d Warner v Browne*⁴ and *Cheshire Lines Committee v Lewis & Co*⁵. It follows that in a periodic tenancy a similar curb for ten, 20, or 50 years should not be rejected as repugnant to the concept of a periodic tenancy; and once the argument based on uncertainty is rejected we see no distinction in the present case. Accordingly in our judgment this appeal should be dismissed. We say nothing as to the situation which might arise in law should the board sell the reversion to another, when it might be arguable that the proviso would be no longer relevant.'

In *Charles Clay & Sons Ltd v British Railways Board*¹ the point which I have to consider—the ghost of the past—was expressly left unlaidd. Here we have a case where the tenant is saying that on the bargain struck the landlord cannot ever determine the tenancy.

Now counsel for the plaintiffs was able to say, and to say quite rightly, that great inroads have been made on the application of this idea of repugnancy since 1807, as the passage I have just read shows, and there is no need for me to go into the cases between *Doe d Warner v Browne*⁴ and *Charles Clay & Sons Ltd v British Railways Board*¹ for it is now plain that a fetter for a period, even a period of uncertain duration, cannot necessarily be considered as repugnant to the grant of a periodic tenancy. It nevertheless appears to me that it must be basic to a tenancy that at some stage the person granting the tenancy shall have the right to determine and a tenancy in which the landlord is never going to have the right to determine at all is, as I see it, a complete contradiction in terms. Unless, therefore, some greater estate than a weekly tenancy was created by the agreements, the determination provisions must, in my view, be regarded as repugnant and on this aspect the defendants are entitled to succeed.

The plaintiffs, however, claim in the alternative that they hold the premises on a perpetually renewable lease convertible to a lease for 2,000 years. Counsel for the plaintiffs, in advancing this contention (as he put it) very much as an alternative and accepting (as I understand him) the defendants' submission that the court leans against perpetual renewals, submitted (in my view quite rightly) that the court must be

1 [1971] 1 All ER 1007, [1971] Ch 725

2 [1971] 1 All ER at 1010, 1011, [1971] Ch at 733, 734

3 [1948] 1 All ER 758, [1948] 2 KB 1

4 (1807) 8 East 165

5 (1880) 50 LJQB 121

a concerned with the intention of the parties. He reminded me of the evidence of Mr Strickland, and he referred me to the judgment of Evershed J in *Northchurch Estates Ltd v Daniels*¹. It is, I think, important to recall the language which was under consideration in that case. That was a case in which there was an agreement in which, as regards the term, it said²:

b 'The term shall be for a period of one year certain from Mar. 25, 1938, the tenant having the option to renew the tenancy from year to year on identical terms and conditions as hereinafter stated notice of such intention to renew the tenancy to be given in writing on or before Dec. 25, in each year.'

c Evershed J reached the conclusion that there was a clear intention expressed by the parties to create a perpetually renewable lease and that any inclination which he might otherwise have felt to lean against any intention to create such a lease must give way to the language which the parties in that case themselves had chosen to use.

d So far as this particular case is concerned, on the whole of the evidence I have reached the clear conclusion that not only is there no clear intention to be found to create a perpetually renewable lease but rather such indications as one can gather from the evidence as to what the intention of the parties was point in a wholly opposite direction. In the result it is unnecessary for me to consider certain other interesting questions which might otherwise have had to be determined.

e At this point it is perhaps convenient to mention that at a late stage I was referred by counsel for the plaintiffs to a recent decision, *Binions v Evans*³, where the Court of Appeal held that an agreement to provide the widow of a former employee with a cottage which she could occupy as tenant at will free of rent until the end of her life or until determined as provided operated, on the sale of the cottage, to create a constructive trust to permit the widow to remain there for the rest of her life. I understood it to be suggested (if somewhat faintly) that the agreement with which I am concerned must be considered as establishing some sort of equitable interest which the plaintiffs are to enjoy in perpetuity. The facts in this case are in no way comparable with the facts in *Binions v Evans*³ and I cannot see that the decision in that case can assist the plaintiffs at all.

f Finally, the plaintiffs, in their reply and defence to counterclaim, claimed that their tenancies of both the premises involved are business tenancies within the meaning of Part II of the Landlord and Tenant Act 1954 and that no notice to terminate has been served in accordance with the provisions of that Act. [His Lordship then reviewed the evidence on this point, found that the plaintiffs were conducting at the garage premises the business of letting parking or garage space, and concluded:]
g To the extent that the plaintiffs claim that the tenancy is a business tenancy their action succeeds.

h Declarations granted (i) that the notice to quit dated 20th May 1971 was bad in law and of no effect and (ii) that 25 and 39/41 Ashburn Mews were business premises within the meaning of Part II of the Landlord and Tenant Act 1954 and protected by that Act.

Solicitors: Lawrence Alkin & Co (for the plaintiffs); Harold Stern & Co (for the defendants).

Susan Corbett Barrister.

i 1 [1946] 2 All ER 524, [1947] Ch 117

2 [1946] 2 All ER at 526, [1947] Ch at 118

3 [1972] 2 All ER 70, [1972] Ch 359

English Clays Lovering Pochin & Co Ltd v Plymouth Corporation

CHANCERY DIVISION

GOULDING J

29th, 30th NOVEMBER, 1ST DECEMBER 1972

Town and country planning – Development – Permitted development – Development by mineral undertakers – Erection, alteration or extension of building, plant or machinery – Development on land ‘in’ quarry or mine – Development on land ‘adjacent to and belonging to’ quarry or mine – Mine – Site on which mining operations are carried out – Mining operations – Winning and working of minerals – Land adjacent to and belonging to mine – Adjacent – Belonging to – Plaintiffs engaged in production of china clay – Crude slurry extracted from clay pits and partly treated on site – Partly treated slurry conveyed by pipeline to second site two miles distant – Process of refining and drying clay completed on second site – Plaintiffs proposing to erect new buildings on second site – Whether second site part of larger site on which ‘mining operations are carried out’ – Whether second site ‘land in . . . a quarry or mine’ – Whether second site ‘land . . . adjacent to and belonging to a quarry or mine’ – Town and Country Planning General Development Order 1963 (SI 1963 No 709), arts 2, 3, Sch 1, class XVIII.

The plaintiff was a large company engaged in the manufacture of china clay in an area for which the defendant was the planning authority. The plaintiff extracted ‘slurry’, a mixture of solid matter and water, from clay pits on a site known as Lee Moor. The slurry was pumped from the pits into tanks where the first separating process took place whereby coarse sand and other impurities were removed. The slurry then went through more separating and dewatering processes on the site eventually entering refining tanks, from which, when refined to the required standard, it went into holding tanks. From those tanks the slurry was pumped into a pipeline through which it passed to another site, known as Marsh Mills, owned by the plaintiff. Lee Moor, which was about 1,500 acres in extent, and Marsh Mills, which was about 80 acres, were separated by approximately two miles at the nearest approach of their boundaries. The centre of Lee Moor was about four miles from the centre of Marsh Mills. Whereas Lee Moor was on high open ground on the edge of Dartmoor, Marsh Mills was in a wooded valley; the agricultural use of much of the valley had been replaced by housing and Marsh Mills itself lay close to the road and railway that approached Plymouth. From the pipeline the refined slurry entered ‘driers’ at Marsh Mills where further dewatering and drying processes were carried out to produce a clay product containing 10 per cent or less of water. No manufacturing process was carried on at the driers which were situated where the final treatment of the slurries could be most economically carried out. The plaintiff wished to replace a building at Marsh Mills containing obsolete driers by a new building to be used as a store and to erect a further building to contain modern driers. It sought a declaration that the proposed development would be development by a mineral undertaker permitted by art 3^a of, and Sch 1, class XVIII^b to, the Town and Country Planning General Development Order 1963, contending (i) that the proposed works would be carried out by a ‘mineral undertaker’, i.e. itself, and (ii) that the Marsh Mills site was ‘land in or adjacent to and belonging to a quarry or mine comprised in [the plaintiff’s] undertaking’ within para 2 of class XVIII.

Held – (i) The plaintiff was a ‘mineral undertaker’ within art 2^c of, and Sch 1, class XVIII to, the 1963 order since it was engaged in winning and working china clay. Furthermore the plaintiff was a mineral undertaker in relation to the activities

^a Article 3, so far as material, is set out at p 734 g, post

^b Class XVIII, so far as material, is set out at p 734 j to p 735 b, post

^c Article 2, so far as material, is set out at p 734 e, post

a carried on at Marsh Mills, even if those activities could not be described as 'mining operations' within art 2 for there was no interruption in the production process between the clay workings on Lee Moor and the driers at Marsh Mills (see p 735 j to p 736 a, post).

(ii) The Marsh Mills land was not part of a 'site on which mining operations are carried on' within art 2 and was not therefore 'land . . . in a quarry or mine' within class XVIII. The word 'site' in art 2 was used in its ordinary meaning and therefore the Marsh Mills site was the relevant unit and was not to be regarded as part of a larger site including also the Lee Moor area. Furthermore the operations at Marsh Mills were not part of the process of 'winning and working' china clay, within class XVIII, for that expression referred to the process of extracting or separation of raw mineral from the solid earth. The activities at Marsh Mills fell outside the description 'winning and working' and were more properly described as the 'treatment' of minerals (see p 736 d and e and p 737 e and g, post).

(iii) Although the functional connection between them showed that the Marsh Mills site could properly be regarded as land belonging to the Lee Moor site and therefore 'land . . . belonging to a . . . mine', within class XVIII, it was not 'land . . . adjacent to' the Lee Moor site. Although 'adjacent' did not necessarily mean 'adjoining' the question whether Marsh Mills was 'adjacent' to Lee Moor within class XVIII was to be determined having regard to all the circumstances and bearing in mind that the word occurred in planning legislation. Having regard to the different types of land use in the vicinity of the two sites, it could not be said that the Marsh Mills site was, in a planning sense, 'adjacent to' the Lee Moor site (see p 737 h and p 738 a d g and h, post); dictum of Sir Arthur Wilson in *Wellington Corpn v Lower Hutt Corpn* [1904] AC at 775, 776 applied.

(iv) It followed therefore that the proposed development on the Marsh Mills site was not development permitted under class XVIII of Sch 1 to the 1963 order.

Notes

For permitted development by mineral undertakers, see 37 Halsbury's Laws (3rd Edn) 296, para 406.

f For the Town and Country Planning General Development Order 1963 (SI 1963 No 709), arts 2, 3, Sch 1, class XVIII, see 21 Halsbury's Statutory Instruments (2nd Reissue) 107, 111, 130. The 1963 order was revoked and replaced as from 1st March 1973 by the Town and Country Planning General Development Order 1973 (SI 1973 No 31).

g Cases referred to in judgment

Bishop Auckland Industrial Co-operative Society Ltd v Butterknowle Colliery Co Ltd [1904] 2 Ch 419, 73 LJCh 635, 91 LT 441, CA; *affd* [1906] AC 305, [1904-7] All ER Rep 977, 75 LJCh 541, 94 LT 795, HL, 33 Digest (Repl) 846, 1012.

Ecclesiastical Commissioners for England's Conveyance, Re [1936] Ch 430, [1934] All ER Rep 118, 105 LJCh 168, 155 LT 281, 47 Digest (Repl) 801, 176.

h *English Clays Lovering Pochin & Co Ltd v Davis, Watts Blake Bearne & Co Ltd v Davis* (1966) 12 RRC 307, [1967] JPL 223, [1966] RVR 607, [1966] RA 475 LT.

Federal Comr of Taxation v Broken Hill South Ltd (1941) 65 CLR 150.

King v Drake-Brockman, ex parte National Oil Pty Ltd (1943) 68 CLR 51, sub nom *R v Drake-Brockman, ex parte National Oil Proprietary Ltd* [1943] ALR 394, 17 ALJ 277, 33 Digest (Repl) 725, *4.

j *Lightbound v Higher Bebington Local Board* (1885) 16 QBD 577, 55 LJMC 94, 53 LT 812, 50 JP 500, CA, 26 Digest (Repl) 590, 2476.

Parker v Federal Comr of Taxation (1953) 90 CLR 489.

St Thomas', St Bartholomew's, and Bridewell Hospitals (Governors of) v Hudgell [1901] 1 KB 364, 70 LJQB 115, sub nom *London Corpn and St Thomas's Hospital v Hudgell* 83 LT 677, 65 JP 149, 30 Digest (Repl) 342, 42.

Tylecote v Morton (1901) 85 LT 692, DC.

Wellington Corpn v Lower Hutt Corpn [1904] AC 773, 73 LJPC 80, 91 LT 539, PC, 47 Digest (Repl) 801, 175. a

Originating summons

By a summons dated 25th May 1972 the plaintiff, English Clays Lovering Pochin & Co Ltd, claimed against the defendant, Plymouth Corporation, a declaration that the erection of a clay drier building and store building together with necessary conveyors and two chimneys at Marsh Mills, Plymouth, as proposed by the plaintiff in a planning application dated 11th February 1972 would be development by a mineral undertaker permitted by Town and Country Planning General Development Orders 1963 to 1969¹ art 3 and Sch 1, class XVIII, subject to the conditions and limitations imposed in Sch 1 in relation to that class. The facts are set out in the judgment. b

Charles Sparrow QC and *Guy Seward* for the plaintiff. c

Jeremiah Harman QC and *Elizabeth Appleby* for the defendant.

GOULDING J. In these proceedings the plaintiff is English Clays Lovering Pochin & Co Ltd. That is a large company engaged in the production of china clay. The defendant is the Corporation of the City of Plymouth, and it is sued as the planning authority for that area. d

The question stated by the originating summons for the court's decision is whether the erection of a clay drier building and store building together with necessary conveyors and two chimneys at Marsh Mills, Plymouth, as proposed by the plaintiff in a planning application dated 11th February 1972 would be development by a mineral undertaker permitted by art 3 of, and class XVIII of Sch 1 to the Town and Country Planning General Development Orders 1963 to 1969¹ subject to the conditions and limitations imposed in the schedule in relation to that class. e

In order to understand how the question has arisen between the parties, it is necessary for me to describe the operations which the plaintiff carries on in the neighbourhood of Plymouth. They are sufficiently set out in an affidavit by Mr R F Silverlock, who is the chief estates surveyor to the plaintiff, made in support of the summons. As a result, I think, of criticism in the defendant's evidence, Mr Silverlock subsequently supplemented his account of the relevant processes, in a further affidavit. In my judgment, however, his first affidavit contains all that is really required for present purposes. He said: f

"The Plaintiff is engaged in the winning and working of china clay from a complex of pits situated at Lee Moor, Devon. The clay beds are bared by the removal of surface soil and subsoil and other unwanted overlying material. The clay face is then washed by high pressure water jets and the resultant mixture of water and solid matter, referred to as slurry is composed of china clay, micaceous residue and other impurities. The slurry flows along the bottom of the pits to the first separating and pumping stage, that is to lagoons or tanks with centrifugal sand pumps which elevate the slurry for the separation of coarse sand and other impurities by means of mechanical separators or sand troughs, and those separated impurities are transported to debris tips above ground by skips, belt conveyors or mobile plant. The slurry of clays and finer impurities flows to collecting cisterns whence it is pumped to the surface dewatering tanks, at which point the slurry contains about 5% of solid matter. After some dewatering the slurry is treated either in settling ponds or in centrifugal separators to dispose of the finer sand and micaceous residue which are run off to a dam. The purified and screened slurry then enters refining tanks and thereafter, when g

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¹ SI 1963 No 709 as amended by SI 1964 No 1239, SI 1965 No 498, SI 1967 No 1076, SI 1968 No 1623 and SI 1969 No 276

a refined to the required specification, it goes into holding tanks. From the holding tanks the refined slurry is pumped into a pipeline and so passes to the "dries" at Marsh Mills where further processes are carried out to produce the saleable product. The pipeline follows the line of the disused Lee Moor tramway, a strip of land about 25 feet wide fenced off and owned or leased by the Plaintiff and ends within the Marsh Mills works some four miles from the main sand and mica separating plant. At Marsh Mills further dewatering takes place at the holding tanks or buffer storage and a denser suspension of clay containing 15-25% solid matter is then pumped through filter presses consisting of a number of chambers separated by cotton or nylon elements through which the water passes leaving on them cakes of clay. These are then periodically removed from the chambers and dropped on to moving metal belts which feed the cake up to cutters which shred it into pieces of convenient size either for further treatment before drying or else direct on moving belts to the vertical Buell drying kilns or into inclined rotating cylinders where hot air and gases evaporate more water to provide a clay product containing 10% or less of moisture. This is conveyed on moving belts to storage bins whence it is loaded into road or rail vehicles for dispatch to consumer. No manufacturing process is carried on at the dries. The dries are situated where the further and final treatment of the slurries can be most conveniently, economically and efficiently carried out.'

The planning permission which now governs the plaintiff's operations was given by the then Minister of Housing and Local Government in a letter dated 20th November 1958 which contains his decision after a local inquiry. The letter is headed 'Town and Country Planning Act, 1947. Winning and working of china clay and allied minerals. Lee Moor, Wotter and Marsh Mills, Plympton. Appeal by English Clays Lovering Pochin and Company Limited'. It is addressed to the plaintiff's solicitors. The decisive part of the document is para 17. It begins:

f 'In the exercise of his powers under the Town and Country Planning Act, 1947, the Minister accordingly [and then follow two sub-paragraphs]—(a) refuses permission for the winning and working of minerals in the areas shown cross-hatched on [certain enclosed plans, which are enumerated], and (b) grants permission for the winning and working of china clay and minerals overlying china clay in the areas shown unhatched and unstippled and edged by a bold line on the said plan A, subject to the following conditions . . .'

g The conditions are five in number and I need not refer to them in this judgment except to notice that condition 5 contains the expression 'the permission area', in the singular. The tracts of land described in the permissive part of the Minister's decision as 'the areas shown unhatched and unstippled and edged by a bold line on the said plan A' are, so far as I can see from the copies of plans furnished to me, four in number, consisting of one large area and three small areas. The large area is on an elevated tract of land, referred to as Lee Moor; it contains, I think, about 1,500 acres. Of the smaller ones, two are irrelevant and have not been mentioned in the argument before me; the third is at Marsh Mills and is the area under discussion in these proceedings; it contains approximately 80 acres.

j I have been told, and the exhibited maps appear to confirm, that the large Lee Moor area and the small Marsh Mills area are separated by approximately two miles at the nearest approach of their respective boundaries. From the centre of the one area to the centre of the other is about four miles. The Lee Moor area and the Marsh Mills area are used by the plaintiff for the purposes of a single undertaking for production in a saleable form of china clay, as described in the evidence which I have read, the two areas being connected by a pipeline, as the deponent, Mr Silverlock, indicated.

The plaintiff now wants to reconstruct and modernise the plant and machinery at Marsh Mills so that a larger quantity of china clay can be produced and sold. I need not go into any great detail on the scheme which is contemplated. Briefly, it is as follows. In place of a building at Marsh Mills containing, at the present time, two oil-heated driers of an obsolete type, the plaintiff proposes to erect a new building, which will be used as a large store for vats of dried china clay. That building will adjoin the railway track. In place of the two driers which will thus be displaced, the plaintiff proposes the erection of a further building on part of the site where there is no building at the present time and the installation in such new building of two new driers of a modern oil-fired type. Near to the new building, twin chimneys are proposed for the purpose of carrying away the gaseous emission of the new driers. There is also to be a conveyor connecting the new driers with the store building.

The application of the plaintiff for planning permission to carry out the scheme which I have briefly described has led to a difference between the plaintiff and the planning authority, which is defined by the question in the originating summons, namely, whether the proposed development will have the benefit of certain provisions in the Town and Country Planning General Development Order 1963 to which I will refer simply as "the Development Order".

I should refer to art 2 of that order. Paragraph (1) of art 2 contains a number of definitions which are to apply in the order unless the context otherwise requires. Among them are the following:

"mine" includes any site on which mining operations are carried on; "mineral undertakers" means undertakers engaged in mining operations and includes undertakers licensed under the Petroleum (Production) Act 1934 to search and bore for and get petroleum; and for the purposes of this order any land in respect of which a licence is in force under the said Act authorising any undertakers to search and bore for and get petroleum shall be deemed to be comprised in their undertaking; "mining operations" means the winning and working of minerals in, on or under land, whether by surface or underground working.

Paragraph (2) of art 2 provides that the Interpretation Act 1889 shall apply to the interpretation of the Development Order as it applies to that of an Act of Parliament.

Article 3 (1) provides the important enacting part of the Development Order:

'Subject to the subsequent provisions of this order, development of any class specified in schedule 1 to this order is permitted by this order and may be undertaken upon land to which this order applies, without the permission of the local planning authority or the Minister: Provided that the permission granted by this Order in respect of any such class of development shall be subject to any condition or limitation imposed in the said schedule 1 in relation to that class.'

That sends me at once to Sch 1. Part I of the schedule is headed:

'The following development is permitted under article 3 of this order subject to the conditions set out opposite the description of that development in column (2). The references in that column to standard conditions are to the conditions numbered and set out in Part II of this schedule.'

Class XVIII enumerated in the first column of Part I of the schedule is entitled '*Development by mineral undertakers*'. It contains three paragraphs or items, of which the second is that now in controversy. It is as follows:

'The erection, alteration or extension by mineral undertakers on land in or adjacent to and belonging to a quarry or mine comprised in their undertaking of any building, plant or machinery, or structure or erection in the nature of plant or machinery, which is required in connection with the winning or working of minerals, including coal won or worked by virtue of section 36 (1)

a of the Coal Industry Nationalisation Act 1946, but not any other coal, in pursuance of permission granted or deemed to be granted under Part III of the Act, or which is required in connection with the treatment or disposal of such minerals: Provided that permission shall be required for the erection, alteration or extension of a building, but the local planning authority shall not refuse permission and shall not impose conditions upon the grant thereof, unless they are satisfied that it is expedient so to do on the ground that: (a) the erection, alteration or extension of such building would injure the amenity of the neighbourhood and modifications can reasonably be made or conditions can reasonably be imposed in order to avoid or reduce the injury; or (b) the proposed building or extension ought to be, and can reasonably be, sited elsewhere.'

c The development permitted by that paragraph is stated in the second column to be subject to standard conditions 1 and 2 which are conditions relating to access to and use of highways.

It will be seen that if the plaintiff's proposals, on a proper interpretation of the order, fall within item 2 of class XVIII, the powers of the planning authority to refuse permission or impose conditions on permission are very strictly limited, whereas if the proposals are not within that item, then, so far as appears from the evidence and argument, the planning authority will have the same large discretion as in the case of the great majority of ordinary applications.

d It is common ground that the Development Order is to be construed in what has sometimes been called in argument 'a broad or common sense manner', at any rate in the manner appropriate, as counsel say, to a document framed for administrative purposes rather than as an instrument couched in conveyancing language. That has not prevented counsel on either side from spinning elaborate arguments worthy of a more complicated subject-matter and drawn from other provisions of the Development Order itself, from other statutes or statutory instruments and from reported cases on different documents. While I greatly admire and acknowledge the thoroughness of counsel's endeavours, I do not find in the end that I can get any guidance from those illustrative arguments. It appears to me that, having considered all, I have to apply myself to the ordinary meaning of the language used by the Minister in making the Development Order, in the passages from it which I have just read.

e It is not disputed that the relevant works now proposed are required for one or more of the purposes mentioned in item 2 of class XVIII. The argument is therefore centred on the first few lines opening that item. The plaintiff says that the erection of the proposed new works on the Marsh Mills site will be carried out by a mineral undertaker, namely itself. It further says that the Marsh Mills site is land in a quarry or mine comprised in the plaintiff's undertaking, or alternatively is land adjacent to and belonging to such a quarry or mine. Thus, submits the plaintiff, the provisions of item 2 are applicable.

f In answer, the defendant makes four points. First, the defendant says that the erection of the proposed works at Marsh Mills will not be carried out by a mineral undertaker. Secondly, that the Marsh Mills site is not land in a quarry or mine within the meaning of the Development Order. Thirdly, that the Marsh Mills site is not land adjacent to such a quarry or mine. And, fourthly, that the Marsh Mills site is not land belonging to such a quarry or mine. I can conveniently decide the matter by dealing with those four points in order.

g On the first, I accept the plaintiff's submission. It is not contested that china clay is a mineral or that the plaintiff wins and works china clay. Thus, the plaintiff is a mineral undertaker by virtue of the definition in art 2 of the Development Order. Counsel for the defendant says, 'Well, that is all very well, but at Marsh Mills the plaintiff is doing something quite different and is not to be called a mineral undertaker in that connection. At Marsh Mills, the plaintiff is not a mineral undertaker, but an industrialist'. That seems to me to be altogether too refined an interpretation.

There is no interruption, either physical or commercial, in the production process between the clay workings on Lee Moor, and the driers at Marsh Mills. Thus, whether or not the work at Marsh Mills is itself a mining operation within the meaning of the Development Order, it appears to me that the plaintiff is correctly described as a mineral undertaker in the context of the present question.

Now I come to the second point, whether the Marsh Mills site is land in a quarry or mine. For that purpose, the plaintiff fastens on the definitions in art 2 of the Development Order whereby 'mine' includes any site on which mining operations are carried on, and 'mining operations' means the winning and working of minerals in, on or under land whether by surface or underground working. In reply, and only in reply, counsel for the plaintiff—seizing, I think, on observations of counsel for the defendant originally provoked by myself—contended that the Lee Moor area and the Marsh Mills area should be considered as a single site for planning purposes because included in one planning permission as one permission area by the Minister in the letter of decision which I have read. Thus, if the whole permission area is one site there can be no dispute, it is submitted, that mining operations are carried on at Lee Moor. Accordingly, anything done at Marsh Mills is done on part of a site, and therefore on a site, on which mining operations are carried on, therefore on a mine. In my judgment, that argument is not acceptable. There is nothing to give any special or technical meaning to the word 'site' in the definition of 'mine', and, if I followed this late submission of counsel for the plaintiff, very curious and even absurd results might be brought about in cases where different areas differently combined are subject to concurrent planning permission. In my view, the word 'site' must be treated in its ordinary everyday sense, and counsel for the plaintiff is quite right in his earlier approach that the Marsh Mills site is itself a relevant unit for present purposes. The submission which he pressed in opening and supported again in reply on that footing was that the drying and other operations at Marsh Mills are part of the process of winning and working china clay. Consequently, those drying and other operations at Marsh Mills are themselves 'mining operations'. Therefore, the Marsh Mills site is itself a 'mine' within the definition in the Development Order. It is common ground that winning and working is to be treated as a single compound expression and not to be analysed by distinguishing winning from working. The plaintiff says it is a very wide expression and includes everything done by a mineral undertaker until the desired material is produced in a saleable form. In support of that submission, counsel for the plaintiff referred me to two dictionaries, namely, the Shorter Oxford Dictionary and Johnson's Dictionary, to three statutes and to five judicial decisions. The statutes were the Coal Industry Nationalisation Act 1946, the Mines (Working Facilities and Support) Act 1923, and the Petroleum (Production) Act 1934. Of the judicial decisions, two were in the English courts, namely *Bishop Auckland Industrial Co-operative Society Ltd v Butterknowle Colliery Co Ltd*¹ and *Tylecote v Morton*². The other three were all of them decisions of the High Court of Australia, namely *The Federal Comr of Taxation v Broken Hill South Ltd*³, *The King v Drake-Brockman, ex parte National Oil Pty Ltd*⁴, and *Parker v Federal Comr of Taxation*⁵.

Counsel for the plaintiff also emphasised—and this is nearer home—that the Minister, in giving permission in 1958, included both the Lee Moor site and the Marsh Mills site in a single comprehensive permission for the winning and working of china clay. I recall for a moment the relevant passages. First of all, in the heading at the beginning of the Minister's letter we find the two lines 'Winning and working of china clay and allied minerals. Lee Moor, Wotter and Marsh Mills, Plympton'. And in

¹ [1904] 2 Ch 419; *affd* HL [1906] AC 305, [1904-7] All ER Rep 977

² (1901) 85 LT 692

³ (1941) 65 CLR 150

⁴ (1943) 68 CLR 51

⁵ (1953) 90 CLR 489

a the effective part of the letter, the Minister grants permission for the winning and working of china clay and minerals overlying china clay in areas which include both sites, and they are referred to in one of the conditions as 'the permission area', in the singular. Counsel for the plaintiff laid great stress on that document as one embodying an important decision couched in considered language and the work of a functionary charged with the administration of the town planning legislation, and indeed at the time empowered to make orders under the town planning Act in force.

b Therefore, I was pressed by counsel for the plaintiff with the persuasive authority of what he said was really an implied assertion by the Minister that what is done at the Marsh Mill site is comprehended within the term 'winning and working of minerals'.

c Counsel for the defendant submitted that that argument put too much weight on a concise use of language to cover a decision that in the whole document is quite clearly expressed. Counsel for the defendant said that one must not read the decisive paragraph in the Minister's letter except in conjunction with the preceding paragraphs, which describe in some detail the arguments presented at the local inquiry before the Minister's inspector and the Minister's view on those arguments. The arguments all related to the quarrying work done on the Lee Moor site and its effect on the landscape and surroundings, and therefore it was natural for the Minister to use a comprehensive phrase really based on the character of the work on the larger area.

d After considering all that authority and argument, I remain persuaded that I have to apply the ordinary interpretation of language and I remain of opinion that the essential idea in the term 'winning or working of minerals' as it appears in item 2 of class XVIII is that of the extracting or separation of raw mineral from the solid earth in which it occurs. What is done afterwards may be called cleaning or dressing

e or treatment or refining or some other appropriate term according to circumstances, but it is not, in my judgment, within the ordinary meaning of the words 'winning or working of minerals'. My interpretation of the words is strengthened by the distinction which is made in the Development Order itself between winning or working on the one hand and treatment or disposal of the same minerals on the other. On the facts of the present case, I think that 'winning and working' is probably complete

f when the crude slurry passes from the pit to the sand pumps, although it is not necessary to reach so definite a conclusion for the purposes of the originating summons. I feel myself no doubt that what is done at Marsh Mills is outside 'winning or working' and is more properly described as treatment of minerals. Accordingly the definitions in the Development Order do not, in my judgment, modify the usual meaning of 'mine' so far that I can say that the Marsh Mills site is land in a mine.

g It is certainly not land in a quarry, the term 'quarry' not receiving any special definition in the order.

h I must therefore pass to the third and alternative point: is the Marsh Mills site land adjacent to a quarry or mine? It is common ground that the word 'adjacent' does not require actual contiguity. In the Privy Council case, *Wellington Corpn v Lower Hutt Corpn*¹, it is said, in the judgment delivered by Sir Arthur Wilson:

" 'Adjacent' is not a word to which a precise and uniform meaning is attached by ordinary usage. It is not confined to places adjoining, and it includes places close to or near. What degree of proximity would justify the application of the word is entirely a question of circumstances."

i Other cases that were cited to me on the use of the word 'adjacent' were *Lightbound v Higher Bebington Local Board*², a decision of the Court of Appeal, and *Re Ecclesiastical Commissioners for England's Conveyance*³, a judgment of Luxmoore J. Seeing, therefore, that I have to determine what is land adjacent to a mine or quarry, with regard

1 [1904] AC 773 at 775, 776

2 (1885) 16 QBD 577

3 [1936] Ch 430, [1934] All ER Rep 118

to the circumstances, I bear in mind as the determining factor that the phrase occurs in legislation dealing with town and country planning. I must ask, are the two areas under consideration properly to be considered adjacent, with planning considerations in mind? Town and country planning is concerned, of course, with the control of the neighbourhood in the public interest. It is concerned with amenities in the broadest sense, with the visual appearance of a neighbourhood, with the flow of traffic, with the density of population in relation to the essential services that are available and a proper balance between different types of land use, and other matters of the same kind. I do not intend to give an exhaustive list. a

Counsel for the plaintiff's submissions on the point may be summarised as follows:

(i) the two sites are physically connected by industrial equipment, namely, the pipeline, and are used in one continuous process; (ii) in the planning permission given by the Minister in 1958, which counsel for the plaintiff says is a most important document for planning purposes, the two sites are described together, with, I think, the two other small sites, as 'the permission area'; (iii) the distance between the two sites is not of itself great from a planning point of view, bearing in mind, as one must, the scale and areas that are relevant when planning functions are exercised. b

Proceeding to exercise my judgment on that material, I find it is not enough to say that the Marsh Mills site is only two miles from the nearest point of the Lee Moor site and is physically and functionally connected with it. One must observe also that the intervening ground is not a uniform plain occupied by one predominant type of land use. On the contrary, most of the Lee Moor site is high ground on the margin of Dartmoor, whereas the Marsh Mills site is in a wooded valley watered by a stream called the Plym. The agricultural use of much of the land below the woodland has been replaced by an extensive housing estate. Moreover, the Marsh Mills site lies very near the road and railway that approach the city of Plymouth from the east in the lowland part of the area. c

Then I ask myself why the Minister who made the Development Order extended the general permission given by item 2 of class XVIII to work to be done on land in a quarry or mine or adjacent and belonging to a quarry or mine but not to such work on land at a distance. The answer is plainly that an existing quarry or mine will already have had its effect on land in its own vicinity, and therefore fresh building or other works erected either in the existing quarry or mine or on the adjacent and belonging land will merely be intensifying what has already occurred in that neighbourhood. But such an argument is not applicable to land at a greater distance. Bearing all these considerations in mind and particularly the character of the neighbourhood of Marsh Mills, in contrast to that of Lee Moor, I ought not, in my judgment, to say that the Marsh Mills site is, in this planning sense, adjacent to the Lee Moor site. d

Finally, I must deal with the fourth point, and there I think that the plaintiff is right although it will not help the plaintiff in view of my decision on the second and third points. In my judgment, the Marsh Mills site is land belonging to the Lee Moor site. The proper test for that decision is, I think, connection or association of use. Compare *St Thomas', St Bartholomew's and Bridewell Hospitals v Hudgell*¹. On that view, the commercial or industrial connection is relevant. The functional connection is sufficient, in my judgment, to show that the Marsh Mills site belongs to the quarry on Lee Moor. If, however, the proper test were common proprietorship, the result would be the same. It matters not, to my mind, that part of the Marsh Mills site is freehold and part leasehold, while the whole of the other is freehold. Both sites belong, in present title, to the same owner, namely the plaintiff. e

I ought not to leave the case without saying that I do not intend, by this judgment, to cast any doubt on a reported decision of the Lands Tribunal in a rating case in which the tribunal considered these very hereditaments. It is reported under the title *English Clays Lovering Pochin & Co Ltd v Davis, Watts Blake Bearne & Co Ltd v Davis*². f

¹ [1901] 1 KB 364

² (1966) 12 RRC 307

a Both out of respect to the tribunal and in the interests of the plaintiff, I ought to take a few minutes to show why my judgment does not, in my view, in any way conflict with the tribunal's decision. The tribunal was there concerned with the situation for rating purposes of three pipelines, one of which was the pipeline from Lee Moor to Marsh Mills mentioned in the present case and belonging to the plaintiff. The actual decision of the tribunal was that the pipeline was not rateable. But, in reaching that decision and, as I understand it, as an essential part of the ratio decidendi, the tribunal found that the Marsh Mills site belonging to the plaintiff was itself part of a quarry within the meaning of s 180 of the Mines and Quarries Act 1954. It is not necessary for me to go into the referential legislation which made that definition of 'quarry' decisive for rating purposes. I will at once go to s 180 of the Mines and Quarries Act 1954 and read the definition, or the part which is material:

c '(2) In this Act the expression "quarry" means an excavation or system of excavations made for the purpose of, or in connection with, the getting of minerals (whether in their natural state or in solution or suspension) or products of minerals, being neither a mine nor merely a well or bore-hole or a well and bore-hole combined.

d '(3) For the purposes of this Act— . . . (b) there shall be deemed to form part of a quarry so much of the surface (including buildings, structures and works thereon) surrounding or adjacent to the quarry as is occupied together with the quarry for the purpose of, or in connection with, the working of the quarry, the treatment, preparation for sale, consumption or use, storage or removal from the quarry of the minerals or products thereof gotten from the quarry or the removal from the quarry of the refuse thereof . . .'

e It was under that definition that the tribunal decided that the Marsh Mills site was part of the plaintiff's quarry, because, in their view, it was adjacent to the quarry. Their decision on that point was stated as follows¹:

f 'We think that they [i.e. the pipelines] are "equipment" because they are plant essential to the working of the quarries and have not changed that quality because of s. 41 of the Pipe Lines Act, 1962. We accept counsel for the appellants' first contention as to what constitutes the "quarries" in these cases. It seems to us clear on the facts that the installations at Marsh Mills and Heddon are occupied together with their respective clay pits for the purpose of, or in connection with, the treatment and preparation for sale and for the removal of the material gotten there. When that material gets to these installations, it is not in a condition in which it can be sold or removed (except on very rare occasions): it has to be further dewatered, then pumped into pressure filters and go through the other processes we have described. Indeed, as the agreed statement of facts . . . in each case says: "No manufacturing process is carried on at the dries and its sole use is the treatment and preparation for sale of the clay won from the pits." Even if counsel for the [valuation officer] was right in his limited construction of the words "removal from the quarries of the minerals"—and we do not think he is—the installations would still be occupied for the "treatment" and "preparation for sale" of the clay. These installations should therefore be deemed part of the quarries unless they are not "adjacent" thereto. We think that the decision of the Privy Council in the *Wellington* case² and that of the Court of Appeal in the *Lightbound* case³ justify us in construing the word in accordance with the "circumstances" and the "apparent scope and object" of the statute. It seems to us that the object of s. 180 of the Mines and Quarries Act, 1954, is to bring within the definition of a "quarry" everything that is comprised in a quarry

1 (1966) 12 RRC at 316, 317

2 [1904] AC 773

3 (1885) 16 QBD 577

"undertaking"; from the "hole in the ground", through the treatment and preparation for sale sections to the despatch section, provided only that a sensible person with an adequate knowledge of the working of quarries, and in these appeals particularly of clay pits, would say that the several parts formed part of a single clay working installation. We do not say that distance is wholly and always irrelevant in the consideration of the word "adjacent": we do say that in the conditions affecting clay pits in Cornwall and Devon it may be, and in these cases is, inevitable that there be a considerable distance between the point of extraction and the point where final treatment, preparation for sale, and despatch can conveniently, efficiently and economically be carried out, and we think that the use of the word "adjacent" instead of "adjoining" or "contiguous" gives colour to the construction we adopt. "Close proximity" may be relevant in considering "adjoining": we think "adjacent" requires a considerably looser application and that the distances involved in these appeals are not such as to make a sensible man say that the dries are not part of, in each case, a single quarry undertaking. To our minds the view that s. 180 was intended to cover the entirety of a mine or quarry undertaking is supported by sub-ss. (4), (5) and (6). These bring within a mine or quarry land used for the deposit of refuse, railway lines serving mines or quarries (if not already deemed part of them under sub-s. (3)) and conveyors and aerial ropeways provided for the removal from a mine or quarry of minerals or refuse. There is no requirement that these must be adjacent nor is there any limitation by distance. It seems to us impossible to believe that the Mines and Quarries Act defined them so as to include every form of transportation used in mines or quarries except a pipeline of this kind. In so far as it is a matter of fact we find that the dries of both companies are in the best position to secure the convenient, economical and efficient final treatment, preparation for sale and removal of the clay, that the pipelines in both cases are an essential and integral part of the equipment required to produce and despatch saleable clay and that the dries and the pipelines in both cases are "adjacent" to their respective quarries. As a matter of law we are of the opinion that upon a proper construction of s. 180, including the word "adjacent", we are not precluded from reaching those findings of fact.

It will be seen that the Lands Tribunal construed the word 'adjacent' with reference to its context in, and the neighbouring provisions of, the Mines and Quarries Act 1954. The long title of that Act is this:

'An Act to make fresh provision with respect to the management and control of mines and quarries and for securing the safety, health and welfare of persons employed thereat; to regulate the employment thereat of women and young persons; to require the fencing of abandoned and disused mines and of quarries; and for purposes connected with the matters aforesaid.'

Thus, in the Mines and Quarries Act 1954 the purpose of the legislature was directed to the management of mines and quarries and the welfare of the employees working therein, and it is natural accordingly to do as the Lands Tribunal did and interpret the word 'adjacent' with reference to the unity of a single mining or quarry-working installation. Wholly different considerations, in my judgment, are applicable, for reasons that I have already fully explained, where the word 'adjacent' has to be tested in legislation relating to town and country planning.

Summons dismissed.

Solicitors: *Robbins, Olivey & Lake*, agents for *Stephens & Scown*, St Austell (for the plaintiff); *Town Clerk*, Plymouth Corporation (for the defendant).

Susan Corbett Barrister.

^a R v Governor of Pentonville Prison, ex parte
Azam

^b R v Secretary of State for the Home
Department, ex parte Khera

R v Secretary of State for the Home
Department, ex parte Sidhu

COURT OF APPEAL, CIVIL DIVISION

^c LORD DENNING MR, BUCKLEY AND STEPHENSON LJJ
9th, 10th, 11th APRIL, 3rd MAY 1973

^d Immigration – Detention – Illegal entrant – Illegal entrant not given leave to enter or remain in United Kingdom – Detention pending directions for removal – Persons entering United Kingdom and present there in breach of immigration laws – Commonwealth immigrant – Immigrant entering United Kingdom clandestinely in breach of laws relating to Commonwealth immigrants previously in force – Immigrant no longer liable to prosecution under previous laws – Whether immigrant ‘settled’ in United Kingdom and deemed to have indefinite leave to remain – Whether immigrant ‘illegal entrant’ liable to detention and removal – Commonwealth Immigrants Act 1962, ss 4, 4A (as added by the Commonwealth Immigrants Act 1968, s 3) – Immigration Act 1971, ss 1 (2), 4 (2), 33 (1), (2), 34 (1) (a), Sch 2, paras 9, 16 (2).

^e Immigration – Detention – Unlawful detention – Remedy – Habeas corpus – Appeal – Detainee making out a prima facie case that he is not an illegal entrant – Whether entitled as of right to writ of habeas corpus – Whether bound to rely on statutory appeal procedure – Immigration Act 1971, s 16.

^f S was born in India. In 1967 he obtained an Indian passport. He arrived at Dover on 17th December 1967 and reported to the immigration authorities. He was refused admission. He returned on 9th January 1968 and was again refused admission. A few days later he returned in a small boat and, unknown to the authorities, landed somewhere on the coast. By doing so he committed an offence under s 4 (1)^a of the Commonwealth Immigrants Act 1962. Thereafter he had lived and worked in the United Kingdom.

^g In March 1968 the Commonwealth Immigrants Act 1968 came into force, and, by s 3, added a new section, s 4A^b, to the 1962 Act which made it an offence for a Commonwealth citizen to land in the United Kingdom without submitting to an examination by the immigration authorities. In December 1968 K, an Indian, was brought to England by boat and entered the country clandestinely without reporting to the immigration authorities. In January 1970 A, a Pakistani, arrived in England by similar means. Thereafter both K and A lived in the United Kingdom and obtained employment. In December 1971 the police visited K and he admitted to them that he had entered the country illegally. He was informed that further enquiries would be made and his passport was taken. However, he was told subsequently that no police action would be taken and his passport was returned to him. In September 1972 the police visited A who admitted to them that he had entered the country illegally. The police told him that he would not be prosecuted but that the facts would be reported to the immigration authorities.

^a Section 4 (1) is set out at p 756 d and e, post

^b Section 4A, so far as material, is set out at p 755 b and c, post

On 1st January 1973 the Immigration Act 1971 came into force. That Act repealed the 1962 and 1968 Acts and, by s 4 (2)^c and Sch 2^d 'conferred new powers on immigration authorities with respect to, the removal from the United Kingdom of persons . . . entering or remaining unlawfully'. By s 34 (1) (a) the 1971 Act applied to entrants arriving in the United Kingdom before the Act came into force.

In January 1973 A was detained under an order issued by the chief immigration officer under para 16 (2) of Sch 2 to the 1971 Act 'pending the completion of arrangements for dealing with him under the Act'. In February 1973 K and S were detained under similar orders. All three applied for writs of habeas corpus on the ground that their detention was unlawful.

Held – (i) S had entered the United Kingdom 'in breach of . . . the immigration laws', within s 33 (1)^e of the 1971 Act, because his clandestine entry into the country, after having been refused admission, was an offence which, by virtue of s 4 (1) of the 1962 Act, was deemed to continue throughout the period that he was in the United Kingdom. Accordingly, on the date when the 1971 Act came into force, S was in the United Kingdom 'in breach of the immigration laws' within s 33 (2) of the 1971 Act (see p 748 b, p 752 c, p 758 c and g and p 761 b and d, post).

(ii) (Buckley LJ dissenting) A and K had both 'entered' and, on the date when the 1971 Act came into force, were present in the United Kingdom 'in breach of the immigration laws' within s 33 (1) and (2) of the 1971 Act, because they had committed an offence under s 4A (1) of the 1962 Act by 'landing' in the United Kingdom without submitting to examination by immigration officers. For that purpose no distinction was to be drawn between the words 'landing' or 'entering' and therefore a person

^c Section 4 (2), so far as material, provides: "The provisions of Schedule 2 to this Act shall have effect with respect to . . . (c) the exercise by immigration officers of their powers in relation to entry into the United Kingdom, and the removal from the United Kingdom of persons refused leave to enter or entering or remaining unlawfully; and (d) the detention of persons pending examination or pending removal from the United Kingdom; and for other purposes supplementary to the foregoing provisions of this Act."

^d Schedule 2, so far as material, provides:

'8.—(1) When a person arriving in the United Kingdom is refused leave to enter, an immigration officer may, subject to sub-paragraph (2) below [make directions for his removal from the United Kingdom].

'(2) No directions shall be given under this paragraph in respect of anyone after the expiration of two months beginning with the date on which he was refused leave to enter the United Kingdom.

'9. Where an illegal entrant is not given leave to enter or remain in the United Kingdom, an immigration officer may give any such directions in respect of him as in a case within paragraph 8 above are authorised by paragraph 8 (1) . . .

'16. . . (2) A person in respect of whom directions may be given under any of paragraphs 8 to 14 above may be detained under the authority of an immigration officer pending the giving of directions and pending his removal in pursuance of any directions given . . .

^e Section 33, so far as material, provides:

'(1) For purposes of this Act, except in so far as the context otherwise requires . . . "entrant" means a person entering or seeking to enter the United Kingdom, and "illegal entrant" means a person unlawfully entering or seeking to enter in breach of a deportation order or of the immigration laws, and includes also a person who has so entered . . . "immigration laws" means this Act and any law for purposes similar to this Act which is for the time being or has (before or after the passing of this Act) been in force in any part of the United Kingdom . . . "limited leave" and "indefinite leave" mean respectively leave under this Act to enter or remain in the United Kingdom which is, and one which is not, limited as to duration; "settled" shall be construed in accordance with section 2 (3) (d) . . .

'(2) It is hereby declared that, except as otherwise provided in this Act, a person is not to be treated for the purposes of any provision of this Act as ordinarily resident in the United Kingdom . . . at a time when he is there in breach of the immigration laws . . .

^a who had landed in breach of s 4A of the 1962 Act had entered 'in breach of the immigration laws'. Furthermore it was immaterial that, after the lapse of six months from the date of their entry, A and K could no longer be prosecuted for an offence under s 4A (1); their presence in the United Kingdom was unlawful and remained so all the time they were there (see p 749 b c and g to j, p 751 f and h, p 761 c, p 762 d and g and p 763 a and b, post).

^b (iii) (Buckley LJ dissenting in part) It followed that, since the applicants were in the United Kingdom 'in breach of the immigration laws', they could not, by virtue of s 33 (2) of the 1971 Act, be treated as being 'ordinarily resident' there; consequently they were not 'settled', within ss 2 (1), (3) (d)^f, and 33 (1), at the date when the 1971 Act came into force and could not, therefore, be treated as having been given indefinite leave to enter or remain in the United Kingdom under s 1 (2)^g of the 1971 Act (see p 749 h, p 750 c, p 758 h, p 760 j to p 761 a and p 762 h, post).

^c (iv) Under paras 9 and 16 of Sch 2 to the 1971 Act, a person who had entered the country unlawfully and who had not thereafter been given leave to remain could be detained under the authority of an immigration officer pending his removal or the giving of appropriate directions; the words 'is not given leave' in para 9 were to be construed as meaning 'has not been given leave' or (per Stephenson LJ) as meaning 'is a person not given leave'. The statement made by the police to A that he would not be prosecuted did not amount to the giving of leave to remain in the United Kingdom. Since all the applicants were illegal entrants and none of them had been given leave to remain in the United Kingdom they were, by virtue of paras 9 and 16 of Sch 2, liable to detention if directions for their removal from the country were contemplated (see p 750 d to f, p 751 g and j, p 752 b, p 759 c and d, p 763 j, p 764 a c and h to p 765 a, post).

^e (v) There were no grounds for contending that, by virtue of s 34 (4) (b)^h, the 1971 Act did not apply to S because his removal was 'in pursuance of a decision taken before the coming into force' of the Act, i.e. the decision to refuse him entry. The word 'decision' in s 34 (4) (b) referred to decisions to remove and no decision to remove S had been made before the coming into force of the Act (see p 752 e, p 758 a and p 764 f, post).

^f (vi) It followed therefore (Buckley LJ dissenting in part) that all three applicants as illegal entrants who had not been given leave to remain in the United Kingdom, had been lawfully detained under the power conferred by para 16 (2) of Sch 2 to the 1971 Act, and they were not entitled to writs of habeas corpus (see p 751 g, p 753 d, p 758 j, p 763 j and p 765 a, post).

^g Per Curiam. Under Sch 2 of the 1971 Act the powers of detention and removal only apply in respect of a person who is in truth an illegal entrant. If a person can make out a *prima facie* case that he is not an illegal entrant he is entitled to a writ

^f Section 2, so far as material, provides:

^h '(1) A person is under this Act to have the right of abode in the United Kingdom if . . . (c) he is a citizen of the United Kingdom and Colonies who has at any time been settled in the United Kingdom . . . and had at that time (and while such a citizen) been ordinarily resident there for the last five years or more . . .

'(3) . . . for the purposes of [sub-s (1)] . . . (d) . . . references to a person being settled in the United Kingdom . . . are references to his being ordinarily resident there without being subject under the immigration laws to any restriction on the period for which he may remain . . .'

^j ^g Section 1 (2) provides: 'Those not having [the right of abode in the United Kingdom] may live, work and settle in the United Kingdom by permission and subject to such regulation and control of their entry into, stay in and departure from the United Kingdom as is imposed by this Act; and indefinite leave to enter or remain in the United Kingdom shall, by virtue of this provision, be treated as having been given under this Act to those in the United Kingdom at its coming into force, if they are then settled there (and not exempt under this Act from the provisions relating to leave to enter or remain).'

^h Section 34 (4), so far as material, is set out at p 752 d, post

of habeas corpus as of right and is not obliged to rely on the less convenient remedy of appeal under s 16 of the 1971 Act (see p 751 d to f, p 758 h and j and p 759 h to p 760 a, post).

Notes

On 11th June 1973 the decision of the Court of Appeal was affirmed by the House of Lords: see p 765, post.

For the power to detain illegal entrants, see Supplement to 1 Halsbury's Laws (3rd Edn) para 987B, 7.

For the Commonwealth Immigrants Act 1962, ss 4, 4A, see 4 Halsbury's Statutes (3rd Edn) 32, 33.

For the Immigration Act 1971, ss 1, 2, 4, 33, 34, Sch 2, paras 9, 16, see 41 Halsbury's Statutes (3rd Edn) 16, 17, 22, 52, 54, 64, 67.

Cases referred to in judgments

Abdul Manan, Re [1971] 2 All ER 1016, [1971] 1 WLR 859, CA.

Corke, ex parte [1954] 2 All ER 440, [1954] 1 WLR 899, DC, 16 Digest (Repl) 279, 488.

Director of Public Prosecutions v Bhagwan [1970] 3 All ER 97, [1972] AC 60, [1970] 3 WLR 501, 134 JP 622, 54 Cr App Rep 460, HL, Digest (Cont Vol C) 20, 157y.

Greene v Secretary of State for Home Affairs [1941] 3 All ER 388, [1942] AC 284, 111 LJKB 24, 166 LT 24, HL, 17 Digest (Repl) 422, 28.

K (H) (infant), Re [1967] 1 All ER 226, sub nom *Re H K (infant)* [1967] 2 QB 617, [1967] 2 WLR 962, DC, Digest (Cont Vol C) 18, 1579a.

R v Brixton Prison (Governor), ex parte Soblen [1962] 3 All ER 641, [1963] 2 QB 243, [1962] 3 WLR 1154, CA, Digest (Cont Vol A) 24, 149a.

R v Home Secretary, ex parte Budd [1942] 1 All ER 373, [1942] 2 KB 14, 111 LJKB 475, 166 LT 293, CA, 17 Digest (Repl) 422, 29.

R v Secretary of State for Home Affairs, ex parte Soblen [1962] 3 All ER 373, [1963] 1 QB 829, [1962] 3 WLR 1145, DC and CA, Digest (Cont Vol A) 22, 99a.

Schmidt v Secretary of State for Home Affairs [1969] 1 All ER 904, [1969] 2 Ch 149, [1969] 2 WLR 337, 133 JP 274, CA, Digest (Cont Vol C) 17, 129a.

Appeal

Mohammed Azam appealed against a decision of the Queen's Bench Divisional Court dated 23rd February 1973 whereby the court refused to order that a writ of habeas corpus ad subjiciendum should issue to the governor of Pentonville Prison. Gurbax Singh Khara appealed against a decision of the Divisional Court dated 21st March 1973 whereby the court refused to order that a writ of habeas corpus ad subjiciendum issue to Her Majesty's Secretary of State for the Home Department and the governor of Winson Green Prison, Birmingham. Malkiat Singh Sidhu appealed against a decision of the Divisional Court dated 21st March 1973 whereby the court refused to order that a writ of habeas corpus ad subjiciendum should issue to the Secretary of State and the governor of Pentonville Prison. The appeals were heard together. The facts are set out in the judgment of Lord Denning MR.

T O Kellock QC and *S Kadri* for the appellant Azam.

L J Blom-Cooper QC and *C Allan* for the appellant Khara.

David Turner-Samuels QC and *Stephen Sedley* for the appellant Sidhu.

Gordon Slynn for the respondents.

Cur adv vult

3rd May. The following judgments were read.

LORD DENNING MR. These three cases raise questions of the first importance to many Commonwealth citizens now in this country. Each of the three men is an 'illegal entrant'. Each entered this country clandestinely without any permission to do so. Each has worked here for more than three years. Each has now been

a arrested and detained in prison. In each case without trial. Each is about to be removed under the directions of the Home Secretary from this country. Each has brought a writ of habeas corpus claiming that his detention is unlawful.

Other cases await our decision. There must be many 'illegal entrants' wondering whether it will be their turn next. No one can tell the number. They came in secretly. They went to ground for a time. Afterwards they mingled with others.

b They got lost in the crowd. Frequently they have managed to get passports of some kind. They go to their High Commissioners and say that they did have passports which have been lost or damaged. On that plea they have been issued with new ones. There is no easy way of telling a legal from an illegal entrant. They have obtained work. They have been issued with national insurance cards. Now, under the new Act¹, which came into force on 1st January 1973, they are faced with arrest and removal. The situation is shown by the facts in these three cases.

c *Mohammed Azam*

Mohammed Azam is a young man whose home was in Campbellpur, Pakistan. His father is dead, but his mother and two sisters, aged 12 and nine, still live in Pakistan. He has been here since January 1970. An agent in Pakistan arranged for him to get here. The fee was 15,000 rupees (something over £500). He travelled by air from Pakistan to Paris. He stayed two days in Paris, and eight days in Rotterdam. Then at night he joined a small boat with four or five other Pakistanis. He disembarked at night in England. He went to Birmingham for three weeks. Then to Derby with friends for some four months. He got casual employment. But he afterwards went to South Wales, where he has been in regular work, with a national insurance card. He has worked long hours, and sometimes seven days a week, so as to earn money.

e He has sent £30 to £40 a month home to his family.

After he had been here 18 months, he took steps to get a passport. He got a Pakistani passport issued by the Pakistani authorities at Bradford on 19th August 1971. It was a genuine passport for him with his true name and photograph on. It bore an endorsement to the effect that it was issued so as to replace a passport issued a week earlier in Karachi; but this previous passport was not his or was not genuine. He had paid

f £20 for the endorsement.

On 5th September 1972 some police officers went to the factory where he worked. At first he denied that he had come into this country illegally. But afterwards he admitted that he had come in January 1970 by boat from Rotterdam. They went with him to his lodgings and examined his national insurance card and his passport. At the end of the interview the police told him that the facts would be reported to the immigration authorities. They also told him that he would not be prosecuted by

g the police.

On 1st January 1973 the Immigration Act 1971 came into force. Three or four weeks later, on 26th January 1973, a chief immigration officer, together with two police officers, went to the factory where he worked. They took him to his lodgings, and then to the police station. He could not speak much English. So they got an interpreter.

h He gave his story substantially as I have told it. At the end the chief immigration officer told him that, as he had entered the country illegally, he was liable to be removed to Pakistan, and that any decision about it would be taken by the Home Office. The chief immigration officer gave the police officers a detention order on these terms:

j 'Mohammed Azam

'The above-named is a person whose detention I have authorised under Paragraph 16 of Schedule 2 to the Immigration Act 1971. I accordingly request you to receive the said person pending the completion of arrangements for dealing with him under the Act.'

In pursuance of that order, Mr Azam was transferred to the prison at Swansea. Afterwards he was transferred to the prison at Pentonville on 3rd February 1973. On 9th February 1973 he applied to the Divisional Court for a writ of habeas corpus. This was refused. He now appeals to this court.

Gurbax Singh Khera

Gurbax Singh Khera is now 33 years of age. He is married, with a wife and small daughter in India. He was born in a village in the Punjab. He lived there all his life until December 1968. His father was then already in England, living in Wolverhampton. His uncle still lives in the same village in the Punjab. The uncle arranged with agents in India to get him to England. The uncle paid the agents about 15,000 rupees (some £500). The son got a valid Indian passport issued by the Government of India in New Delhi. He travelled by air from New Delhi to Paris. Then by car to a port on the French coast. When it was dark he embarked on a small motor-boat with three other Asians. The boat was manned by two white men. He was frightened because it was his first time at sea. They crossed to England. They got out on a sandy shore. The white men led them to hard ground. The Asians were put into the back of a van. They were driven for five or six hours until they arrived at Wolverhampton. Mr Khera was dropped at his father's house. The others went on elsewhere. Mr Khera soon obtained work and has continued at work ever since. Eighteen months later, in August 1970, he got a new passport issued to him by the Indian High Commission in London. The High Commission noted that his former passport was damaged and had been cancelled and retained.

In November 1970 he purchased a house, 243 Willenhall Road, Wolverhampton, for £1,200. He lived there with his father.

On 30th December 1971—when he had been here three years—a police officer called at his home. At first he gave a wrong name, but afterwards he admitted that he had come illegally by boat three or four years ago. The officer took him to the police station and called an interpreter to his aid. At the end the police officer told him that further enquiries would be made. He was bailed to appear at the police station six days later on 5th January 1972. The police officer kept his passport.

But the day before Mr Khera was due to appear, a police officer came to his house. He gave him back his passport and told him there was no need for him to report on the next day. He said: 'There will be no further police action. The full circumstances have been reported to the Home Office.' Soon afterwards Mr Khera's father returned to India. He thought that in the circumstances he could lawfully remain in England. So he made enquiries with a view to bringing his wife and daughter over to England.

On 1st January 1973 the 1971 Act came into operation. Five or six weeks later, on 5th February 1973, a police officer called at his house and took him to the police station. An immigration officer was waiting there for him, together with an interpreter. Mr Khera told him all that had happened. The immigration officer told him that he had entered and remained in this country in breach of the immigration laws. He made out a detention order requesting the police to detain Mr Khera. He was then taken to Winson Green prison and detained there.

His employers were much disturbed by his arrest. They wrote on 12th February 1973 this letter:

'This man has been employed by Ductile Planetary Mill Limited since 17th June, 1969 and has always been a good, cheerful and honest worker. He has responded to training in a way that has allowed us to make him a skilled operative on a finishing process, and at the moment production is affected by his absence ...'

On 22nd February 1973 his solicitor applied to the Divisional Court for a writ of habeas corpus. This was refused. He now appeals to this court.

Malkiat Singh Sidhu

- a Malkiat Singh Sidhu is a man of 43. He was born at Jullunder in India. He has a wife and eight children there. On 24th March 1967 he was issued at New Delhi by the Government of India with a passport. He arrived at Dover on 17th December 1967 and reported to the immigration authorities. He was refused admission. He came again on 9th January 1968 and was again refused admission. A few days later
- b he came in a small boat and landed somewhere on the coast. He travelled by bus to Birmingham. He has lived in Solihull and has been in work here. On 8th October 1970 he went to the Indian High Commission in London, and reported to them that he had lost his passport of 24th March 1967. Thereupon the High Commission issued him with a fresh passport.

- In 1971 he got into touch with the Joint Council for the Welfare of Immigrants. They wrote on his behalf to the Home Office, asking that he should be given 'residential status' in accordance with *Director of Public Prosecutions v Bhagwan*¹. But the Home Office did not grant it, as the date of his arrival in the United Kingdom could not be confirmed. On 30th October 1972 his wife and eight children applied in New Delhi for an entry certificate. Their application was sent to London. On 26th February 1973 the immigration officers asked Malkiat Singh Sidhu to come and see them. He
- c could not speak English or understand it, so they got an interpreter. It was discovered that he had come on 17th December 1967 and 9th January 1968 and had been refused admission of both occasions. He admitted that he had come back a few days later in a little boat.

- d On that information the immigration officers made a detention order against him. He was detained first at Heathrow and afterwards at Pentonville. On 7th March 1973 he applied for a writ of habeas corpus. This was refused, but he was granted
- e bail pending an appeal. He now appeals to this court.

The three cases affect so many others that I will endeavour to summarise the history of the law on the matter.

Before 1962

- f Before 1962 any Commonwealth citizen could come as of right into this country without the leave of anyone. He could stay here as long as he liked: see *Director of Public Prosecutions v Bhagwan*². He had the same rights as any native-born Englishman. He could not be detained by the executive without a trial. If he committed a crime, he was liable to be arrested and tried like anyone else. But he could not be deported, not even if he was an habitual criminal, nor even if his presence here was very obnoxious to the rest of the people.

- g In all those respects he was very different from an alien. At common law no alien has any right to enter this country except by leave of the Crown; and the Crown can refuse leave without giving any reason: see *Schmidt v Secretary of State for Home Affairs*³. If he comes by leave, the Crown can impose such conditions as it thinks fit, as to his length of stay, or otherwise. He has no right whatever to remain here. He is liable to be sent home to his own country at any time if, in the opinion of the
- h Crown, his presence here is not conducive to the public good; and for this purpose, the executive may arrest him and put him on board a ship or aircraft bound for his own country: see *R v Brixton Prison (Governor), ex parte Soblen*⁴. The position of aliens at common law has since been covered by various regulations; but the principles remain the same.

- j *From 1962 to 1968*

In 1962 Parliament put up some obstacles in the way of Commonwealth citizens

1 [1970] 3 All ER 97, [1972] AC 60

2 [1970] 3 All ER at 99, [1972] AC at 74

3 [1969] 1 All ER 904 at 907, [1969] 2 Ch 149 at 168

4 [1962] 3 All ER 641 at 660, [1963] 2 QB 243 at 300, 301

who wished to come here, or to remain here—but they left a big gap, as I will show. The obstacles were these. a

(i) If a man came to a port of entry, he could be required to submit to examination within 24 hours. If he had a work permit or other sufficient reason, he would be admitted. If not, he could be refused admission. If he was refused admission, he could be sent back straight away, or at any time within two months. If he afterwards slipped in clandestinely and stayed here (as Mr Sidhu did), then he was guilty of the offence of entering or remaining here, and that offence was deemed to continue throughout any period that he was here: see s 4 (1) (a) of the Commonwealth Immigrants Act 1962. If he was admitted for a limited period, and overstayed that period, then again he was guilty of a continuing offence for the whole period that he was here: see s 4 (1) (b) of the 1962 Act. b

(ii) If a man came here in a ship as a seaman or one of the crew of a ship, and did not return to the ship but stayed here after she had left—or if he came as a stowaway—he was treated just as if he had been refused permission. He could be sent off again by the executive without any time limit—whenever he was picked up and found as a deserting seaman: see para 8 (4) of Sch 1 to the 1962 Act and *Re Abdul Manan*¹. He was also guilty of a continuing offence for the whole period he was here: see s 4 (1) (a) of the 1962 Act. c

The big gap in the 1962 Act was this. If a man did not enter through a recognised port of entry (where there were immigration officers), but came in clandestinely—such as landing on a lonely beach—then, by the decision of the House of Lords, he was guilty of no offence whatever. He was not bound to seek out an immigration officer or to submit himself for examination. If he was not examined within 24 hours—as he rarely was—then he was free to go where he pleased and to remain here as long as he liked: see *Director of Public Prosecutions v Bhagwan*². He was as free as any Commonwealth citizen who had come before 1962. He could not be sent away. Nor could he be deported unless he committed a criminal offence here and was recommended for deportation. d

This gap, declared legal by the House of Lords, was so large, and so many people entered through it, that it may appropriately be called the 'Bhagwan Gap'. It lasted from 1962 to 9th March 1968. e

From 1968 to 1973

In 1968 Parliament made an attempt to stop the Bhagwan Gap, but it did not succeed very well. This is what was done. It was enacted³ that, if a Commonwealth citizen landed clandestinely (not going through a regular port of entry) he was bound to submit himself to an immigration officer for examination within 28 days; and, if admitted, get his passport stamped accordingly. If he did not submit himself for examination within 28 days, then his clandestine landing was itself an offence: see s 4A of the 1962 Act (which was inserted by s 3 of the Commonwealth Immigrants Act 1968). The important thing to notice is, however, that it was only the landing here which was made an offence. The Act did not make his remaining here an offence. The landing was a summary offence which was to be tried by justices: see s 14 (1) of the 1962 Act. If a prosecution was to be taken against him, it had to be taken within six months of his landing: see s 104 of the Magistrates' Courts Act 1952. f

Although he could not, after six months, be prosecuted under the section, nevertheless, he was liable to be prosecuted for conspiracy. In most cases the illegal landing would be made in pursuance of an agreement between him and the agents who brought him in. The agreement would be indictable, at common law, as a conspiracy; and there would be no time-limit for it. Nevertheless, although the agents, who arranged and conducted the illegal landings, were sometimes prosecuted and g

¹ [1971] 2 All ER 1016 at 1017, [1971] 1 WLR 859 at 861

² [1970] 3 All ER 97, [1972] AC 60

³ See the Commonwealth Immigrants Act 1968 h

a convicted, I believe that the illegal entrants were not often prosecuted. Once they were here, they went to ground. Even if found, it would be difficult to prove that they were parties to a conspiracy.

b So, in practice, it meant that, between 1968 and 1973, if a Commonwealth immigrant landed clandestinely, he was after six months virtually untouchable. He could not be prosecuted for the unlawful landing. He could not be removed. He could not be deported, unless he committed a fresh criminal offence and was recommended for deportation.

c But this does not mean that after six months he was here as of right; or that his presence here was lawful. His presence here was unlawful in its inception. It continued to be unlawful during the six months that he could be prosecuted for it. After the six months, it continued to be unlawful. It is a general rule of law that the expiry of a time-limit does not make that lawful which was previously unlawful. It only bars the remedy in respect of it.

From 1st January 1973 onwards

d The Immigration Act 1971 was passed on 28th October 1971 but it did not come into force for the most part until 1st January 1973. Thenceforward, any Commonwealth citizen who enters without leave is guilty of an offence and may be prosecuted, not only within six months, but also within three years of it so long as the prosecution is started within two months of evidence coming to hand: see ss 24 (1) (a) and 28 (1) (a) of the 1971 Act. This applies also to Commonwealth citizens who landed unlawfully since 28th April 1971: see s 35 (3) of the 1971 Act. But those who landed unlawfully before 28th April 1971 cannot be prosecuted for the offence of unauthorised landing, because more than six months have elapsed since they landed. Nevertheless, their presence here remains unlawful.

e Now comes the important point. Under the new Act an 'illegal entrant' can be removed, no matter how long it was since he entered. By contrast, a person who was 'settled' here on 1st January 1973 is treated as having indefinite leave to stay here. It is, therefore, of the first importance to ascertain whether a person is 'settled' here or is an 'illegal entrant'. It would be tedious to go through all the sections in this regard, but I will state the result.

f (i) A person is an 'illegal entrant' if he 'entered in breach of the immigration laws': see the definition in s 33 (1). Those who entered before 9th March 1968 through the 'Bhagwan Gap' did not enter in breach of the immigration laws. So they are not 'illegal entrants'. But those who landed clandestinely after 9th March 1968 are 'illegal entrants'. They 'landed' in breach of s 4A of the 1962 Act (which was introduced as from 9th March 1968). It follows, I think, that they 'entered' in breach of the immigration laws'. Counsel for Mr Azam sought to say that they made only an unauthorised 'landing' and not an unlawful 'entry'. The landing, he submitted, was unlawful but the entry was not. I cannot accept this distinction. It is too fine for words. When a man 'lands' illegally and immediately thereafter 'enters', he makes an unlawful entry. Section 34 (2) proceeds on that footing.

g (ii) A person is only to be treated as 'settled' here on 1st January 1973 if he was 'ordinarily resident' here at that time: see s 2 (3) (d) and the definition in s 33. That means that he must have been lawfully resident here without being at that time in breach of the immigration laws: see s 33 (2) and *Re Abdul Manan*¹. Those who were refused entry and afterwards landed clandestinely were clearly 'in breach of the immigration laws'; because they were guilty of a continuing offence (s 4 of the 1962 Act). Those who landed clandestinely (without being previously refused) were also 'in breach of the immigration laws'. True they could not be prosecuted after six months, but their residence was unlawful and remained so all the time they were here.

¹ [1971] 2 All ER 1016, [1971] 1 WLR 859

(iii) Special provision was made for people who entered lawfully on a permit for a limited period and overstayed their time. They were not 'illegal entrants' within s 33 (1). Having entered lawfully, their subsequent 'remaining' here did not convert them into 'illegal entrants'. But they were not 'settled' here: see ss 2 (3) (d) and 33. Such a person was put into a better position than an illegal entrant. He was specially catered for. He was regarded as ordinarily resident here, even though he had remained here in breach of the immigration laws: see s 7 (2). He could not be deported on the ground that his presence was not conducive to the public good: see ss 7 (1) (a) and 3 (5) (b). But he could be deported on the ground that he had overstayed his time (see s 3 (5) (a)), unless he had been here for five years or more: see s 7 (1) (b).

Applying these considerations, it is plain that the three men here were all 'illegal entrants'. They were not 'settled' here on 1st January 1973; nor did they come on a permit for a limited period. So they are liable to be removed.

The removal of illegal entrants

The 1971 Act clearly contemplates that an illegal entrant can be removed on the direction of the Home Secretary: see ss 4 (2) (c) and 16 (1) (a). It is specifically made retrospective so as to apply to entrants arriving in the United Kingdom before the Act came into force: see s 34 (1) (a) and (b). It follows that a man who entered unlawfully before the Act came into force is liable to be removed after it. The procedure is contained in Sch 2. Summarised, it comes to this: 'Where an illegal entrant is not given leave to enter or remain in the United Kingdom' (para 9), he 'may be detained under the authority of an immigration officer pending the giving of directions and pending his removal in pursuance of any directions given' (para 16).

The words 'is not given' must, I think, include 'has not been given'. Otherwise it would mean that no one who entered unlawfully before 1st January 1973 could be detained or removed under this procedure. That cannot have been intended. When you remember that an 'illegal entrant' includes one who *has* entered unlawfully, para 9 must be read as if it said in full: 'when a person who *has* entered unlawfully is not *thereafter* given leave to remain.'

After an immigration officer has given authority for the man's detention, it is for for Secretary of State to consider whether he should be given leave to remain or should be removed. He must give the man notice in writing of his decision: see s 4 (1). If the man is to be removed, the Secretary of State may order any shipping or air line to make arrangements accordingly: see para 10 (1) of Sch 2.

The power to remove an illegal entrant seems to be entirely a matter for the discretion of the Secretary of State. The statute places no limit on his discretion. If he exercises it honestly, I do not think that the court can interfere with his discretion. An illegal entrant in this respect is like an alien. He has no right to be here. He can be removed without reasons given and without a hearing: see *Schmidt v Secretary of State for Home Affairs*¹. We were assured, however, that the Home Secretary does exercise his discretion with the greatest care. He is ready to consider any representations that may be made to him.

Appeal

Once the Secretary of State gives directions that a man is to be removed on the ground that he is an illegal entrant, the man is given a right of appeal to an adjudicator on the ground that, on the facts of the case, he was not in law an illegal entrant: see s 16 (1) of the 1971 Act. He has no right of appeal on any other ground: cf s 13 (4). But there is a very significant provision in the Act. He cannot appeal so long as he is in the United Kingdom: see s 16 (2). He can only appeal after he has been removed, that is, presumably when he has got back to his homeland. Such an appeal would not seem to be a very beneficial remedy if a mistake has been made.

a These provisions as to appeal give rise to a question of the first importance. Do they take away a person's right to come to the High Court and seek a writ of habeas corpus? I do not think so. If Parliament is to suspend habeas corpus, it must do so expressly or by clear implication. Even in the days of the war, when the enemy were at the gate, habeas corpus was not suspended or taken away. When a man was detained under reg 18B¹, he was entitled to apply for a writ of habeas corpus if he could show a prima facie case that he was unlawfully detained. During the war, a man called Budd made an application which was successful, because the prerequisites of a lawful detention had not been complied with. But, in his next application he failed, because the Home Secretary had made a return which could not be faulted: see *R v Home Secretary, ex parte Budd*². Lord Greene MR put an illustration which is appropriate here³:

c '... if, for example, a regulation empowered the Home Secretary to detain any person who was in fact an alien, the court could inquire into the nationality of the applicant, since, if it transpired that he was not in fact an alien, his detention would be *ultra vires*.'

d Under Sch 2 the power to detain and remove applies in respect to a person who is in truth an illegal entrant. If a man can make a prima facie case that he is not an illegal entrant, he is entitled to a writ of habeas corpus as of right: see *Green v Secretary of State for Home Affairs*⁴ per Lord Wright. The court has no discretion to refuse it. Unlike certiorari or mandamus, a writ of habeas corpus is of right to every man who is unlawfully detained. If a prima facie case is shown that a man is unlawfully detained, it is for the one who detains him to make a return justifying it.

e In my opinion, therefore, if any of these men can raise a prima facie case that he is not an illegal entrant, he is entitled to have a writ of habeas corpus to have the matter determined. He is not to be deprived of it by the process of removing him out of the jurisdiction. That expedient was condemned by s 12 of the Habeas Corpus Act 1679 with severe penalties; and we should not let it be resorted to now.

f *These three cases*

Mohammed Azam

This young man came in clandestinely to England in January 1970. He was an illegal entrant. He remained here unlawfully in breach of the immigration laws. It was suggested that he was given leave to remain, but the statement made by the police cannot be so construed. In this respect his case is like the case of Khera which I will consider in a moment. He has shown no ground for saying that his detention was unlawful; or that his removal would be. There is no ground for habeas corpus in his case.

Gurbax Singh Khera

h This man came in clandestinely to England in December 1968. He was an illegal entrant. Counsel submitted that Mr Khera was impliedly given leave to remain here or that his illegal entry was waived, or that the Home Office had acquiesced in his remaining here. He made this submission because of the visit of the police officer on 30th December 1971 and what happened afterwards, which I have recounted. I cannot, however, read into this any implied leave or waiver. The police officer only told the man that there would be no police action and that the full circumstances had been reported to the Home Office. That is in no sense a representation that he had leave to stay. I can understand, of course, that Mr Khera thought that

1 Of the Defence (General) Regulations 1939 (SR & O 1939 No 927)

2 [1942] 1 All ER 373, [1942] 2 KB 14

3 [1942] 1 All ER at 376, [1942] 2 KB at 22, 23

4 [1941] 3 All ER 388 at 400, [1942] AC 284 at 302

when the police officer returned his passport to him, he was out of trouble. So he would have been but for the new Act. But the new Act was expressly made retrospective. Section 34 (1) (a) and (b) said that the Act, as from its coming into force, shall apply in relation to entrants or others arriving in England, at whatever date before or after it came into force. It is clear to my mind that Mr Khera was never given leave to be here. The representation made by the police officer could not be so construed.

Malkiat Singh Sidhu

This man entered the country clandestinely in January 1968; but, unfortunately for him, he cannot avail himself of the Bhagwan Gap. He had previously come in to Dover and to Folkestone and had been refused. When he came in afterwards clandestinely, he was guilty of an offence against s 4 of the 1962 Act; and so long as he remained here he was continually guilty of an offence. He entered unlawfully in breach of the immigration laws and was, therefore, an 'illegal entrant' within s 33 (1).

Counsel for Mr Sidhu sought to escape removal in this way. He said that, by s 34 (4) (b) of the 1971 Act, the Act did not apply—

'in relation to removal from the United Kingdom and matters connected therewith... in any case where a person is to be removed in pursuance of a decision taken before the coming into force of this Act...'

Counsel said that this removal was 'in pursuance of' the decisions taken in December 1967 and January 1968 when he was refused entry at Dover and Folkestone.

I am afraid I cannot accept this argument. Section 34 (4) (b) is dealing with decisions to remove taken before the carrying into force of the Act. These decisions to refuse entry were not decisions to remove. The removal was in consequence of it, but not in pursuance of them.

Conclusion

In setting out the facts relating to these three men, I have done so with some sympathy for them. Coming from a Commonwealth country, where there is desperate poverty, they sought refuge in this country—a country where they can obtain work at good wages; where there are social services beyond compare; and where, above all, the law still protects the freedom of the individual. No doubt they had heard of friends and relatives who had come and settled here, and done well. No doubt there were grasping agents ready to take their money to arrange a passage. Yet, they must have known that their entry was unlawful. No one enters a country by night in a small boat if he is coming in lawfully. They must have known that there was a queue of people waiting to come in lawfully; and that they were jumping the queue. They must have known, too, that their stay here was precarious. So they did all they could to get passports of seeming validity. No doubt they hoped all the time that they would not be found out. To be fair to them, they seem to have behaved well and worked well. After three years, some might think that their wrongdoings could be forgiven, and that there should be an amnesty. But, Parliament has decided otherwise. I think I can see why. These men, if once here by leave, will seek to bring their wives and children over. Two of them have already applied to do so. If the men are allowed to remain, it will be difficult to refuse the wives and children. If this were allowed, the number of immigrants would be increased so greatly that there would not be room for everybody. Again, if an amnesty were granted, it would be an encouragement to others to follow their example; and that simply cannot be permitted. By sending back illegal entrants, it will help to deter others from trying to do the same.

In the circumstances Parliament, as I read the 1971 Act, has decided that illegal entrants can be sent back. It has entrusted this decision to the Home Secretary, and not to the courts. It has left it to his discretion. It is better left there because, after

a all, the matter is one of policy which the courts cannot handle. The Home Secretary can take into account all the circumstances. He has to weigh in the balance on the one hand the length of time the man has been here, and his conduct while here; and, on the other hand, the effect on our society if he and others like him are allowed to stay. This is not a justiciable matter for the courts. It is an administrative matter for the Secretary of State. It is very like his discretion to remove aliens, which
 b has never been questioned in all our long history. Illegal entrants cannot expect to be treated better than aliens. Even though they are Commonwealth citizens, they have come into this country in flagrant defiance of our laws. They cannot pray in aid those very laws so as to enable them to remain here. The invasion by them has reached such a scale that Parliament has said: 'This must be stopped. The Home Secretary can send them back.' If he orders their removal, the courts cannot interfere with his decision. But I would emphasise that this power of the Home Secretary
 c can only be exercised when the man is in truth an illegal entrant. It is very different from the power given in wartime under reg 18B¹. Under that regulation a man could be detained on suspicion—suspicion that he was of hostile association. Here he can only be removed if he was in truth guilty—guilty of having unlawfully entered. Under reg 18B it was dependent on the opinion of the Home Secretary—if he had reasonable cause to believe. Here it is dependent on matter of fact—whether he was
 d an illegal entrant. Under reg 18B the decision could hardly ever be challenged by habeas corpus. Here it can be. The Home Secretary can, if called on, be required to show that the man was an illegal entrant. With these safeguards, none of these men can justly complain if the Home Secretary should decide that he shall be removed. I would, therefore, dismiss these appeals.

e **BUCKLEY LJ.** Each of the three appellants has been detained by the authority of an immigration officer pursuant to the Immigration Act 1971, Sch 2, para 16 (2). That paragraph empowers an immigration officer to authorise detention of a person in respect of whom directions might be given under any of paras 8 to 14 of the same schedule. The relevant paragraphs are paras 9 and 10, which are applicable to the
 f appellants only if each of them is an 'illegal entrant' within the meaning of the statute. Section 33 (1) defines 'illegal entrant' as meaning a person unlawfully entering or seeking to enter the United Kingdom in breach of a deportation order or of the immigration laws, including a person who has so entered. None of the appellants has been ordered to be deported. In respect of each of the appellants the question is whether he is a person who has entered the United Kingdom unlawfully in breach
 g of the immigration laws. By the same section the expression 'immigration laws' is defined as meaning the 1971 Act and any law for purposes similar to that Act which is for the time being or has (before or after the passing of that Act) been in force in any part of the United Kingdom. Each of the appellants entered the United Kingdom clandestinely without submitting to examination by the immigration authorities. Mr Azam came here in January 1970; Mr Khera came in December 1968; Mr Sidhu
 h came in January 1968. It is consequently necessary to consider what the law was at these dates respectively in order to determine whether they entered the United Kingdom unlawfully in breach of the immigration laws then in force.

Each of the appellants is a Commonwealth citizen, that is, a British subject. Before the passing of the Commonwealth Immigrants Act 1962 every British subject had the right at common law to enter the United Kingdom without let or hindrance when and
 j where he pleased and to remain here as long as he wished: see *Director of Public Prosecutions v Bhagwan*². That state of affairs was modified by the 1962 Act. The appellants are persons to whom the 1962 Act applies. Section 3 of, and Sch 1 to, the 1962 Act empower immigration officers to examine any person who lands or seeks

¹ See the Defence (General) Regulations 1939 (SR & O 1939 No 927)

² [1970] 3 All ER 97 at 99, [1972] AC 60 at 74

to land in the United Kingdom for the purpose of ascertaining whether he is or is not a Commonwealth citizen subject to control under the Act, and, if so, for the purpose of determining what action, if any, should be taken in his case under that Act. Section 2 of the Act empowers immigration officers on examination of any Commonwealth citizen to whom the Act applies, who enters or seeks to enter the United Kingdom, to refuse him admission or to admit him subject to conditions. Paragraph 1 (2) of Sch 1 provided that a person should not be required to submit to examination after the expiration of 24 hours from the time when he landed in the United Kingdom. In *Director of Public Prosecutions v Bhagwan*¹ the House of Lords pointed out that the only restrictions which the 1962 Act imposed on a British subject's right to enter the United Kingdom are those to be found in s 2, and that the powers of an immigration officer under that section were exercisable only on the examination of an immigrant under the Act. Bhagwan, who had not presented himself for examination nor been required to do so within 24 hours of his landing, was prosecuted for conspiring with others to evade examination under the Act. It was contended that by implication the Act imposed on citizens to whom it applied a duty to present themselves to an immigration officer for examination within 24 hours of landing in the United Kingdom. The House of Lords rejected this contention. Lord Diplock said²:

'My Lords, in the face of what the Act states and, even more significantly, what it omits to state, it would, in my view, be quite unjustifiable to attribute to Parliament so devious an intention to impose by implication on Commonwealth citizens a duty in derogation of their common law rights as British subjects which it did not put into express words.'

The House of Lords accordingly held that Bhagwan could not be found guilty of conspiracy.

Accordingly from the commencement of the 1962 Act until the Commonwealth Immigrants Act 1968 came into operation the position was that a British subject who came into the United Kingdom without being examined by an immigration officer within 24 hours after he landed in the United Kingdom could not thereafter be refused entry to or removed from the United Kingdom, nor could conditions be imposed on his presence in the United Kingdom; he could not be prosecuted for any offence under the Act and so could not be deported consequent on conviction of such an offence. He was as much entitled to be in the United Kingdom as he would have been if the 1962 Act had never been enacted. In this state of the law an immigrant who submitted himself to examination under the Act and was permitted to enter the United Kingdom without any conditions being imposed could not, in my opinion, be properly said to have entered the United Kingdom by the leave of the immigration officer; he would have entered in the exercise of his common law right to do so. Under para 2 of Sch 1 to the 1962 Act the powers of an immigration officer to refuse admission to the United Kingdom or to admit to the United Kingdom subject to conditions had to be exercised in writing. There is no corresponding provision for leave to enter the United Kingdom being given in writing or at all. This was the state of the law when Mr Sidhu entered the United Kingdom. In December 1967 he had been refused admission at Dover. In January 1968 he was again refused admission. On 14th January 1968 he entered the country secretly without examination. By so doing, having already been refused admission, he committed an offence under s 4 of the 1962 Act. Such offence is by the terms of the section a continuing offence so long as he remains in the United Kingdom. He is accordingly still guilty of that offence today, and could be prosecuted for it, and could be recommended for deportation.

Section 2 of the 1968 Act substituted for s 2 (1) and (2) of the 1962 Act new provisions

¹ [1970] 3 All ER 97, [1972] AC 60

² [1970] 3 All ER at 103, [1972] AC at 79

a which contain considerable amendments of the subsections in the earlier Act, but none of these amendments is, I think, relevant for present consideration. Section 3 of the 1968 Act introduced into the 1962 Act a new section, s 4A. Subsections (1) and (2) of that section are in the following terms:

b '(1) Subject to the following provisions of this section, if any person being a Commonwealth citizen to whom section 1 of this Act applies lands in the United Kingdom and does not fulfil either of the conditions specified in the next following subsection, he shall be guilty of an offence.

c '(2) The conditions referred to in subsection (1) of this section are—(a) that, while on board the ship or aircraft from which he lands in the United Kingdom, he has been examined by an immigration officer; (b) that he lands in accordance with arrangements approved by an immigration officer, and on landing, submits to examination in accordance with those arrangements.'

d These provisions in effect required an immigrant to whom the 1962 Act applied (other than one coming to the United Kingdom by land from the Irish Republic) to reach the United Kingdom either on an authorised ship or aircraft or through an authorised port or airfield. To do otherwise was made an offence. Section 4 substituted 28 days for the period of 24 hours mentioned in Sch 1, para 1 (2), to the 1962 Act. This was the position when Mr Azam and Mr Khera came to the United Kingdom. Each of them entered the country secretly without complying with the requirements of s 4A, but neither of them had been refused admission. They were consequently guilty of offences under s 4A, but not of offences under s 4. An offence under s 4A is not a continuing offence. Consequently an offender under that section cannot be prosecuted for the offence after the end of six months from the time when the offence was committed (Magistrates' Courts Act 1952, s 104). Neither Mr Azam nor Mr Khera was required to submit to examination within 28 days of landing and neither of them has been prosecuted. Consequently since about July 1970 in the case of Mr Azam, and since about June 1969 in the case of Mr Khera, neither of them has been liable to be prosecuted or, on conviction, to be recommended for deportation on account of his irregular entry to the United Kingdom. There was then no other power to remove them from the United Kingdom for any infraction of the immigration laws. True, they might perhaps have been prosecuted for conspiracy but that is a different offence. Accordingly as it seems to me, they were, at any rate so long as they remained in the United Kingdom, in the same position as they would have been if the 1968 Act had not been passed, that is, a similar position to Bhagwan's. They were legally entitled to be here and to remain here.

g The 1971 Act created a new category of British subjects called 'patrials', being persons recognised by the Act as having the right of abode in the United Kingdom. Section 3 of the Act prohibits entry into the United Kingdom by any person who is not a patrial, without leave. Thus, for the first time non-patrial British subjects were deprived of any right to enter the United Kingdom without leave; leave to enter or remain became for them (as it had previously been for aliens) a condition precedent to the acquisition of any right to come or to be here. None of the appellants is a patrial. Under s 1 (2) any person who is not a patrial may live, work and settle in the United Kingdom by permission, and anyone who, when the Act came into operation (which was on 1st January 1973), was settled in the United Kingdom is to be treated as having been given indefinite leave to enter or remain here.

j So if any of the appellants was 'settled' here on 1st January 1973 he is entitled to remain here. By virtue of ss 33 (1) and 2 (3) (d) of the 1971 Act a person is settled in the United Kingdom for the purposes of that Act if he is ordinarily resident here without being subject under the immigration laws to any restriction on the period for which he may remain. Section 33 (2) provides that a person is not to be treated for the purposes of the Act as ordinarily resident in the United Kingdom 'at any time when he is there in breach of the immigration laws'. So the question arises

whether the appellants respectively were in this country on 1st January 1973 in breach of the immigration laws. It will be convenient to take first the case of Mr Azam. a

The Divisional Court expressed the view, with which I agree, that Mr Azam was ordinarily resident in this country on 1st January 1973 unless his residence here ceased to qualify for this purpose by reason of s 33 (2). The Divisional Court reached the conclusion on the facts of the case that Mr Azam was in this country in breach of the immigration laws. He came to this country, said Lord Widgery CJ, in flagrant breach of those laws, and the fact that some of the consequences of his illegal entry had spent themselves did not make it possible to say that he was otherwise than here in breach of those laws. With deference to those who think otherwise, I feel unable to agree with this view. b

It is, I think, instructive to compare the language of s 4A (1) of the 1962 Act with the language of s 4 (1) of the Act which is in the following terms: c

'If any person being a Commonwealth citizen to whom section one of this Act applies—(a) enters or remains within the United Kingdom, otherwise than in accordance with the directions or under the authority of an immigration officer, while a refusal of admission under section two of this Act is in force in relation to him; or (b) contravenes or fails to comply with any condition imposed on him under that section or under Part II of the First Schedule to this Act, he shall be guilty of an offence; and any offence under this subsection, being an offence committed by entering or remaining in the United Kingdom, shall be deemed to continue throughout any period during which the offender is in the United Kingdom thereafter.' d

Section 4 speaks of entering the United Kingdom whereas s 4A speaks of landing in the United Kingdom. Section 4 (1) (a) only applies to entering or remaining within the United Kingdom while a refusal of admission is in force. Section 4 (1) (b) relates to contraventions or breaches of conditions attached to entering the United Kingdom. If, on the other hand, an immigrant to whom the Act applies lands in the United Kingdom in contravention of s 4A but submits himself to examination within the prescribed time, he commits no offence under s 4 but remains guilty of an offence under s 4A, whether on examination he is permitted to enter the United Kingdom, or permitted to enter subject to conditions, or refused entry. Section 4 (1) makes an offence under that section a continuing offence throughout any period during which the offender is in the United Kingdom thereafter. Section 4A does not make an offence under that section a continuing offence. e

In my opinion the legislature has made a distinction between the act and the consequences of illegal entry and the act and the consequences of illegal landing. 'Landing' in these Acts, in my view, relates to the physical act of disembarking from a ship or aircraft (the 1962 Act, s 4A (7), Sch 1, paras 1 (1) and (2), 5 (1), 7 (1), 10 (1)). The 1971 Act uses the words 'disembark' and 'embark': see s 11. A would-be entrant may land without being treated as having entered the United Kingdom within the meaning of the Acts. (See for example s 11 of the 1971 Act. Although less clear, I think this is also implicit in the 1962 Act.) Entry is something which occurs, in the case of an entrant who requires leave to enter and comes into the United Kingdom by the authorised means, only after he has been examined and permitted to enter, whether unconditionally or subject to conditions, notwithstanding that he may have landed before he was examined. Conversely a would-be entrant who is refused admission and is removed from the United Kingdom cannot, I think, be said to have entered the United Kingdom notwithstanding that he may have landed for the purpose of examination and may even have spent some days ashore while his examination was proceeding or pending. Entry, in my opinion, involves some degree of participation in the life of the community in the United Kingdom, however temporary it may be. f
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h
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a This distinction between landing in the United Kingdom and entering the United Kingdom may seem to be a fine and somewhat artificial one, but it is one which an analysis of the Acts seems to me to indicate as an intentional distinction on the part of the legislature. If Parliament had intended that a secretive entry into the United Kingdom in breach of s 4A but not of s 4 should have similar consequences to an illegal entry in spite of a refusal of admission, it would surely either have made an offence under s 4A a continuing offence, as is an offence under s 4, or it would have provided, as in the cases of seamen and stowaways (see the 1962 Act, Sch 1, paras 8 and 9), that the secretive entrant should be treated as if he had been refused admission.

b Bearing in mind that, as the House of Lords indicated in *Bhagwan's case*¹, the traditional and one might say basic freedom of every British subject to move at will about the Crown's dominions should not be withdrawn or abridged unless by clear language or necessary implication in a statute, I do not think that s 4A should be construed as affecting a Commonwealth citizen's right of entry to the United Kingdom but merely as regulating certain methods of exercising that right. So construed the section did not, in my judgment, render Mr Azam's entry into the United Kingdom illegal, although his method of entry rendered him liable to a penalty. Nor was his entry without prior examination unlawful on that account, for the 1962 Act, as amended by the 1968 Act, did not destroy his common law right to enter the United Kingdom (contrast the language of s 3 (1) of the 1971 Act) but merely rendered him liable to a discouraging penalty if that right were exercised in a particular manner. It might be suggested that s 4A imposed a duty on a would-be entrant to comply with the conditions laid down in that section and so to submit himself for examination, but it remained the law that no one should be required to submit to examination after 28 days from the time when he landed. In these circumstances, in my judgment, if s 4A imposed any duty, it was confined to landing and did not relate directly to submitting to examination.

c This leads me to the conclusion that Mr Azam, notwithstanding his failure to comply with the conditions of s 4A (1), was not a person who 'entered' the United Kingdom unlawfully in breach of the immigration laws: in other words he was not an illegal entrant for the purposes of the 1971 Act.

d But if, as may be the case, I am wrong about that, is Mr Azam to be deemed to have received indefinite leave to remain here pursuant to s 1 (2) of the 1971 Act? This, as I have already indicated, depends on whether he was settled here on 1st January 1973, that is, ordinarily resident here without any restriction on the period for which he might remain (s 2 (3) (d)), which could not be the case if at that date Mr Azam was here in breach of the immigration laws. It is true that Mr Azam's presence here on 1st January 1973 was a consequence of his having earlier committed a breach of the immigration laws by landing without fulfilling the conditions of s 4A, but with the passage of time that breach had ceased to have any significance or substance. Mr Azam was no longer liable to any kind of penalty in respect of it. So far from his presence in the United Kingdom being in breach of any law it was, I think, an exercise of his common law right as a British subject to reside in this part of Her Majesty's dominions, of which right the statutes had not, for reasons which I have already endeavoured to make plain, deprived him. In my judgment, Mr Azam was not in the United Kingdom on 1st January 1973 in breach of the immigration laws, so that he must be taken to have then been settled here and must be treated under s 1 (2) of the 1971 Act as a person to whom indefinite leave to enter or remain in the United Kingdom (which I take to mean leave which is unqualified in any way and unrestricted as to duration) had been given. It follows from this, in my judgment, that, even if contrary to my view Mr Azam should be regarded as having been an illegal entrant, he nevertheless is a person who is permitted under the terms of s 1 (2) of the 1971 Act to remain in the United Kingdom. This conclusion appears to me

to be consistent with a common sense view of the policy of the 'general principle', as it is called in the marginal note to the section, enshrined in s 1 (2). a

The same considerations apply to the case of Mr Khera, and the same conclusions follow. It is consequently unnecessary for me to consider the point, which is peculiar to his case, relating to his communication with the police which, it is suggested, amounted to an implied grant of permission to remain in the United Kingdom or a waiver of any right to rely in relation to him on the irregularity in his arrival in this country. Nor need I deal with the other point raised by his counsel, that the immigration officer, at whose instance Mr Khera was detained, did not specifically consider the question whether Mr Khera had obtained leave to remain here. I would observe, however, that Mr Khera had an opportunity to raise this point, if it had any substance, which I doubt, and that, as he did not do so, the course taken by the immigration officer does not seem to me to be open to criticism on the ground suggested. b

Mr Sidhu, having entered the United Kingdom in spite of having been refused admission, was indisputably an illegal entrant. The first point taken in this court on his behalf is that since, as is contended, he is to be removed from the United Kingdom, if at all, pursuant to a decision taken before the 1971 Act came into force, he is not a person to whom the 1971 Act is applicable for any purpose connected with such removal (s 34 (4) (b)). In my judgment this premise is a false one. The decision to detain Mr Sidhu was taken after 1st January 1973. Any decision of the Secretary of State that he shall be removed from the United Kingdom will also have been made after that date. Mr Sidhu's removal, if he is removed, will be in pursuance of that decision of the Secretary of State, and not, as has been suggested, in pursuance of the decision in January 1968 to refuse him admission to the United Kingdom. So, in my judgment, the 1971 Act applies to Mr Sidhu for the present purposes. c

The second point taken on Mr Sidhu's behalf is that the powers under Sch 2, para 8, to the 1971 Act are not available in this case because of sub-para (2) thereof; that the powers under para 9 of the same schedule are inappropriate, because nothing is known about the ship or aircraft in which he arrived; and that the Secretary of State has not exercised or indicated any intention to exercise his powers under para 10. We are told that the Secretary of State intends to exercise those powers, if they are available to him. In my judgment, the fact that he has not yet exercised them is no bar to Mr Sidhu's detention under para 16 (2) of the schedule, which expressly provides for detention pending the giving of directions for the removal of the detained person. d

The reasons which, in my opinion, prevail in the cases of Mr Azam and Mr Khera do not apply to Mr Sidhu. Having entered the United Kingdom in spite of having been refused admission, he committed a breach of s 4 of the 1962 Act. That breach constituted a continuing offence which was still continuing at 1st January 1973. No common law right to enter the United Kingdom or to remain here was available to him. At 1st January 1973 he was an illegal entrant who was here in breach of the immigration laws. He is consequently not to be treated as having then been ordinarily resident here and s 1 (2) of the 1971 Act does not apply to him. e

Counsel for the respondents has contended that, disregarding the merits of the appellants' cases, none of them should be granted habeas corpus because the 1971 Act provides an appeal procedure which he suggests should be preferred to habeas corpus proceedings. In my judgment, this argument should not prevail. A litigant should not be refused the ancient remedy of habeas corpus on account of the availability of some less expeditious and advantageous alternative remedy. None of the appellants could appeal under the Act until his removal from the United Kingdom had taken place. In these circumstances not only is the appeal procedure manifestly less convenient and advantageous to the appellants than habeas corpus proceedings, but it is not adequate to maintain intact the right which the appellants assert, namely a right to remain undisturbed in the United Kingdom. f

For these reasons I would allow the appeals of Mr Azam and Mr Khera but dismiss the appeal of Mr Sidhu. g

STEPHENSON LJ. We are concerned with three Commonwealth immigrants who claim that they are unlawfully detained.

An immigration officer has authorised the detention of each of them by detention orders dated 30th January, 5th February and 28th February 1973 respectively under para 16 of Sch 2 to the Immigration Act 1971 pending the completion of arrangements for dealing with them under the Act. They are therefore all persons deemed to be in legal custody by virtue of para 18 (4) of the same schedule. The question is whether the immigration officer who made each of those detention orders was entitled to make it by virtue of para 16 of the schedule or whether he exceeded his statutory powers because for one reason or another the person whom he ordered to be detained was not 'a person in respect of whom directions may be given under any of paras 8 to 14' of the same schedule. Only if he is such a person may he be 'detained under the authority of an immigration officer pending the giving of directions and pending his removal in pursuance of any directions given'. Of those paragraphs, paras 8 to 11 provide for the removal of persons refused leave to enter and illegal entrants. The respondents allege that all these appellants are illegal entrants and para 9 therefore applies. That paragraph provides: 'Where an illegal entrant is not given leave to enter or remain in the United Kingdom, an immigration officer may give' directions of the kind referred to in para 16 (2). By s 33 (1) an 'illegal entrant' means—

'a person unlawfully entering or seeking to enter [the United Kingdom] in breach of a deportation order or of the immigration laws, and includes also a person who has so entered'.

Of each appellant the question then has to be asked: is he an illegal entrant? If not, he must be released and the writ must go. If he is, has he been given leave to enter or leave to remain? (I hope to justify the form of the last question without ignoring an argument addressed to us on the use of the present tense in para 9.) If he has, again he must go free. The appellant Sidhu admits that he is an illegal entrant but claims that the 1971 Act, including para 9 of Sch 2, does not apply to him. The appellant Khera, having conceded in the Divisional Court that he was an illegal entrant, would like this court to decide on the arguments of the appellant Azam's counsel that he is not, but also to imply from the facts of his case that he has been given leave and further to hold that the immigration officer failed to consider whether he had been given leave. The appellant Azam maintains that he is not an illegal entrant, or if he is, he has become entitled to remain because he has been given leave.

If any of the points taken on the appellant Azam's behalf were right we should be bound to decide that the appellant Khera's detention was unlawful. It therefore becomes necessary to consider the 1971 Act, what changes it has made in the law and whether and how it affects the appellants.

We cannot get out of deciding whether the detention of any of these three appellants is lawful by finding in the appeals provisions of Part II of the Act an alternative remedy. Where a person is detained in custody pursuant to the sentence of a court of law I agree with counsel for the respondents that he must challenge the legality of his detention by the prescribed procedure for appealing to a higher court or higher courts and not by such an application for habeas corpus: see *Ex parte Corke*¹. But when he is detained in custody pursuant to an order of the executive I am far from satisfied by the authorities on which counsel relies that the principles applicable to the exercise of the court's discretion in granting writs of mandamus or certiorari apply also to habeas corpus or that the existence of an alternative remedy however

convenient, beneficial and effectual prevents the issue of the writ. Certainly there is no such alternative remedy here and I agree with Lord Denning MR and Buckley LJ that we must examine the legality of the appellants' detention. a

The Immigration Act 1971 is according to its preamble—

‘An Act to amend and replace the present immigration laws, to make certain related changes in the citizenship law and enable help to be given to those wishing to return abroad, and for purposes connected therewith.’ b

By s 34 (1) it repeals the whole of the Aliens Restriction Act 1914, the whole of the Commonwealth Immigrants Act 1962 with a few exceptions, the whole of the Commonwealth Immigrants Act 1968 and the whole of the Immigration Appeals Act 1969 as well as parts of three British Nationality Acts: see Sch 6.

The 1962 Act was ‘An Act to make temporary provision for controlling the immigration into the United Kingdom of Commonwealth citizens’; the 1968 Act an Act to amend ss 1 and 2 of the 1962 Act and its first schedule ‘and to make further provision as to Commonwealth citizens landing in the United Kingdom’. By contrast the 1971 Act regulates the entry into and stay in the United Kingdom (Part 1) of all immigrants including aliens and, on its true construction as I think, whenever they ‘immigrated’. c

The Act begins by dividing (s 1) persons into those who have a right of abode in the United Kingdom from those who have not. Section 2 defines those who have that right under the Act and calls them ‘patrial’ (sub-s (6)). If a person is not patrial ‘he shall not enter the United Kingdom unless given leave to do so in accordance with this Act’ (s 3 (1) (a)), but ‘he may be given leave to enter the United Kingdom (or, when already there, leave to remain in the United Kingdom) either for a limited or for an indefinite period’ (sub-s (1) (b)), and the limited leave may be subject to conditions (sub-s (1) (c)); and he is liable to deportation if he satisfies the provisions of sub-ss (5) or (6). The administration of that control on entry and stay is given by s 4 to immigration officers (the power to give or refuse leave to enter) and to the Secretary of State (the power to give leave to remain or to vary any leave), and sub-s (2) of that section introduces the provisions of Sch 2 with respect to among other things ‘the detention of persons pending examination or pending removal from the United Kingdom’. d

The introductory words of s 2 (1), ‘A person is under this Act to have the right of abode in the United Kingdom’, leave open the possibility that persons may have the same or an equivalent right other than under the Act. It may be that the immigrant Bhagwan would fall into that category: see *Director of Public Prosecutions v Bhagwan*¹. e But I understand the Act to be limiting the right to be ‘free to live in, and to come and go into and from, the United Kingdom without let or hindrance’ to patrials (s 1 (1)), and to be regulating and controlling the entry into, stay in and deportation from the United Kingdom of all persons who are not patrial by s 1 (2). By that subsection they need permission but are treated as having been given indefinite leave to enter or remain in the United Kingdom if they are settled there at the coming into force of the Act, i.e., on 1st January 1973. Those who are not patrial have now no right to live in the United Kingdom or to come and go without let or hindrance; they can have only permission to live, work and settle in the United Kingdom indefinitely, which may come to very much the same thing. f

Who then are to be regarded as ‘settled’ in the United Kingdom on 1st January 1973? The answer is any ‘non-patrial’ who is ‘ordinarily resident there without being subject under the immigration laws to any restriction on the period for which he may remain’ (s 33 (1) and s 2 (3) (d)), but subject to this, that he is not to be treated g

a as ordinarily resident there 'at a time when he is there in breach of the immigration laws' (s 33 (2)) and that means in breach of 'any law for purposes similar to this Act which is for the time being or has (before or after the passing of this Act) been in force in any part of the United Kingdom and Islands': s 33 (1). That meaning of immigration laws must also be its meaning in the definition of illegal entrants.

b All the appellants entered the United Kingdom clandestinely without encountering an immigration officer. The appellant Sidhu entered on 1st January 1968 (two months before the 1968 Act came into force) after being refused leave by an immigration officer under s 2 of the 1962 Act on 9th January 1968. He indisputably entered in breach of s 4 (1) (a) of the 1962 Act which provided:

c 'If . . . a Commonwealth citizen . . . (a) enters or remains within the United Kingdom, otherwise than in accordance with the directions or under the authority of an immigration officer, while a refusal of admission under section two of this Act is in force . . . he shall be guilty of an offence . . .'

d And indeed he was still guilty of that offence in February 1973 because the offence was by s 4 (1) 'deemed to continue throughout any period during which the offender is in the United Kingdom thereafter'. He is therefore beyond doubt an illegal entrant and unless the 1971 Act or para 9 of Sch 2 does not apply to him for some other reason his detention is lawful.

e The position of the appellants Azam and Khera is at first sight less clear, but I would have had no doubt that the Divisional Court was right in holding them both to be illegal entrants and counsel for the appellant Khera right in conceding them to be so were it not for the contrary opinion of Buckley LJ. They both entered clandestinely after the 1968 Act but before the 1971 Act came into force, the appellant Azam in January 1970 and the appellant Khera in December 1968. In my judgment they both entered in breach of s 4A which was added to the 1962 Act by s 3 of the 1968 Act. That section provided that 'if . . . a Commonwealth citizen . . . lands in the United Kingdom and does not fulfil either of [two] conditions', that he has been examined on board the ship or aircraft from which he lands, or that he lands in accordance with arrangements approved by an immigration officer and on landing submits to examination in accordance with those arrangements, he shall be guilty of an offence. Neither of these two appellants fulfilled either of these two conditions. Why has not each of them entered in breach of this section? The section imposed further restrictions on landing in the United Kingdom: see the sidenote. It plugged the gap left by s 4 of the 1962 Act and made clandestine entry illegal, as Lord Diplock pointed out in *Bhagwan's* case¹. It did not make such landing an offence which continued throughout the offender's stay in the United Kingdom, although it did (by s 4) extend the time after which he could not be removed for so entering from 24 hours to 28 days (1962 Act, Sch 1, para 1). But that merely had the effect of protecting the offender from prosecution after the six months' time limit for summary offences prescribed by the Magistrates' Courts Act 1952, s 104. As Lord Diplock pointed out, the 1962 Act was an experiment in controlling the numbers of Commonwealth immigrants and I think that the 1968 Act merely tried a different method of achieving the same thing, with one hand making entry without encountering an immigration officer an offence and extending the period for discovering it, with the other reimposing the ban on prosecuting the offender who 'gets away with it' after six months.

j The reasons for imposing the restrictions on persons landing and not on persons entering is not so clear. But it is to be noted that it is not only the Aliens Restriction Act 1914 and the Aliens Order 1953² which treat of landing and impose restrictions

1 [1970] 3 All ER at 104, [1972] AC at 80

2 SI 1953 No 1671

on landing and embarkation. The 1962 Act, having provided in s 2 for the Commonwealth citizen who 'enters or seeks to enter the United Kingdom', provides by s 3 (1) that the provisions of Part 1 of Sch 1 to that Act shall have effect with respect to— a

'(a) the examination of persons landing or seeking to land in the United Kingdom from ships and aircraft; (b) the exercise by immigration officers of their powers of refusal of admission ... under section two ...' b

And in Sch 1 will be found in para 5 a provision for landing cards and embarkation cards and in para 10 (1) definitions by which "'immigrant" means a Commonwealth citizen ... who lands or seeks to land in the United Kingdom' and "'land" means ... land from a ship or aircraft'. The definition of 'land' is repeated in the new s 4A (7). You cannot enter the United Kingdom from a boat or aircraft without landing or disembarking, and you cannot enter the United Kingdom except from a boat or aircraft (unless you cross the border from Eire to Northern Ireland). It is said that you can land from a boat (or aircraft) without entering because to enter you must enter the community by living in the United Kingdom if only for a season. I doubt that, but even if it be right I do not see how a person who lands in breach of s 4A (1) or (2) (b) and stays on in the United Kingdom has not entered the United Kingdom in breach of that immigration law. c

The 1968 Act passes from 'entering' in s 2 to 'landing' in s 3 without, I think, intending to draw any distinction between landing and entering by boat or aircraft or perhaps to do more than follow in s 3 the language which the 1962 Act had put into a schedule and anticipate that there may be yet undiscovered or unpractised methods of reaching the United Kingdom—such as by swimming or Channel tunnel. I find nothing in s 11 of the 1971 Act and its instances of what is not to be deemed to enter the United Kingdom which makes me regard the distinction between landing and entry as significant. d

'A person arriving in the United Kingdom by ship or aircraft shall for purposes of this Act be deemed not to enter the United Kingdom unless and until he disembarks' e

implies that when he does disembark (or land) he will generally be considered to have entered. And I find no material difference between offences under s 4A which s 35 (3) of the 1971 Act describes as 'unauthorised landing', and offences under s 4, which the sidenote to s 24 of the 1971 Act describes as 'illegal entry'. The material difference between the two sections is that pointed out by Lord Diplock in *Bhagwan's* case¹ and it turns these two appellants into illegal entrants. On this question I agree with Lord Denning MR. f

Next comes the question whether illegal entrants though all three are, they are nevertheless to be treated under s 1 (2) of the 1971 Act as having been given indefinite leave because ordinarily resident there at a time when they are not in breach of immigration laws past or present. Again I have come to the conclusion, in agreement with Lord Denning MR and in spite of Buckley LJ's dissent, that the Divisional Court was right in holding that they were here on 1st January 1973 in breach of s 4A and are therefore prevented by s 33 (2) of the 1971 Act from claiming to be settled and so to be treated as having been given indefinite leave. g

There is considerable force in the argument that a person is not in breach of a law at a time when he cannot be prosecuted for the offence of breaking it and that the omission from s 4A of words like those in s 4 of the 1962 Act making the offence of unauthorised landing continue points strongly to the appellants no longer being in breach after the expiry of the 28 days and six months from their landing. Suppose one h

¹ [1970] 3 All ER at 104, [1972] AC at 80 i

a of these appellants had been prosecuted before the time expired, convicted and not deported, could he be said to be in breach of s 4A years later?

The answer is not, I think, to be found in analogies, though I do not see why a man may not be in breach of contract after the limitation period for suing him on it has run out. It is in the wording of s 33 (2) which makes the right question not 'is he in breach now?' but 'is he here in breach now?' Persons may be ordinarily resident here now, and since 1st January 1973 either in compliance with the immigration laws or not. There is no third class of persons who are here safe from prosecution or other action for breach of these laws. The appellants are here not in compliance with them but in contravention of them and they are therefore not entitled to be treated as here with indefinite permission to remain. This construction of s 33 (2) may take away from Commonwealth citizens who have been here for years the right to be heard by a court in opposition to a recommendation for deportation which they would have had if they had been prosecuted earlier. But they themselves will still be able to make representations to the Secretary of State in support of their pleas to remain. And if unlawful ordinary residence here is to turn them into persons here with indefinite leave, other 'non-patrials' will be prevented from coming and staying here lawfully.

d I find nothing in Part III of the 1971 Act which deals with criminal proceedings to throw doubt on this construction of s 33 (2). A breach of the immigration laws may be an illegal entry or a similar offence (s 24) or a general offence in connection with administration (s 26). Those and other offences, summary and indictable, are all subject now to prosecution for three years after being committed (provided that not more than two months elapse after the police have enough evidence to justify proceedings (s 28)). Indeed I find some support for my view that liability to prosecution does not affect the question whether an offender is here in breach of the immigration laws in s 28 (4) which provides:

f 'Any powers exercisable under this Act in the case of any person may be exercised notwithstanding that proceedings for an offence under this Part of this Act have been taken against him.'

This would seem to be an unnecessary provision if it referred only to those who after being prosecuted for one offence committed another. It would seem to justify detaining as an illegal entrant a person who had become ordinarily resident here after being prosecuted.

g It was argued last on behalf of the appellant Azam that if he was not to be treated as having an indefinite leave under s 1 (2) of the 1971 Act he was to be treated as having it under s 34 (3) (a), as he was not at the coming into force of the Act subject to a condition limiting his stay in the United Kingdom. He can only be treated as having it thereunder if he is a person treated in accordance with s 34 (2) as having leave to enter the United Kingdom. Is he such a person?

h Section 34 (1) (a) applies the Act in relation to entrants or others arriving in the United Kingdom at whatever date before or after it comes into force, and sub-s (2) provides so far as relevant that a person given leave to land by virtue of the Aliens Restriction Act 1914 shall be treated as having been given leave to enter under this Act 'and similarly with the Commonwealth Immigrants Acts 1962 and 1968'. That means that a Commonwealth citizen given leave to enter under s 2 of the 1962 Act or leave to land under s 4A introduced by the 1968 Act shall be treated as having been given leave to enter under the 1971 Act.

i As the appellant Azam, like the appellant Khera, has not been given any such leave he cannot be treated as having it for an indefinite period and this point too fails. So this appellant's detention is lawful and his appeal fails.

I agree that neither of the two points taken on behalf of the appellant Khera is good.

1. Leave to remain in the United Kingdom can be a matter of implication: see

*R v Secretary of State for Home Affairs, ex parte Soblen*¹ per Lord Parker CJ² and Lord Denning MR³. But it must be given by the Secretary of State or on his behalf and it is not given by a police officer informing an immigrant that he will not be prosecuted, that his passport is in order and that the Home Office have been informed, nor by the supervening months of inactivity on the part of the Home Office with knowledge of his entry in breach of s 4A. Nor do the facts amount to a waiver of the breach by the Secretary of State or any agent of his, or cause s 4A to 'drop away' as counsel for the appellant Khera picturesquely put it.

2. An immigration officer must act fairly: see *Re K (H) (infant)*⁴ per Lord Parker CJ. But the immigration officer who interviewed the appellant Khera was not bound to ask him whether he had been given leave to remain since his illegal entry. The appellant had had a solicitor acting for him, he was given an opportunity to tell the immigration officer about the police visit in January 1972 and if he had told him about it the immigration officer would not have been justified in considering that he was no longer here in breach of s 4A but here with leave actual or implied or presumed under s 1 (2) of the 1971 Act. I agree that his appeal also fails.

Finally I find both points taken in this court by counsel on behalf of the appellant Sidhu wholly unconvincing.

1. His first point is that the removal of this appellant from the United Kingdom and his detention connected therewith are in pursuance of the decision taken in 1968 to refuse him admission to enter the United Kingdom in the sense that there would be no power to remove or detain him if he had been admitted when he was refused. But this far-fetched construction of s 34 (4) (b) ignores the context of this subsection. Subsection (4) is providing that 'Notwithstanding anything in the foregoing provisions of this Act, the former immigration laws shall continue to apply, and the Act shall not apply' to certain decisions already taken but not carried out. This subsection is dealing with cases where when the Act comes into force an unimplemented decision has already been made to deport or to remove, or where an appeal is actually pending; in these cases the transitional provisions apply the existing immigration law and not the new Act. No such decision had been taken against this appellant before 1st January 1973. The decision to set in motion the procedure for removal was a decision taken after that and under the powers given by the new Act, and it was in pursuance of the subsequent decision that he was and is detained.

2. Insofar as I understand counsel's second point it is or is connected with that which was rejected by the Divisional Court. It is that the directions which may be given in respect of this appellant are directions under para 10, not para 9, because para 9 only applies to an illegal entrant who is *not* given leave and the appellant is an illegal entrant who *has not been* given leave. As the Secretary of State has not given directions in respect of him under para 10 he may not be detained under para 16 (2).

It is true that the Secretary of State has not given directions, although we are told that an order under para 10 has been drawn up for his signature which awaits the results of this appeal. But detention of this appellant is lawful under para 16 (2) if directions *may* be given in respect of him. Further I share the view of the Divisional Court that the language of para 9 is wide enough to cover the appellant, although I do not share their view that the paragraph must be altered to read 'where an illegal entrant is not given leave or has not been given leave'. Faced with illegal entrants who have entered the United Kingdom and remained here for differing periods, Parliament has used language which naturally and compendiously fits all such persons who have entered or remained without leave, without leave to enter given at the

1 [1962] 3 All ER 373, [1963] 1 QB 829

2 [1962] 3 All ER at 377, [1963] 1 QB at 834

3 [1962] 3 All ER at 379, [1963] 1 QB at 842

4 [1967] 1 All ER 226 at 231, [1967] 2 QB 617 at 630

- a time or leave to remain given then or thereafter. The words 'is not given leave' do not necessarily mean 'is not given leave at the time when the immigration officer gives directions' but may equally well mean 'is a person not given leave'.
So this appellant's detention is lawful and I agree that his appeal too fails.

Appeals dismissed. Leave to appeal to the House of Lords granted in all cases.

- b Solicitors: *Michael Sears & Co* (for the appellant Azam); *Sharpe, Pritchard & Co*, agents for *Cookseys*, Wolverhampton (for the appellant Khera); *Simons, Muirhead* (for the appellant Sidhu); *Treasury Solicitor*.

L J Kovats Esq Barrister.

c

Azam and others v Secretary of State for the Home Department and another

d

HOUSE OF LORDS

LORD WILBERFORCE, LORD HODSON, LORD PEARSON, LORD KILBRANDON AND LORD SALMON
16th, 17th, 18th, 21st, 22nd MAY, 11th JUNE 1973

- e Immigration – Detention – Illegal entrant – Illegal entrant not given leave to enter or remain in United Kingdom – Detention pending directions for removal – Persons entering United Kingdom and present there in breach of immigration laws – Commonwealth immigrant – Immigrant entering United Kingdom clandestinely in breach of laws relating to Commonwealth immigrants previously in force – Immigrant no longer liable to prosecution under previous laws – Whether immigrant 'settled' in United Kingdom and deemed to have indefinite leave to remain – Whether immigrant 'illegal entrant' liable to detention and removal –
f Commonwealth Immigrants Act 1962, ss 4, 4A (as added by the Commonwealth Immigrants Act, 1968, s 3) – Immigration Act 1971, ss 1 (2), 4 (2), 33 (1), (2), 34 (1) (a), Sch 2, paras 9, 16 (2).

- g S was born in India. He arrived at Dover on 17th December 1967 and reported to the immigration authorities. He was refused admission. He returned on 9th January 1968 and was again refused admission. A few days later he returned in a small boat and, unknown to the authorities, landed somewhere on the coast. By entering after the refusal of admission he committed an offence under s 4 (1)^a of the Commonwealth Immigrants Act 1962. Thereafter he lived and worked in the United Kingdom. In March 1968 the Commonwealth Immigrants Act 1968 came into force and, by s 3, added a new section, s 4A^b, to the 1962 Act which made it an offence for a Commonwealth citizen to land in the United Kingdom without submitting to an examination by the immigration authorities. In December 1968 K, an Indian, was brought to

- a Section 4 (1), so far as material, provides: 'If any person being a Commonwealth citizen to whom section one of this Act applies—(a) enters or remains within the United Kingdom, otherwise than in accordance with the directions or under the authority of an immigration officer, while a refusal of admission under section two of this Act is in force in relation to him . . . he shall be guilty of an offence; and any offence under this subsection, being an offence committed by entering or remaining in the United Kingdom, shall be deemed to continue throughout any period during which the offender is in the United Kingdom thereafter.'
j
b Section 4A, so far as material, is set out at p 769 h and j, post

England by boat and entered the country clandestinely without reporting to the immigration authorities. In January 1970 A, a Pakistani, arrived in England by similar means. Thereafter both A and K lived in the United Kingdom and obtained employment. On 1st January 1973 the Immigration Act 1971 came into force. That Act repealed the 1962 and 1968 Acts and, by s 4 (2)^c and Sch 2^d, conferred new powers on immigration authorities with respect to 'the removal from the United Kingdom of persons . . . entering or remaining unlawfully'. By s 34 (1) (a) the 1971 Act applied to entrants arriving in the United Kingdom before the Act came into force. In January 1973 A was detained under an order issued by the chief immigration officer under para 16 (2) of Sch 2 to the 1971 Act 'pending the completion of arrangements for dealing with him under the Act'. In February 1973 K and S were detained under similar orders. All three applied for writs of habeas corpus on the ground that their detention was unlawful.

Held – (i) S was an 'illegal entrant' within s 33 (1)^e of the 1971 Act because the offence which he had committed under s 4 (1) of the 1962 Act by entering the country after being refused admission was expressly stated to be a continuing offence and was therefore continuing on the date when the 1971 Act came into force (see p 769 g, p 773 j, p 776 b to e and p 781 f and g, post). Furthermore S was, for the same reason, in the United Kingdom 'in breach of the immigration laws' when the 1971 Act came into force. By virtue of s 33 (2) he could not therefore be treated as being 'ordinarily resident' in the United Kingdom. In consequence he was not 'settled' there, within ss 1 (2)^f, 2 (3) (d)^g and 33 (1), and could not be treated under s 1 (2) as having been given indefinite leave to remain. It followed that, as an illegal entrant who had not been given leave to remain in the United Kingdom, S had been lawfully detained

c Section 4 (2), so far as material, provides:

'The provisions of Schedule 2 to this Act shall have effect with respect to . . . (c) the exercise by immigration officers of their powers in relation to entry into the United Kingdom, and the removal from the United Kingdom of persons refused leave to enter or entering or remaining unlawfully; and (d) the detention of persons pending examination or pending removal from the United Kingdom; and for other purposes supplementary to the foregoing provisions of this Act.'

d Schedule 2, so far as material, provides:

'8.—(1) Where a person arriving in the United Kingdom is refused leave to enter, an immigration officer may [make directions for his removal from the United Kingdom] . . .

'9. Where an illegal entrant is not given leave to enter or remain in the United Kingdom, an immigration officer may give any such directions in respect of him as in a case within paragraph 8 above are authorised by paragraph 8 (1) . . .

'16. . . (2) A person in respect of whom directions may be given under any of paragraphs 8 to 14 above may be detained under the authority of an immigration officer pending the giving of directions and pending his removal in pursuance of any directions given . . .'

e Section 33, so far as material, provides:

'(1) For purposes of this Act, except in so far as the context otherwise requires . . . "entrant" means a person entering or seeking to enter the United Kingdom, and "illegal entrant" means a person unlawfully entering or seeking to enter in breach of a deportation order or of the immigration laws, and includes also a person who has so entered . . . "immigration laws" means this Act and any law for purposes similar to this Act which is for the time being or has (before or after the passing of this Act) been in force in any part of the United Kingdom . . . "limited leave" and "indefinite leave" mean respectively leave under this Act to enter or remain in the United Kingdom which is, and one which is not, limited as to duration; "settled" shall be construed in accordance with section 2 (3) (d) . . .

'(2) It is hereby declared that, except as otherwise provided in this Act, a person is not to be treated for the purposes of any provision of this Act as ordinarily resident in the United Kingdom . . . at a time when he is there in breach of the immigration laws . . .'

f Section 1 (2), so far as material, is set out at p 771 b, post

g Section 2 (3), so far as material, is set out at p 771 d, post

a under paras 9 and 16 (2) of Sch 2 to the 1971 Act (see p 771 f, p 773 f, p 776 b to e and p 781 f and g, post).

(ii) A and K were 'illegal entrants' within s 33 (1) of the 1971 Act because they had landed in the United Kingdom in breach of s 4A of the 1962 Act. For that purpose no distinction could be drawn between the word 'landing', used in s 4A, and the word 'entering'; a person landing in the United Kingdom in breach of s 4A was a person 'entering . . . in breach of the immigration laws' within s 33 (1) (see p 770 d to f, p 773 j, p 776 b to e and p 779 a to c, post).

b (iii) (Lord Salmon dissenting) At the date when the 1971 Act came into force A and K were in the United Kingdom 'in breach of the immigration laws' within s 33 (2) because they had entered in breach of s 4A of the 1962 Act. It was immaterial that, because the offence under s 4A was a summary offence which was not a continuing offence, they could no longer be prosecuted for the offence when the 1971 Act came into force; in consequence of their illegal entry their presence in the United Kingdom continued to be 'in breach of the immigration laws' even though they could no longer be prosecuted. Accordingly, for the same reasons as S, A and K could not be treated as having been given indefinite leave to remain in the United Kingdom. They had, therefore, been lawfully detained (see p 772 a to c and f, p 773 j and p 776 b to e, post).

d Decision of the Court of Appeal sub nom *R v Governor of Pentonville Prison, ex parte Azam* p 741, ante, affirmed.

Notes

For the power to detain illegal entrants, see Supplement to 1 Halsbury's Laws (3rd Edn) para 987B, 7.

e For the Commonwealth Immigrants Act 1962, ss 4, 4A, see 4 Halsbury's Statutes (3rd Edn) 32, 33.

For the Immigration Act 1971, ss 1, 2, 4, 33, 34, Sch 2, paras 9, 16, see 41 Halsbury's Statutes (3rd Edn) 16, 17, 22, 52, 54, 64, 67.

Cases referred to in opinions

f *Director of Public Prosecutions v Bhagwan* [1970] 3 All ER 97, [1972] AC 60, [1970] 3 WLR 501, 134 JP 622, 54 Cr App Rep 460, HL, Digest (Cont Vol C) 20, 157y.

Ingle v Farrand [1927] AC 417, 96 LJKB 523, 136 LT 770, 91 JP 75, 25 LGR 123, 11 Tax Cas 446, HL, 44 Digest (Repl) 288, 1175.

Phillips v Eyre (1870) LR 6 QB 1, 10 B & S 1004, 40 LJQB 28, 22 LT 869, Ex Ch, 44 Digest (Repl) 287, 1159.

g Appeals

By notice of motion dated 16th February 1973 the applicant, Mohammed Azam, applied to the Divisional Court of the Queen's Bench Division for an order that a writ of habeas corpus should issue to the governor of Pentonville Prison. On 23rd February 1973 the court (Lord Widgery CJ, Cusack and Croom-Johnson JJ) ordered that the application be dismissed. By notice of motion dated 27th February 1973 the appellant,

h Gurbax Singh Khara, applied to the Divisional Court for an order that a writ of habeas corpus should issue to the Secretary of State for the Home Department and to the governor of Winson Green Prison, Birmingham. On 21st March 1973 the court (Lord Widgery CJ, James and Nield JJ) ordered that the application be dismissed. By notice of motion dated 12th March the appellant, Malkit Singh Sidhu, applied for an order that a writ of habeas corpus should issue to the Secretary of State for the Home

j Department and to the governor of Pentonville Prison. On 21st March 1973 the court (Lord Widgery CJ, James and Nield JJ) ordered that the application be dismissed. The appellants appealed to the Court of Appeal against the respective orders of the Divisional Court. The appeals were heard together and, on 3rd May 1973, the Court of Appeal¹ (Lord Denning MR and Stephenson LJ, Buckley LJ dissenting in relation

¹ Page 741, ante

to the appeals of the appellants Azam and Khera) dismissed the appeals. The appellants appealed to the House of Lords. The facts are set out in the opinion of Lord Wilberforce. a

T'O Kellock QC and S Kadri for the appellant Azam.

L J Blom-Cooper QC and Preetam Singh for the appellant Khera.

David Turner-Samuels QC and Stephen Sedley for the appellant Sidhu.

The Attorney-General (Sir Peter Rawlinson QC) and Gordon Slynn for the respondents. b

Their Lordships took time for consideration.

11th June. The following opinions were delivered.

LORD WILBERFORCE. My Lords, the appellants in these three appeals have been detained by authority of an immigration officer acting under provisions in the Immigration Act 1971 to which I shall later refer. Their detention may be followed by their removal from the United Kingdom, if the Secretary of State makes an order to that effect. They have applied unsuccessfully for writs of habeas corpus and the present appeals are against the refusal of their applications. c

Each of the appellants came into the United Kingdom clandestinely before the coming into force, on 1st January 1973, of the Immigration Act 1971. The bare facts and dates relevant for the present purpose are as follows: d

Mohammed Azam, who came from Pakistan, arrived clandestinely in January 1970 in a small boat. He has been here ever since. He was seen by police officers in September 1972 but no action followed. On 26th January 1973, after the Immigration Act 1971 had come into force, he was seen by a chief immigration officer and some officers of police, and a detention order was made against him. He was put in prison and is still there. e

Gurbax Singh Khera, who came from India, arrived clandestinely in December 1968 in a small boat. He was seen by police officers in December 1971 but early in January 1972 he was told by a police officer that there would be no further police action and that the full circumstances had been reported to the Home Office. A detention order was made against him on 5th February 1973: he was taken to prison and is still there. f

Malkit Singh Sidhu was born at Jullundur, India. He arrived at Dover on 17th December 1967 and reported to the immigration authorities. He was refused admission. He arrived again on 9th January 1968 and was again refused admission. Soon after, he arrived in the United Kingdom clandestinely in a small boat and has been here ever since. In 1971 the Joint Council for the Welfare of Immigrants wrote on his behalf to the Home Office asking that he be given residential status, but this was refused. On 26th February 1973 he was seen by immigration officers and a detention order was made. He was put in prison, but later was granted bail pending the hearing of this appeal. g

To these bare facts I would add that there lie behind each case human stories of hardship and struggle of which the learned judges who have heard these applications have been fully aware. They are not directly relevant to these appeals so I do not state them—they are vividly presented in the judgment of Lord Denning MR. But it is right, I think, to bear in mind that the legal provisions, which we have to interpret and apply, operate in their nature on the way of life and basic rights of individuals and their families. We were told that there are a number of other persons in a similar situation, some of whose cases are reaching the courts. Most of these would concern persons clandestinely coming to the United Kingdom between the coming into effect of the 1968 Act and that of 1971. h

The three cases have in common one thing: all three appellants came to the United Kingdom and were resident in the United Kingdom well before the Immigration Act 1971 came into force, so that to apply the provisions of that Act to them involves a measure of retroactivity. But (it is necessary to be clear as to this at the j

a outset) this is not one of those cases where the courts are able to refuse to attribute
b retroactive effect to legislation. Parliament can, if it uses sufficiently clear words, give
c legislation retroactive effect and there is no doubt that it has done so here. The
definition of 'illegal entrant' (s 33 (1)), is expressed to include a person who *has entered*
the United Kingdom in breach of the immigration laws: and if there is any doubt
whether the words 'has [so] entered' relate to entry before the coming into force of the
Act (and not merely to entry before a question as to his entry arises), that is removed
by the definition of 'immigration laws' which includes any law which 'has (before or
after the passing of this Act) been in force'. So if the appellants are otherwise within
the description 'illegal entrant' the Act must apply to them notwithstanding that they
entered illegally before the 1971 Act came into force. The contrary (i.e. that the Act
has not retroactive force) was not argued in this House and has not been held by any
court.

c The machinery which has been used in order to effect the detention of the appel-
lants is set out in a complicated series of provisions in the 1971 Act. I regret that in a
matter which affects directly so many individuals, so labyrinthine a path requires to
be followed. I shall not attempt to trace its windings, for to do so would obscure
the relatively compact points on which the appeals depend. It is sufficient to state
d that under paras 9 and 16 (2) of Sch 2—which is introduced through s 4 (2) of the Act
—immigration officers have power to authorise detention, pending the giving of
directions and pending removal in pursuance of any directions, of 'an illegal entrant'.
The first question therefore is whether these appellants are 'illegal entrants'. Even if
they are, however, this is not the end of the matter: for, by virtue of s 1 (2) of the Act,
a person is treated as having indefinite leave to remain in the United Kingdom if, at
e the date of the Act coming into force, he is settled there. The second question,
therefore, is whether these appellants were 'settled' in the United Kingdom on 1st
January 1973. In addition to these main points, there are certain subsidiary points
separately invoked on behalf of individual appellants which I will state and deal with
later.

f In my opinion all three appellants were, on 1st January 1973, and are, illegal
entrants. I have already referred to the definition of this expression: the question
depends on whether they entered in breach of the immigration laws. The laws in
question include the Commonwealth Immigrants Acts of 1962 and 1968.

g In considering these Acts it is necessary to distinguish between the appellant
Sidhu, on the one hand, and the appellants Azam and Khera, on the other. The appel-
lant Sidhu entered clandestinely after being refused entry. By so doing he committed
an offence of unlawfully entering and remaining in the United Kingdom under s 4 of
the 1962 Act. This offence is expressly stated to be a continuing offence. It was con-
tinuing on 31st December 1972. So there is no doubt that he was an illegal entrant:
the contrary was not contended in this House.

h The position of the appellants Azam and Khera is different. They committed no
offence under s 4 of the 1962 Act because they never sought permission to enter. In
fact nothing in the 1962 Act affected them until the 1968 Act (s 3) amended it by intro-
ducing into the former a new s 4A. The relevant portions of s 4A are as follows:

i '(1) Subject to the following provisions of this section, if any person being a
Commonwealth citizen to whom section 1 of this Act applies lands in the United
Kingdom and does not fulfil either of the conditions specified in the next following
subsection, he shall be guilty of an offence.

'(2) The conditions referred to in subsection (1) of this section are—(a) that,
while on board the ship or aircraft from which he lands in the United Kingdom,
he has been examined by an immigration officer; (b) that he lands in accordance
with arrangements approved by an immigration officer, and on landing, submits
to examination in accordance with those arrangements . . .

'(7) In this section "land" means land from a ship or aircraft . . .'

The section fixed a period of 28 days from the date of landing within which the person concerned was obliged to submit to examination, so that, after the expiry of the 28 days, an offence would be committed if he did not so submit. Any prosecution for this offence must be brought within six months under the general law applicable to summary offences (Magistrates' Courts Act 1952, s 104).

It will be seen that this section did not, as did s 4 of the 1962 Act, create a continuing offence: after the expiry of six months or, it may be, six months and 28 days after an unlawful landing no prosecution could be brought. Nor, it should be added, could any administrative action be taken to remove them. They had acquired, as Lord Widgery CJ has said, some status of irremovability. But the fact that they were irremovable does not mean that their entry was legal.

The question is whether Mr Azam and Mr Khera were illegal entrants as having entered the United Kingdom in breach of the immigration laws. The argument that they were not, rests on a distinction sought to be drawn between 'entering' and 'landing'. The new s 4A, it was said, was a provision of an administrative and limited character whose purpose was to regulate merely the initial step of landing in this country. Once that was accomplished (lawfully or unlawfully), entry into the United Kingdom and remaining there was by virtue of the entrants' constitutional rights as British subjects to enter and remain. This right was not affected by the Act of 1962 or that of 1968. (See *Director of Public Prosecutions v Bhagwan*¹.)

My Lords, I am unable to accept this distinction. In my opinion, s 4A is not merely an administrative provision if that expression means something without substantive effect on a person's rights. It subjects, as from its coming into effect, the pre-existing right of Commonwealth citizens freely to enter by providing that they must thenceforth do so in a particular manner, failing which their landing is unlawful. In this context there is no distinction between landing and entry, the landing is the entry, and the entry is the landing. I can see no warrant for splitting the process carried out by these appellants into an initial physical act of touching British soil and a later social act of joining the community: any such supposed division would surely astonish the newly arrived as much as it perplexes the lawyer. To suppose that, if a boat arrived clandestinely on a beach conveying these three appellants, Mr Sidhu, who made an attempt to comply with the law, would be an illegal entrant but Mr Azam and Mr Khera, who simply disregarded it or defied it, would not, would attribute a truly arbitrary character to this legislation. In my opinion, all three are 'illegal entrants'.

Then comes the question whether the appellants, or any of them, are to be treated as having indefinite leave to remain. In order to understand this question some more detailed reference to the legislation is required.

Before the 1962 Act, Commonwealth citizens were free to enter and to remain in the United Kingdom as of right. By the 1962 Act, if they arrived at a port of entry, they were required to submit to examination, and entry could be refused. If a man came in clandestinely, without having been refused entry, he committed no offence until the amendment introduced by s 3 of the 1968 Act. Subject to these controls, Commonwealth citizens retained the basic right, as British subjects, to enter and remain in and to leave and re-enter the United Kingdom.

The Immigration Act 1971 introduced as from 1st January 1973 a radical change. British subjects were divided into two categories 'patrials' and others. Patrials, defined in detail in s 2, are free to live in and to come and go into and from the United Kingdom without let or hindrance. Others, which includes, generally, Commonwealth citizens, may 'live, work and settle in the United Kingdom by permission . . .', subject to regulation and control of their entry, stay in and departure.

There were, as Parliament well knew, a large number of Commonwealth citizens in the United Kingdom at the date when the Act came into force. Parliament must have known that many of these persons had entered illegally. It must have known that many of these illegal entrants had been here for a number of years, and had

a established themselves in the community by taking employment, acquiring houses, paying taxes and social security contributions. So these cases had to be dealt with. Broadly what Parliament did was to provide that those lawfully here were to be treated as having received indefinite leave to remain. Others, if they did not get permission to remain, and the Act made provision for their doing so, were liable to be removed. The critical question relates to the definition of these categories.

b The relevant provisions (omitting immaterialities) must be set out: s 1 (2) states:

‘... indefinite leave to enter or remain in the United Kingdom shall, by virtue of this provision, be treated as having been given under this Act to those in the United Kingdom at its coming into force, if they are then settled there (and not exempt under this Act from the provisions relating to leave to enter or remain).’

c The critical word here is ‘settled’. And it is to be noticed that this section in terms relates to persons already in the United Kingdom when the section came into force.

Section 33 (1) provides that ‘settled’ shall be construed in accordance with s 2 (3) (d), and the latter states that:

d ‘... references to a person being settled in the United Kingdom ... are references to his being ordinarily resident there without being subject under the immigration laws to any restriction on the period for which he may remain.’

‘Ordinarily resident’ is not defined in the Act, so it must be given its normally understood meaning. I think it is clear that, apart from the next provision to be mentioned, all three appellants would be regarded as ‘ordinarily resident’ in the United Kingdom on 1st January 1973. But s 33 (2) declares that:

e ‘... except as otherwise provided in this Act, a person is not to be treated for the purposes of any provision of this Act as ordinarily resident in the United Kingdom ... at a time when he is there in breach of the immigration laws.’

It is on the last 13 words that this point depends.

f There can be no doubt that they prevent the appellant Sidhu from being regarded as ordinarily resident and so from having indefinite leave to remain. As already explained, he was at that date guilty of a continuing offence against s 4 of the 1962 Act. His counsel could not argue that this was not the case. But, again, it was contended that the other two cases (Azam and Khera) were different for the reason already stated—that they were not guilty of any continuing offence. They had, it was true, committed offences against s 4A, but the time limit for prosecution for these offences g had expired: the illegality had ‘dropped away’; they were no longer here in breach of the immigration laws. My Lords, however arbitrary a distinction between the case of Sidhu, on the one hand, and those of Azam and Khera, on the other, might appear to be, your Lordships would, I apprehend, give effect to it if the language of Parliament so directed. For myself, I would be prepared to go further and if there was real doubt to give the two appellants the benefit of it. On 31st December 1972 there were h no administrative means of removing them from the United Kingdom; to apply s 33 (2) against them affects that status, and to some extent affects their liberty. These circumstances call for care in interpretation. But, in my opinion, s 33 (2) admits of no doubt.

j First, as a matter of language. The words ‘at a time when ...’ are at first sight puzzling. But I accept the explanation that they take this form because they had to cover both the case of a continuing breach, and also the case where a person has entered on a condition, or for a limited period, and has broken the condition or outstayed the permission. For these purposes they are appropriate: they do not naturally extend to the case when an admitted breach has ceased to be capable of prosecution; and since they carry a natural and explicable meaning, there is no call to strain them to a meaning they naturally do not bear. So everything depends on the words which follow ‘when he is there in breach of the immigration laws’. These do not, in my

opinion, require that there should be subsisting a breach in respect of which sanctions may be imposed. The words are not 'when he is committing a breach': the emphasis is on 'there'. They are apt, if not ideal, to cover the case of a person whose presence there arises from a breach—indeed to cover any case of an illegal entrant. They apply just as much to an illegal entrant as to a person whose presence originally lawful has come to be unlawful. To say, as the appellants must, that a man may be an illegal entrant, because he entered the United Kingdom in breach of the immigration laws, and yet may not be there in breach of the immigration laws is too subtle an argument for me to accept.

But I would not wish to decide this point on a dry interpretation of the words alone. It is necessary to try to understand the Parliamentary intention. In search of this I can find no warrant for introducing a class of persons whose presence was once illegal, but whose illegality has 'dropped away'. If Parliament had intended to confer an indirect amnesty of this kind, it would surely have done so by express words. If the presence here was once 'in breach of the immigration laws' I find difficulty in seeing how, unless Parliament so states, it could change its quality by the mere expiry of a time fixed for summary prosecution.

I would further test the present cases by considering the groups of persons present in the United Kingdom on 1st January 1973, with whom Parliament must have intended to deal. These included (there may be other cases) (i) Commonwealth citizens who arrived before the period of control—i.e. before the 1962 Act; (ii) Commonwealth citizens who arrived after the 1962 Act and before the 1968 Act but otherwise than through ports of entry: until the 1968 amendment these persons were not in breach of any immigration laws; (iii) Commonwealth citizens admitted unconditionally under the pre-1973 control procedure. All of these persons were clearly intended to benefit from s 1 (2) and to be treated as having indefinite leave to remain.

On the other side, there are (i) persons who entered unlawfully after a refusal (such as the appellant Sidhu), (ii) persons whose original entry was lawful but who have remained unlawfully, because the conditions in which they entered have not been complied with. Such persons, however long they have been in the United Kingdom, are evidently excluded from those deemed to have leave to remain. If one asks into which category the Parliamentary scheme places persons in the position of the appellants Azam and Khera, there can be only one answer. They must come within the second.

The argument was used, understandably enough, that a construction of the Act ought not to be accepted which would expose persons who had established themselves long ago in this country to the hardship of uprooting and removal elsewhere. I sympathise with this argument (though I note that if it is valid it applies however short the period of unlawful residence once the six months period has elapsed) but there are answers to it. In the first place, the 1971 Act provides (s 3) for leave to remain being applied for and granted. In the second place, although the procedure of detention can be applied—and I do not wish to minimise the unpleasantness of this—the decision whether to remove or not is made by the Secretary of State. I have no doubt that in exercising his discretion he will give full weight to the record of each case and to human factors. It must not be overlooked what the character of this legislation is. It is concerned with the control of immigration into an overcrowded island: persons who have slipped in outside the controls may well make it more difficult for others to come in. So it is not unreasonable that persons who came in illegally in this way should be denied an automatic right to remain indefinitely and should have the opportunity of applying for leave to remain, and in the final resort should have to have their cases considered on a balance of merits and in relation to other cases by the Secretary of State.

For all these reasons I would hold that the appellants are not able to make good either of their two main points.

a It remains to refer to some special contentions put forward by learned counsel, in discharge of their duty, for individual appellants. I deal with these briefly since they have not found favour with any of the learned judges below.

b (1) For the appellant Azam it was contended that he must be presumed to have been granted leave to remain under s 34 (2) of the 1971 Act. This subsection, as I understand it, means that a Commonwealth citizen given leave to enter by virtue of the 1962 or 1968 Acts is treated as having been given leave to enter under the 1971 Act. Such a person (by s 34 (3)) is treated as having indefinite leave. However, the appellant Azam (and the same is true of the appellant Khera) had nothing 'by virtue of' either previous Act, so that this subsection does not avail him.

c (2) For the appellant Khera, two points were argued. The first can be stated in this way. It was admitted (contrary to the contention put forward on behalf of the appellant Azam) that presence in the United Kingdom originally established in breach of s 4A of the 1962 Act remained unlawful notwithstanding expiry of the period of prosecution. But this character of unlawfulness could be waived so as to permit a person to be treated as ordinarily resident otherwise than in breach of the immigration laws. It was said to have been waived in the appellant Khera's case. Whether or not this argument is soundly based in law, I am of opinion that it wholly fails on the facts. The fact said to give rise to the waiver was the statement by a police officer in d January 1972 (to which I have referred) that there would be no further police action and that the full circumstances had been reported to the Home Office. I can interpret this as doing no more than referring to the indisputable fact that no prosecution could be brought against the appellant. It had nothing to do with the quality of his residence: the statement itself, by reference to the Home Office, signifies the contrary.

e The second point is even less substantial. It was said that the action of the immigration officer, in authorising the detention of the appellant, was invalid, because he had failed to consider, or enquire into, the essential question whether the appellant had been given leave to remain.

f In the first place, I do not accept that the immigration officer had any duty to enquire whether the appellant, an illegal entrant, had been given such leave. But whether he had or not, the evidence of the immigration officer makes it clear that the appellant had every opportunity, which he did not take, of asserting that he had leave to remain. The contention fails in fact and in law.

g (3) For the appellant Sidhu, reliance was placed on s 34 (4) of the 1971 Act which states that the Act shall not apply (b) in relation to removal from the United Kingdom and matters connected therewith (including detention pending removal) in any case where a person is to be removed in pursuance of a decision taken before the coming into force of the Act. The refusal to admit this appellant was said to have been such a decision. The validity or otherwise of this contention does not depend on a distinction, sought to be drawn, between 'in pursuance of' and 'in consequence of' but on the nature of the 'decision' there referred to. It is quite clear from a reference back to s 34 (4) (a) that the decision in question is an unimplemented decision, made before the Act, to deport or remove. No such decision had been made against this h appellant before the Act came into force: he was detained in pursuance of a decision made after that date.

I would dismiss each of the appeals.

i **LORD HODSON.** My Lords, I have had the opportunity of reading the speech prepared by my noble and learned friend, Lord Wilberforce. I agree that these appeals should be dismissed for the reasons given by him.

LORD PEARSON. My Lords, before the passing of the Commonwealth Immigrants Act 1962 every Commonwealth citizen had the right at common law to enter the United Kingdom without let or hindrance when and where he pleased and to

remain as long as he liked: see *Director of Public Prosecutions v Bhagwan*¹. But as there was a continuing flow of immigrants from Commonwealth countries into the United Kingdom, which was already densely populated, steps to control the immigration were taken by that Act. As appears from its long title and s 5 (1) it was intended originally as a temporary Act to make 'temporary provision' for controlling such immigration and, though in fact its duration was prolonged by Parliament, its original temporary character helps to account for the incompleteness of the control which it introduced. As Lord Diplock said in *Director of Public Prosecutions v Bhagwan*²:

'The inference from this is that the method of control enacted was intended to be experimental. Parliament was to have an opportunity of seeing how it worked.'

The gap in the control arrangements, which has been called 'the Bhagwan gap' because its existence was affirmed in *Director of Public Prosecutions v Bhagwan*³ arose in this way. Under s 3 of the Act and paras 1 and 10 of Sch 1, a Commonwealth citizen to whom the Act applied landing in the United Kingdom from a 'ship' (as widely defined) or an aircraft could within 24 hours of his landing be required by an immigration officer to submit to examination. Under ss 2 and 3 (1) (b) of the Act and para 2 of Sch 1, the immigration officer then had power, within 12 hours after the examination, to give notice refusing the Commonwealth citizen admission into the United Kingdom or admitting him subject to conditions. If the immigration officer refused admission, he could under s 3 (1) (c) of the Act and para 3 of Sch 1 give directions for the removal of the Commonwealth citizen from the United Kingdom. Also if the Commonwealth citizen, having been refused admission, entered the United Kingdom, he was under s 4 of the Act guilty of an offence which continued while he was in the United Kingdom and under s 14 he was liable on summary conviction to be fined, or imprisoned. The six months limitation under s 104 of the Magistrates' Courts Act 1952 would not operate to bar a prosecution because the offence was continuing. He could, therefore, be prosecuted at any time while he remained in the United Kingdom, and, if he was convicted and recommended by the court for deportation under s 7 of the 1962 Act, a deportation order could be made by the Secretary of State under s 9. Thus, in the case of a person who had been refused admission, even if the time for giving directions for removal had passed by, there might still be a prosecution and conviction leading to deportation. In the case of a person admitted subject to conditions, if he remained in the United Kingdom in breach of a condition, there was (apart from the special provisions of Part II of Sch 1 relative to seamen and stowaways) no power for the immigration officer to give directions for removal of such a person, but he could be prosecuted at any time under ss 4 and 14 for the continuing offence, and if he was convicted and recommended by the court for deportation under s 7 a deportation order could be made by the Secretary of State under s 9.

The immigration control under the 1962 Act seems to have been reasonably effective in any case where the necessary first step was taken, that is to say where the Commonwealth citizen was within 24 hours after landing required by the immigration officer to submit to examination. If that necessary first step was not taken, no other steps could follow. Thus, if a Commonwealth citizen landed on a deserted beach and kept out of the way of immigration officers for 24 hours after landing he could not thereafter be required to submit to examination, and therefore, as that essential first step could not be taken, none of the subsequent steps could be taken, and he was not liable to be removed or deported from the United Kingdom (unless he committed and was convicted of some other criminal offence for which he might be imprisoned). That was the gap in the control arrangements.

1 [1970] 3 All ER 97 at 99, [1972] AC 60 at 74

2 [1970] 3 All ER at 103, [1972] AC at 78

3 [1970] 3 All ER 97, [1972] AC 60

a The gap was narrowed but not fully closed by the Commonwealth Immigrants Act 1968, and s 16 of the Immigration Appeals Act 1969. The 1968 Act made a number of amendments in the 1962 Act and in particular by s 3 it inserted a new s 4A, of which the first two subsections provided:

b '(1) Subject to the following provisions of this section, if any person being a Commonwealth citizen to whom section 1 of this Act applies lands in the United Kingdom and does not fulfil either of the conditions specified in the next following subsection, he shall be guilty of an offence.

c '(2) The conditions referred to in subsection (1) of this section are—(a) that, while on board the ship, or aircraft from which he lands in the United Kingdom, he has been examined by an immigration officer; (b) that he lands in accordance with arrangements approved by an immigration officer, and on landing, submits to examination in accordance with those arrangements.'

Section 4 of the 1968 Act amended para 1 (2) of Sch 1 to the 1962 Act by increasing from 24 hours to 28 days the time after landing within which a Commonwealth citizen could be required to submit to examination.

d These provisions did not make the control arrangements complete. It was under s 4A now an offence for a Commonwealth citizen to land in the United Kingdom and not to submit to examination, and there was now a period of 28 days within which he could be required by the immigration officer to submit to examination. But if in fact he did not submit to examination, then (a) as there was no refusal of admission, there was no power for the immigration officer to give directions for removal, and (b) when the six months period for prosecution had expired, as the offence under e s 4A had not been made a continuing offence there was no possibility of a prosecution for this offence leading to conviction and a recommendation and order for deportation. Those Commonwealth citizens who landed clandestinely on deserted beaches and were able to escape detection until the 28 days for requiring examination and the six months for prosecution under s 4A had expired, could not be removed or deported unless convicted of some other offences.

f Section 16 of the 1969 Act empowered the Secretary of State to make a deportation order, not based on a conviction and court recommendation, against a Commonwealth citizen who had been conditionally admitted and had failed to comply with the conditions—subject to an exception if the Commonwealth citizen had been ordinarily resident in the United Kingdom for at least five years. This simplified the procedure but did not radically alter the position.

g Clandestine immigration was not difficult. The person concerned could be landed on a deserted beach and transported in the back of a van to an inland destination. It was common knowledge, or at any rate a widespread popular belief, that clandestine immigration had been and still was taking place on a substantial scale. There was a distinction between two classes of clandestine immigrants. Those who, not having h been refused admission, made their secret entry before the coming into force of the 1968 Act (which was on 9th March 1968) had the benefit of the full 'Bhagwan gap': they lawfully avoided the control, committing no offence. Those who made their secret entry after the coming into force of 1968 Act committed an offence against the new s 4A. If they escaped detection for long enough they became immune from prosecution and deportation for that offence, but, as a matter of ordinary language without statutory definition, they were illegal entrants and they were present in the United Kingdom in breach of the immigration laws. The class of illegal entrants would also j include a person such as the appellant Sidhu who made his secret entry before the coming into force of the 1968 Act but after having been refused admission.

Those were features of the situation with which Parliament had to deal in enacting the Immigration Act 1971. How, then, did Parliament in the 1971 Act deal with the two classes of clandestine immigrants? I do not think there is any real doubt as to the answer to this question. The most material provisions of the 1971 Act are ss 1 (1)

and (2), 2 (1) and (3) (d), 4 (2), the definition of 'illegal entrant', 'immigration laws', and 'settled' in ss 33 (1), (2), 34 (1) (a) and paras 9 and 16 of Sch 2. a

The first class, those who in the period before the coming into force of the 1968 Act entered clandestinely but without committing any offence, are protected. They are not 'illegal entrants' into the United Kingdom and also they are ordinarily resident in the United Kingdom and not 'there in breach of the immigration laws' and therefore 'settled' and entitled to the indefinite leave to remain under s 1 (2). The second class, those whose clandestine entry was in breach of s 4A of the 1962 Act as amended by the 1968 Act (or in breach of s 4 of the 1962 Act if they had previously been refused admission) are, in my opinion, 'illegal entrants' to the United Kingdom and 'there in breach of the immigration laws' within the meaning of s 33 (2) and, therefore, not 'settled' and not entitled to the indefinite leave to remain under s 1 (2). Those who when they landed failed to comply with s 4A were illegal entrants because the landing was or formed part of their entry into the United Kingdom. They have been from the beginning and still are in the United Kingdom in breach of the immigration laws: that is a continuing status, as no leave to remain has been given. b

I have had the advantage of reading the opinion of my noble and learned friend, Lord Wilberforce, and I agree with it. For the reasons given by him and for those which I have indicated I would dismiss these appeals. c

LORD KILBRANDON. My Lords, I also have had the opportunity of reading the speech prepared by my noble and learned friend, Lord Wilberforce. I agree that these appeals should be dismissed for the reasons given by him. d

LORD SALMON. My Lords, it is generally considered unjust that a statute dealing with substantive rights should operate retrospectively. Hence the rule that such a statute will not be construed as having retrospective effect unless the language of the statute expressly or by necessary implication makes it clear that the legislation intended it to have such an effect: see Maxwell on the Interpretation of Statutes¹, *Phillips v Eyre*², *Ingle v Farrand*³. e

Prior to the Commonwealth Immigrants Act 1962 Commonwealth citizens, like all other British subjects, had unrestricted rights under the common law to live and work and remain in the United Kingdom. They also had ancillary unrestricted rights to enter the United Kingdom. That Act was passed as a temporary experimental measure to control immigration. It had become necessary to control immigration because the number of Commonwealth immigrants coming to the United Kingdom was so large that serious social and economic difficulties arose in absorbing them into the community. Section 2 of the Act gave an immigration officer power, in certain circumstances, to refuse a Commonwealth immigrant admission into the United Kingdom or to admit him subject to conditions. Section 4 of the Act made it a continuing offence for a Commonwealth citizen to enter or remain in the United Kingdom otherwise than in accordance with the directions or under the authority of an immigration officer while a refusal of admission under s 2 of the Act was in force in relation to him or to contravene or fail to comply with any condition imposed on him by an immigration officer under the Act. Anyone, however, who entered this country otherwise than at a recognised port of entry could not be refused admission or have any condition imposed on him by an immigration officer because he would not meet one. Accordingly such a person would not be committing a breach of the Act by entering or remaining here. He could lawfully enter and remain by virtue of his ordinary common law rights. (See *Director of Public Prosecutions v Bhagwan*⁴.) f

¹ 12th Edn (1969), p 215

² (1870) LR 6 QB 1

³ [1927] AC 417

⁴ [1970] 3 All ER 97, [1972] AC 60

a A large number of Commonwealth immigrants took advantage of this gap in the 1962 Act by avoiding recognised ports of entry. They usually came here in small boats, landing at night on lonely parts of the coast. They thus encountered no immigration officers. In order to deal with these cases, the Commonwealth Immigrants Act 1968 was passed, which by s 3 introduced a new section into the 1962 Act, namely, s 4A. This new section made it an offence, but not a continuing offence, for a Commonwealth citizen to land in the United Kingdom unless he submitted himself to examination by an immigration officer whilst on board the ship or aircraft from which he landed, and landed in accordance with arrangements approved by an immigration officer. That section, unlike s 4, did not take away the right to be or remain in the United Kingdom but only restricted the right to enter thus putting difficulties in the way of being and remaining in the United Kingdom. Save insofar as the 1962 Act (as amended) restricted the common law rights of Commonwealth citizens to enter or took away the right to be or remain in the United Kingdom, those rights were preserved intact. If a Commonwealth citizen committed a breach of s 4A he was not subject to detention by the executive, nor to being deported otherwise than after conviction. If, however, he were convicted of an offence under that section or, with certain immaterial exceptions, of any other offence for which he was liable to imprisonment, the court convicting him had power to recommend him for deportation and the Home Secretary then, but only then, had power to order him to be deported.

d All the appellants are Commonwealth citizens. The appellants Azam and Khera came to this country in small boats and landed at a lonely part of the coast in January 1970 and December 1968, respectively. They have remained here ever since without ever submitting themselves for examination by an immigration officer. The appellant Sidhu arrived here in a similar fashion in January 1968 after having twice previously been refused admission by an immigration officer at a recognised port of entry. The appellants Azam and Khera accordingly committed offences only under s 4A, which were not continuing offences and affected only the right to enter, whilst the appellant Sidhu (with whose case I shall later deal separately) committed an offence under s 4 which was a continuing offence and affected his right to be in the United Kingdom as well as his right to enter. The appellants Azam and Khera could not be prosecuted for their offences under s 4A (being summary offences) after the end of six months from the time when those offences were committed (Magistrates' Courts Act 1952, s 104). Accordingly, from about the middle of 1970 the appellant Azam was immune from prosecution and deportation under the 1962 Act and the appellant Khera was likewise immune from about the middle of 1969. Ever since those dates they have been resident in this country. They have behaved and worked well and have been highly commended by their employers. Soon after 1st January 1973 when the Immigration Act 1971 came into force, they were thrown into prison on the authority of the chief immigration officer and have remained there ever since awaiting the decision of the Home Secretary whether or not they are to be deported. They applied for writs of habeas corpus, claiming that their detention was unlawful. It is argued on behalf of the Crown that their detention in prison is justified by the provisions of the Immigration Act 1971. The Divisional Court refused the applications for habeas corpus and the Court of Appeal¹, Buckley LJ dissenting, dismissed appeals from those decisions. They now appeal to this House. I should add that the decision of the Home Secretary has very naturally been deferred pending the final outcome of the appellants' applications.

j For some years prior to January 1973 the appellants Azam and Khera had been residing here without any risk of being prosecuted in the courts or interfered with by the executive under the law as it then was. It is true that the breaches of s 4A which they had committed on landing in this country had rendered them liable to prosecution which might have resulted in a recommendation for deportation but, as already

indicated, the time during which they might have been prosecuted had long since expired. a

I agree that the 1971 Act may have been retrospective in its effect and that subject to the appellants Azam and Khera being 'settled' here on 1st January 1973 within the meaning of s 1 (2) of the Act, their present detention is lawful and the Home Secretary may make an order and all necessary arrangements for them being sent back from whence they came. There are, of course, many others in the same position as the appellants Azam and Khera. Indeed, we have been told that this is a test case. b
There can be no doubt that the 1971 Act may give the executive power to deprive many of these of their liberty because of an offence long past which at the time it was committed conferred no such power on the executive. Whether or not an Act should be retrospective in its effect is a matter for the decision of Parliament alone. It depends essentially on legislative policy—something with which neither the courts nor this House, sitting in its judicial capacity, are in any way concerned. c
I feel bound, however, to express concern that the draftsmen of this Act should have chosen to achieve its retrospective effect through a labyrinth of verbiage which may well have been as perplexing to many of those who had to consider it in Parliament as it undoubtedly was to those whom it may have deprived of their constitutional rights.

It is not until you turn to paras 8 to 16 of Sch 2 to the Act that you find the first clue that the Act may give a new power to the Home Secretary to give directions for the removal of persons who have in the past entered the United Kingdom in breach of s 4A of the 1962 Act and a new power to an immigration officer to authorise the detention of such persons pending the giving of such directions by the Home Secretary. Paragraph 9 is the critical paragraph and reads as follows: d

'Where an illegal entrant is not given leave to enter or remain in the United Kingdom, an immigration officer may give any such directions in respect of him as in a case within paragraph 8 above are authorised by paragraph 8 (1). e

At first sight anyone might be forgiven for thinking that this paragraph is referring to persons entering illegally after the Act comes into force. If, however, you refer to s 33 (1) which is the interpretation section you find: f

'... "entrant" means a person entering or seeking to enter the United Kingdom, and "illegal entrant" means a person unlawfully entering or seeking to enter in breach of a deportation order or of the immigration laws, and includes also a person who has so entered ...'

Again, it would be natural to assume that the words I have emphasised refer to a person who has entered after the Act came into force and 'the immigration laws' mean those laws contained in the Act. If, however, you pursue your study of s 33 you will find: g

'... "immigration laws" means this Act and any law for purposes similar to this Act which is for the time being or has (before or after the passing of this Act) been in force in any part of the United Kingdom ...' h

Accordingly, I am driven to the conclusion that subject to s 1 (2) of the Act, by necessary implication the powers conferred in paras 8 to 16 of Sch 2 may be exercised retrospectively in respect of Commonwealth immigrants who before the 1971 Act came into operation entered the United Kingdom in breach of s 4A of the 1962 Act, but had been lawfully residing there for years, without let or hindrance and free from fear of removal. It would surely have been easier, far more satisfactory and fairer to have made this plain by express language in one of the main sections of the Act. It is impossible to ignore the danger that the unnecessarily circuitous and complicated fashion in which the power to act retrospectively was conferred (if it was conferred by the Act) may have concealed the very existence of that power. j

a My Lords, notwithstanding the interesting argument to the contrary, in my opinion, the appellants Azam and Khera were clearly 'illegal entrants' within the meaning of those words in the 1971 Act. It seems to me that the distinction which counsel for the appellant Azam seeks to draw between (a) the word 'entered' in s 4 of the 1962 Act and 'entrant' in s 33 of the 1971 Act and (b) the word 'lands' in s 4A of the 1962 Act is a distinction without a difference for present purposes. I recognise that anyone who disembarks at a recognised port of entry, is refused admission by an immigration officer and is then sent back from whence he came would undoubtedly have landed but may well be said not to have entered the United Kingdom. When, however, a man steps ashore from a small boat on a lonely part of the coast and proceeds inland he has surely entered the United Kingdom and his landing on the shore is necessarily an integral part of his entry.

b I agree, therefore, that the appellants Azam and Khera are now lawfully detained and may be deported unless indefinite leave to remain in the United Kingdom is to be treated as having been given to them under s 1 (2) of the 1971 Act at the time of its coming into force. This depends on whether they were then 'settled' in the United Kingdom within the meaning of that word in s 1 (2). The word 'settled' means ordinarily resident in the United Kingdom: see s 2 (3) (d) of the 1971 Act. Whether a person is ordinarily resident in a country is a question of fact. No one suggests that, according to the natural meaning of those words, the undisputed evidence shows that both the appellants Azam and Khera were ordinarily resident here on 1st January 1973 and had been so resident for some years. This would seem to resolve the appeal in favour of the appellants Azam and Khera. And so it clearly would but for s 33 (2) which, so far as material, reads:

e 'It is hereby declared that, except as otherwise provided in this Act, a person is not to be treated for the purposes of any provision of this Act as ordinarily resident in the United Kingdom . . . at a time when he is there in breach of the immigration laws.'

f The result of this appeal can, therefore, be seen to turn on whether during the years in which the appellants Azam and Khera were residing and working in the United Kingdom they were there 'in breach of the immigration laws'. I agree with Buckley LJ that they were not. In my view, in spite of having committed a breach of s 4A of the 1962 Act they were here in pursuance of their common law rights, untouched by that Act, to be here as Commonwealth citizens—rights which they enjoyed as British subjects up to 1st January 1973. It is true that as from that date their common law rights were taken away. From then on, a man was either a patrial or a non-patrial. Commonwealth citizens were non-patrials and in much the same position as aliens. They had no right to enter or remain in the United Kingdom without leave (see ss 1 (2) and 3 (1) of the 1971 Act). Even after leave was given, or treated as having been given, they could still be deported under s 3 (5) and (6), subject to the provisions of s 7 of the 1971 Act. Sections 1 (2) and 3 (1) are not, however, retrospective. Those sections do not affect what is vital to this appeal, namely, the status or constitutional rights which Commonwealth citizens had enjoyed prior to 1st January 1973. Those rights included the right to enter and remain here save insofar as any of those rights were taken away by the 1962 Act.

h The only section of that Act affecting the appellants Azam and Khera was s 4A. That section regulated the manner in which they should exercise their common law rights of entry. It did not purport to take away those rights or the right to be or remain here. If they entered in breach of the section (as they undoubtedly did) then, as Buckley LJ has so aptly said, all the section did was to impose a discouraging penalty. Their method of landing and entering constituted an offence but it was not a continuing offence. It was complete at the time of landing or entry. It was then that they committed the breach. They were not committing a breach of s 4A at any time thereafter.

I cannot, with respect, agree that they had only acquired a 'de facto status of irremovability'. Indeed, I find some difficulty in understanding the concept of such a status. Either you have a legal right to remain or you are under a legal liability to be removed. Their status of irremovability was, in my view, clearly *de jure*. They could not lawfully have been detained or removed by the executive. After the lapse of six months they could not have been prosecuted or recommended for deportation unless they had committed some other offence which was punishable by imprisonment. They had the legal right to live here and go free; and that right would have been vindicated by the courts. Had they been detained in prison pending deportation, they could have applied to the courts for habeas corpus as they have done now. There would then have been no answer to such an application. All this may be considered by some to constitute another gap in the 1962 Act. But if so, it is not a gap which can now be filled by considering into which category of person the appellants Azam and Khera ought to be placed, whether they ought to be placed in that category of persons which includes amongst others those who came here clandestinely prior to 1968 and who are treated as having indefinite leave to remain here under s 1 (2) of the 1971 Act or whether they ought to be placed in that category of persons such as those who came here in breach of s 4 of the 1962 Act and are clearly excluded from those deemed to have leave to remain. The question is not into which category *ought* they to be placed—a question about which there may be differing views—but whether the legislature by express words or necessary implication has placed them in the second category. I read the words in s 33 (2) of the 1971 Act, 'at a time when he is there in breach of the immigration laws' as only meaning whilst committing a breach and not as also meaning after having committed a breach or in consequence of having committed a breach of the immigration laws. If the legislature had intended it to have the latter meanings as well as the former it would surely have said so in plain English. The language of s 33 (2) is at least as consistent with the restricted meaning which I attribute to it as with the extended meaning for which the Crown contends. It is because this subsection affects the liberty of the subject by cutting down his basic constitutional rights, that I consider that it should be confined to the restricted meaning. So construed, the appellants Azam and Khera, were clearly 'settled' in the United Kingdom and must be treated as having been given indefinite leave to remain there at the time when the Act came into force.

I do not consider that the fact that the 1971 legislation is not criminal in character affords any reason for giving s 33 (2) an extended meaning. If that legislation had created criminal offences, it would, at any rate, have given the appellants Azam and Khera the protection that they could not have been deported except on the recommendation of a court of law. As far as they are concerned, if s 33 (2) is given an extended meaning, the Act did something far worse than creating a criminal offence. It imposed on them the liability to be imprisoned and deported by the executive in place of the right which they had previously enjoyed to live here and go free.

To give s 33 (2) an extended meaning would enable the executive, in the future, to seize and imprison a Commonwealth citizen, long resident in this country and leading a blameless life, because of a summary offence which he had committed in the distant past and for which he had for years been immune from prosecution or for which he may long ago have been tried, convicted and punished. It seems incongruous to describe such a man as being here in breach of the immigration laws. If such a man can properly be so described then he could be kept in prison pending consideration of whether or not he should be deported. He might then have his whole life and that of his family uprooted by being in fact deported. At best, he would be detained in prison for as long as it might take the Home Office to reach a decision. It is not unreasonable to suppose that this might take weeks or even longer. The construction of the subsection which I favour would make this interference with individual liberty impossible. I certainly do not share the view that there is no harm in construing a statute so widely that it gives the executive such a power because the executive can be relied on not to use it or, if they do, to use it fairly.

a If s 33 (2) is confined to its restricted meaning, the 1971 Act confers no power on the executive now to imprison or deport anyone in the position of the appellants Azam and Khera. It is not for us to speculate why Parliament should have distinguished between the consequences of a breach of s 4 and the consequence of a breach of s 4A. Parliament undoubtedly did so in 1968 and, as I think, did so again in 1971.

b To give s 33 (2) its restricted meaning certainly curtails the retrospective effect of the statute. It could not then be applied retrospectively in derogation of the liberty enjoyed by those in the position of the appellants Azam and Khera. Its language is certainly not ideal nor, in my view, apt, expressly or by necessary implication, to include such persons within its ambit.

c I, of course, recognise the importance in the public interest of giving the executive the widest powers effectively to control immigration. Whatever may have been the shortcomings of the previous legislation, the 1971 Act undoubtedly does confer those powers on the executive for the future. By s 3 (5) and (6) it also gives the executive power, in appropriate circumstances, to deport any non-patrial, including, of course, persons who have committed a breach of s 4A of the 1962 Act. No question, however, arises in the present case under that section of the Act.

d The following illustration may be of some assistance in considering the true construction of s 33 (2). A has recently become a member of the House of Lords and has been duly introduced. As a result he has a constitutional right to enter the Chamber and to vote. For security reasons, a regulation having the force of law is promulgated making it an offence to enter the Chamber without first producing a pass to the attendant on duty. It does not, however, take away his constitutional right to be there or to vote. A, who has mislaid his pass, pushes past the attendant who does not recognise him and enters the House. He takes his seat and votes. Surely he is not in the Chamber and does not vote in breach of the law. He is there lawfully and lawfully records his vote in accordance with his constitutional rights although in entering he committed a breach of the law for which he is no doubt answerable. The constitutional right to reside in this country which the appellants Azam and Khera, as British subjects, enjoyed up to 1st January 1973 were surely no less than the constitutional rights which any member of this House enjoys to sit and vote here.

f The appellant Sidhu was not, however, settled here when the 1971 Act came into force because he had committed the continuing offence under s 4 of entering and remaining in the United Kingdom while a refusal of admission under s 2 of the 1962 Act was in force in relation to him. That offence was deemed under the section to be an offence which continued throughout the period during which he was in the United Kingdom. Accordingly, for the whole time during which he resided in the United Kingdom he was 'there in breach of the immigration laws' on any reading of s 33 (2).

g I agree with my noble and learned friend, Lord Wilberforce, that for the reasons which he gives none of the other points argued on behalf of any of the appellants can succeed.

h My Lords, I would therefore dismiss the appeal of the appellant Sidhu, but for the reasons I have already indicated, I would allow the appeal of the appellants Azam and Khera.

Appeals dismissed.

Solicitors: *Michael Sears & Co* (for the appellant Azam); *Sharpe, Pritchard & Co*, agents for *Cookseys*, Wolverhampton (for the appellant Khera); *Simons, Muirhead* (for the appellant Sidhu); *Treasury Solicitor*, London.

S A Hatteea Esq Barrister.

Stapylton v O'Callaghan

QUEEN'S BENCH DIVISION

LORD WIDGERY CJ, ASHWORTH AND BRIDGE JJ

7th MARCH 1973

Criminal law – Theft – Handling stolen goods – Informations charging defendant with theft and handling stolen goods – Informations relating to the same goods – Goods stolen – Defendant found in possession of goods – Defendant having come by goods dishonestly and intending to keep them – No evidence as to how goods came into defendant's possession – Whether defendant should be convicted of theft or handling – Theft Act 1968, ss 1 (1), 3 (1), 22 (1).

The respondent was charged on an information alleging that he had dishonestly received a driving licence, knowing or believing that it had been stolen, contrary to s 22 (1)^a of the Theft Act 1968. Subsequently a further information was preferred against the respondent by the same prosecutor alleging the theft of the same driving licence, contrary to s 1 (1)^b of the 1968 Act. The trial proceeded and the magistrate heard the informations together on the basis that the charges were alternative ones. The magistrate found (i) that the licence had been stolen, (ii) that subsequently the respondent was found in possession of the licence, and (iii) that he had come by it dishonestly and that he intended to keep it. The evidence was, however, inconclusive as to how the respondent had come into possession of the licence. Accordingly the magistrate dismissed both informations on the basis that, although he was satisfied that the respondent was guilty of one offence or the other, the prosecutor had failed to discharge the onus of satisfying him which offence it was that the respondent had committed. On appeal,

Held – As it had been found as a fact that the respondent had dishonestly possessed himself of the licence and intended to keep it, it followed that he had dishonestly assumed a right to the licence 'by keeping or dealing with it as owner' within s 3 (1)^c of the 1968 Act; he had therefore dishonestly appropriated property belonging to another with the intention of permanently depriving the other of it within s 1 (1). He should therefore have been convicted of theft. Accordingly the appeal would be allowed and the case remitted with a direction to convict (see p 784 g to j, post).

Notes

For theft, see Supplement to 10 Halsbury's Laws (3rd Edn) para 1475A, 1, 3; and for handling stolen goods, see *ibid*, para 1565A.

For the Theft Act 1968, ss 1, 3, 22, see 8 Halsbury's Statutes (3rd Edn) 783, 784, 796.

Case and authorities cited

Lawrence v Commissioner of Police for the Metropolis [1971] 2 All ER 1253, [1972] AC 626, HL.

Smith on The Law of Theft (2nd Edn, 1972), paras 18-22, 443-445.

Criminal Law Revision Committee, 8th Report, Theft and Related Offences (1966, Cmdd 2977), paras 35, 139.

Case stated

This was an appeal by way of case stated by John Phipps Esq, one of Her Majesty's metropolitan stipendiary magistrates, in respect of his adjudication at Marylebone Magistrates' Court on 22nd August 1972.

1. On 8th April 1972 an information was preferred at Marylebone Magistrates' Court by the appellant, Robert Stapylton, against the respondent, William Patrick

^a Section 22 (1) provides: 'A person handles stolen goods if (otherwise than in the course of the stealing) knowing or believing them to be stolen goods he dishonestly receives the goods, or dishonestly undertakes or assists in their retention, removal, disposal or realisation by or for the benefit of another person, or if he arranges to do so.'

^b Section 1 (1), so far as material, is set out at p 784 e, post

^c Section 3 (1) is set out at p 784 f, post

a O'Callaghan, that on or before 8th April 1972 in the Greater London area he dishonestly handled stolen goods in that he received one stolen driving licence no 6A/1670956, knowing or believing it to be stolen goods, contrary to s 22 of the Theft Act 1968.

2. On 5th June 1972 a further information was preferred at the Marylebone Magistrates' Court by the appellant against the respondent that on or before 8th April 1972 in the Greater London area he stole a driving licence no 6A/1670956, value 25p, the property of Raymond Mitchell, contrary to s 1 of the Theft Act 1968.

b 3. On 22nd August 1972 the magistrate proceeded to the summary trial of both informations after the provisions of s 19 (2) to (5) of the Magistrates' Courts Act 1952 had been complied with. The respondent agreed to the informations being tried together.

4. The trial was conducted on the basis that the two informations were alternative. No point of law was taken or argued before the magistrate.

c 5. At the conclusion of the trial the only facts which the magistrate was able to find in view of the inconclusiveness of the evidence were: (a) that on 6th April 1972, at some time before 6 p.m., the flat at 22 Enford Street, W1, at which one Raymond Mitchell lived, was broken into and his driving licence no 6A/1670956, together with other property, was stolen; (b) that, when spoken to by a police officer at about 1.20 a.m. on 8th April 1972 at Viceroy Court, NW8, in connection with another matter, the respondent was in possession of the driving licence, that he had come by it dishonestly and that he intended to keep it; (c) that when questioned by the police officer outside Viceroy Court as to his possession of the driving licence, the respondent gave two contradictory explanations, the first being that the licence belonged to a friend who had lent it to him in the Arcade in Edgware Road, W2, and the second that he, the respondent, had found the driving licence near the Arcade at about 6 p.m. on 7th April 1972.

e 6. The evidence put before the magistrate, including the evidence given by the respondent himself in which he adhered to and amplified the second of the explanations, was inconclusive as to how in fact the respondent had come into possession of the licence. In spite of the respondent's evidence the magistrate was not satisfied that it was the truth that he had found the licence, although it may have been so. Equally f the first explanation given by the respondent to the police officer that he had acquired the licence from someone else, which appeared to have been the basis on which the first information was preferred, may have been the truth but the magistrate was not satisfied that it was. Further the magistrate was unable to exclude the possibility that neither account given by the respondent of his possession of the licence was true and that in fact he had dishonestly acquired it in some other way altogether.

g 7. The magistrate was of the opinion therefore that, although he was satisfied that the respondent had committed one or other of the offences charged in the informations, since the prosecution had not discharged the onus of satisfying him as to which offence the respondent had committed it was not open to him to convict the respondent of either offence. Accordingly he dismissed both informations.

h The question on which the opinion of the High Court was desired was whether, in view of the fact that the prosecution had not proved the truth of either information, the magistrate was right in dismissing them both. If he was not right, the High Court was asked to revise or amend the determination and decision, or remit the matter to him with the opinion of the court thereon.

W N Denison for the appellant.

j The respondent did not appear and was not represented.

LORD WIDGERY CJ. This is an appeal by case stated by one of Her Majesty's metropolitan stipendiary magistrates sitting at Marylebone, who on 5th June 1972 had before him an information laid by the appellant against the respondent that the respondent in the Greater London area on 8th April 1972 handled stolen goods in that he received one stolen driving licence knowing or believing it to be stolen, contrary to s 22 of the Theft Act 1968. There was also before the magistrate on the same

occasion a later information laid by the appellant against the respondent that on the date in question, namely 8th April 1972, he stole the particular driving licence of which he had been charged with handling in the earlier information.

The magistrate heard both informations together; he says that the trial was conducted on the basis that the two informations of stealing and handling were alternative, and that at the conclusion of the trial he found these facts (a) that on 6th April 1972 at some time before 6 p m a flat at 22 Enford Street was broken into and the driving licence in question in these proceedings was stolen, with other property, that is at 6 p m on 6th April. He finds secondly that on 8th April 1972 at 1.20 a m, when spoken to by a police officer in connection with another matter, the respondent was in possession of this very driving licence, and the magistrate finds as a fact 'that the respondent had come by it dishonestly and that he intended to keep it'. During the interview between the respondent and the appellant in the early hours of the morning of 8th April, the respondent seems to have given two conflicting explanations of how he came by this licence. The first was that it belonged to a friend who had lent it to him, and the second was that he found it the night before. The magistrate was troubled about this case, and it is quite evident what his trouble was. He thought he had to regard these two charges as not only alternative but mutually exclusive, and on his view of the facts as he found them he was not able to say with any confidence whether the offence committed had been the theft or the handling. He concluded, as one must conclude, on these things, that the respondent was guilty of one offence or the other but being unable to decide to his own satisfaction which offence was the appropriate one, he decided that the charges against the respondent must both be dismissed.

In my opinion there is really a very short answer to this problem, and that is that if one looks at the definition of 'theft' to start with in s 1 of the Theft Act 1968, it reads as follows: '(1) A person is guilty of theft if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it', and 'appropriates' is defined in s 3 (1) in these terms:

'Any assumption by a person of the rights of an owner amounts to an appropriation, and this includes, where he has come by the property (innocently or not) without stealing it, any later assumption of a right to it by keeping or dealing with it as owner.'

It seems to me that the findings which I have already read amply justify a conviction of theft, because the magistrate has found that the respondent dishonestly possessed himself of the licence and intended to keep it. That seems clearly to me to be a dishonest appropriation of property belonging to another with the intention of permanently depriving the other of it. At that point one may stop, as it were, and draw a line and say the offence of theft is complete.

Of course, if one looks on to s 22, which is the section charging handling, one finds that activities such as described here if committed otherwise than in the course of stealing may be caught by s 22, and understandably attract a more severe penalty, but if the facts justify the conclusion that the offence of stealing was committed, the right course in my judgment is to convict of stealing and not to go on to consider the possible additional hazard of convicting the accused of handling with the added penalty which might arise. I think that the magistrate, with respect, misdirected himself, and that the proper solution from his finding of fact would have been a conviction of theft, and I would send the case back to him with a direction to enter a conviction accordingly.

ASHWORTH J. I agree.

BRIDGE J. I agree.

Appeal allowed. Case remitted.

Solicitor; Solicitor, Metropolitan Police.

N P Metcalfe Esq Barrister.

Taylor v Good (Inspector of Taxes)

CHANCERY DIVISION

MEGARRY J

4th, 5th, 6th APRIL 1973

Income tax – Trade – Adventure in the nature of trade – Supervening trade – Asset acquired by taxpayer otherwise than for purpose of trade – Asset subsequently becoming the subject of trade whilst in taxpayer's hands – Purchase of property for possible use as taxpayer's residence – Property subsequently found not to be suitable for residential purposes – Taxpayer obtaining planning permission to develop property – Resale of property at a profit – Whether transaction an adventure or concern in the nature of trade – Whether trading covering whole period from purchase to sale – Income Tax Act 1952, ss 123 (1) (Sch D, Case 1), 526 (1).

In July 1959 at an auction the taxpayer bought a 17 room house for £5,100. At the time of the auction the taxpayer had not decided what to do with the property if he bought it, but had in mind the possibility of going with his wife to live in it if that proved feasible. On the evening of the day of the auction the taxpayer took his wife to see the property. She soon realised that it was impracticable to use the property as their residence and in the face of her attitude the taxpayer abandoned the idea of living in it. On 18th September 1959, before completion of the purchase, an application for permission to develop the property was submitted on the taxpayer's behalf. That was refused on 16th November. He appealed to the Ministry of Housing and Local Government and his appeal was allowed. In 1962 detailed planning permission was granted. From then on, although the property was not advertised for sale, a number of offers were made for it. Ultimately a firm of developers offered £54,500. The taxpayer accepted the offer on 21st August 1963, and contracts were exchanged on 17th September. The taxpayer was assessed to income tax under Case I of Sch D in s 123 (1)^a of the Income Tax Act 1952 for the year 1963-64 in the sum of £48,895, representing in substance the difference between his sale price and the purchase price, on the basis that the purchase and resale of the property was an 'adventure or concern in the nature of trade' within s 526 (1)^b of the 1952 Act. On appeal the Special Commissioners affirmed the assessment; in their decision they stated that the question for determination was 'whether the transaction concerning the purchase and sale' of the house was trading and gave as their opinion 'that the transaction which the [taxpayer] ... carried out in connection with the property constituted an adventure or concern in the nature of trade'. Figures were subsequently agreed on the basis of the commissioners' decision. The taxpayer appealed against that decision.

Held – (i) On principle and authority it was clear that an asset which had been acquired by a taxpayer with no thought of trade might afterwards become the subject of trade as defined in s 526 (1). In the instant case, however much the transaction initially lacked the characteristics of trade, once the transactions relating to the obtaining of planning permission had begun, there came into existence material from which it was possible for the Special Commissioners to reach the conclusion that thereafter the transaction as a whole fell within the statutory definition of 'trade' (see p 794 h and p 795 g and j to p 796 a and e f h and j, post). *Mitchell Brothers v Tomlinson (Inspector of Taxes)* (1957) 37 Tax Cas 224 applied.

^a Section 123 (1), so far as material, provides: 'Tax under Schedule D shall be charged under the following Cases respectively, that is to say—Case I—tax in respect of any trade carried on in the United Kingdom or elsewhere ...'

^b Section 526 (1), so far as material, is set out at p 790 h, post

(ii) The commissioners' finding that there had been trading during the whole period from the purchase to the sale of the property was nevertheless defective. Although there was evidence that, at some time after its acquisition, the property had become the subject of trading there was no evidence to support the finding of trading at the time of acquisition. It did not follow, however, that the whole determination of the commissioners should be held to have been wrong. In the circumstances the case would be remitted to the commissioners to determine when the trading began and what value the property had when it became the subject of trading so that the true profit derived from the trade might be determined and the figures adjusted accordingly. Subject to that the appeal would be dismissed (see p 799 a to c and e f, post).

Per Megarry J. It is open to counsel on the hearing of a case stated to make admissions or agree additions to the case. If those or other additions are made without objection it then becomes too late to object to them later in the argument (see p 798 b, post).

Observations on the contents of cases stated (see p 791 g to j, post).

Notes

For definition of trade and the relevance of profit motive to trade, see 20 Halsbury's Laws (3rd Edn) 113-115, paras 207, 208.

For casual, isolated or exceptional transactions as constituting trade, see 20 Halsbury's Laws (3rd Edn) 119, 120, para 213, and for cases on profits arising from transactions in land, see 28 (1) Digest (Reissue) 83-96, 245-296.

For the Income Tax Act 1952, ss 123, 526, see 31 Halsbury's Statutes (2nd Edn) 116, 489.

For the year 1970-71 and subsequent years of assessment, ss 123 and 526 of the 1952 Act have been replaced respectively by ss 109 and 526 of the Income and Corporation Taxes Act 1970.

Cases referred to in judgment

Cooksey and Bibbey v Rednall (Inspector of Taxes) (1949) 30 Tax Cas 514, [1949] TR 81, 28 (1) Digest (Reissue) 92, 282.

Edwards (Inspector of Taxes) v Bairstow [1955] 3 All ER 48, [1956] AC 14, 36 Tax Cas 207, [1955] 3 WLR 410, 34 ATC 198, [1955] TR 209, 48 R & IT 534, HL, 28 (1) Digest (Reissue) 566, 2089.

Inland Revenue Comrs v Fraser 1942 SC 493, 24 Tax Cas 498, 28 (1) Digest (Reissue) 76, *236.

Leach v Pogson (Inspector of Taxes) (1962) 40 Tax Cas 585, 41 ATC 298, 28 (1) Digest (Reissue) 53, 214.

Lucy & Sunderland Ltd v Hunt (Inspector of Taxes) [1961] 3 All ER 1062, 40 Tax Cas 132, [1962] 1 WLR 7, 40 ATC 446, [1961] TR 305, 28 (1) Digest (Reissue) 93, 286.

Mitchell Brothers v Tomlinson (Inspector of Taxes) (1957) 37 Tax Cas 224, 36 ATC 55, [1957] TR 63, 50 R & IT 240, CA, 28 (1) Digest (Reissue) 93, 285.

Rutledge v Inland Revenue Comrs 1929 SC 379, 14 Tax Cas 490, 28 (1) Digest (Reissue) 57, *35.

Cases also cited

Inland Revenue Comrs v Livingston 1927 SC 251, 11 Tax Cas 538.

Moriarty (Inspector of Taxes) v Evans Medical Supplies Ltd [1957] 3 All ER 718, [1958] 1 WLR 66, 37 Tax Cas 540, HL.

Case stated

1. At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on 21st January 1971 Walter Marcus Taylor ('the taxpayer') appealed against an assessment to income tax of £48,895 for the year 1963-64.

2. Shortly stated the question for the commissioners' decision was whether the surplus on realisation from the sale of property known as Marle Hill Court was a

a profit derived from a trade or an adventure or concern in the nature of trade, within Case I of Sch D, or a capital increment outside the scope of income tax.

[Paragraph 3 named the witnesses who gave evidence before the commissioners and para 4 listed the documents proved or admitted before them.]

5. As a result of the evidence both oral and documentary adduced before them, the commissioners found the following facts proved or admitted.

b (a) The taxpayer assisted by his wife, carried on two businesses in Cheltenham, one as a retail grocer and the other as a newsagent and post office. The two businesses were conducted in shops nearly next door to each other, and the taxpayer and his wife lived in a two-bedroomed council flat above the grocer's shop. They had three daughters, two of whom were married and (at the relevant time) one grandchild. Until May 1959 the taxpayer had been a councillor of the Cheltenham Council for approximately nine years, and he was chairman of the parks and recreation committee for seven years. As a councillor he had been in a position to see the minutes of other committees including the planning committee. The taxpayer owned six properties which he had acquired since about 1960 for investment.

c (b) Marle Hill Court was a gentleman's residence built in the Regency period, and was occupied until 1958, or early 1959, when it became unoccupied. In the 1920s Marle Hill Court was occupied by a Mr Boulton, who died in 1933 or 1934. The house and curtilage comprised $9\frac{1}{2}$ acres of land. Mr Boulton kept livestock on the land. During Mr Boulton's occupation the property had been well maintained, but after his death the property, which was first occupied by his daughter and her husband, and after her death by her husband, deteriorated considerably. During the second world war the property had been requisitioned by the government and six families were billeted there. Provision had been made for gas stoves in the occupied rooms, but it had never been supplied with electricity. No major structural conversion was made during the time it was requisitioned and there was only one bathroom. The property had approximately 17 rooms, and a garage and outhouses.

e (c) The taxpayer knew the property well; his mother had worked there for Mr Boulton and his father had been employed there as a gardener and general farm hand. The taxpayer and his brothers and sisters had worked there occasionally during their school holidays.

f (d) In July 1959 the taxpayer noticed that Marle Hill Court was advertised for sale by auction. The auction was to take place on 23rd July 1959. Two or three days before the auction the taxpayer went to look around the property but he did not go inside. He decided to bid for it at the auction although he did not expect to be successful and did not take his cheque book with him. At the auction there were about 20 people present, only two of whom bid for Marle Hill Court, the taxpayer and a Mr Martin. The taxpayer and Mr Martin took the bidding to £5,000, at which point the taxpayer hesitated and then bid a further £100 and was somewhat surprised when the property was knocked down to him at that figure. At the time of the auction the taxpayer had not decided what to do with the property if he bought it; but had in mind going with his wife to live in it if that proved to be feasible. It had a sentimental attraction to him in view of his, and his parents', connection with it.

h (e) On the evening of the day of the auction, the taxpayer took his wife to see the property. They could not go inside as they had no key. The taxpayer's bank manager whom he took to see the property was agreeable to the necessary overdraft being allowed to enable the purchase to be completed. The taxpayer and his wife discussed the possibility of living in the property because their flat was too small to accommodate their daughters and grandchild, who visited them from time to time, and they had been looking for somewhere else to live. When, subsequently, the taxpayer and his wife, accompanied by two of their daughters, saw the interior of the property, his wife soon realised that their thoughts of using it as a residence for themselves were impracticable. There was a good deal of rubbish in the house. It had a gas geyser in the bathroom, the decoration was in a very poor state and it had

no electricity. The taxpayer assured his wife that the defects could be remedied, but she raised other objections; her daughters did not think it was practical or convenient, she was troubled by its isolation, and its proximity to a local refuse tip. Some vandals had committed damage and boys raided the orchards. The property was a long way from the newsagent and post office which she managed in Cheltenham, and as she did not drive a car she would have found it difficult to get to the shop early in the morning. In face of his wife's attitude the taxpayer abandoned the idea of living in the property. a

(f) The taxpayer and his wife cleaned some of the rooms in the property, began to clear out the rubbish, made curtains and cut the grass and the high hedges round the property. After a time the taxpayer installed his nephew in two or three rooms in the property rent free and, in effect, as a caretaker. The nephew made some minor alterations and decorations, including the installation of a fireplace. The taxpayer rented the grazing of the fields attached to the property to a farmer for a rent of £6 a month. The farmer grazed that land for approximately three years and the taxpayer's nephew occupied the property for approximately the same period. b

(g) In September 1959 the taxpayer consulted planning consultants and on 18th September 1959, before completion of the purchase of the property (which was due to take place on 23rd August 1959, but had been delayed through no fault of the taxpayer), an application for permission to develop the property was submitted on the taxpayer's behalf by Messrs Arthur G Streater & Partners, town planning consultants. The application stated that Marle Hill Court was converted into flats and was then vacant. The taxpayer had not in fact converted Marle Hill Court into flats, and that was an inaccurate reference to the multiple occupation which had taken place during the war above referred to. Mr Streater had advised him that it was not likely that planning permission would be granted because Marle Hill Court was zoned as an area of white land on the Cheltenham town map, but that there was nothing to be lost by applying. Permission was in fact refused by the local authority on 16th November 1959. The taxpayer appealed to the Minister of Housing and Local Government against the local authority's decision to refuse planning permission. A public inquiry was held and the Minister allowed the appeal on 23rd June 1960. Plans were drawn up for the comprehensive development of the property, which included the demolition of Marle Hill Court, and the erection of 90 dwellings on the 9½ acres of land. A fresh application for outline planning permission was made on 23rd November 1961, and after some negotiations with the planning committee planning permission was granted in 1962. The taxpayer did not advertise the property for sale during the period in which he owned it because he did not need to, but several people approached him with offers to buy it. By an offer which was made immediately after the auction he was offered £250 profit on the purchase. He refused that offer. All other offers were made after he had obtained planning permission. The use of Marle Hill Court as a country club was considered merely as a family suggestion and was not proceeded with. No application was made for a liquor licence and no architect was approached. He referred some of the offers to his solicitors who negotiated with developers. A number of offers were made for the property and ultimately a firm of developers offered £54,500, which offer the taxpayer accepted on 21st August 1963 and contracts were exchanged on 17th September 1963. c
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[Paragraph 6 set out the cases¹ referred to.]

¹ *Burrell, Webber, Magness, W J Austin and J Austin v Davis (Inspector of Taxes)* (1958) 38 Tax Cas 307; *Cooke v Haddock (Inspector of Taxes)* (1960) 39 Tax Cas 64; *Cooksey and Bibbey v Rednall (Inspector of Taxes)* (1949) 30 Tax Cas 514; *Edwards (Inspector of Taxes) v Bairstow* [1955] 3 All ER 48, [1956] AC 14, 36 Tax Cas 207, HL; *Inland Revenue Comrs v Fraser* 1942 SC 493, 24 Tax Cas 498; *Inland Revenue Comrs v Reinhold* 1953 SC 49, 34 Tax Cas 389; *Jenkinson*

a 7. It was contended on behalf of the taxpayer that he was not carrying on a trade or an adventure or concern in the nature of trade in connection with the purchase and sale of Marle Hill Court and the assessment should be discharged.

8. It was contended on behalf of the inspector of taxes that the purchase and sale by the taxpayer of Marle Hill Court constituted a trade or an adventure or concern in the nature of trade and the assessment should be confirmed in principle.

b 9. The commissioners who heard the appeal took time to consider their decision and gave it in writing on 16th February 1971 as follows:

‘1. The question for our determination is whether the transaction concerning the purchase and sale of Marle Hill Court (“the property”) constituted a trade or an adventure or concern in the nature of trade.

c ‘2. It was contended on behalf of the [taxpayer] that his motive or purpose in buying the property was to acquire a residence for himself and his wife and, occasionally, his daughters.

d ‘3. The [taxpayer] attended the auction sale on 23rd July, 1959 without thinking it likely that any bid he might make for the property would be successful; he did not even take his cheque book. He was then living in a two-bedroomed council flat which he occupied above his grocer’s shop. There was little competition in the bidding for the property; the [taxpayer] and another man bid against each other up to £5,000. The [taxpayer] hesitated at that figure, then bid £5,100 and secured the property at that figure. Before the auction sale he had not inspected the interior of the property which, however, he was familiar with as he and his parents had worked there for many years previously.

e ‘4. After the auction the [taxpayer] and his wife inspected the property to see whether it was suitable as a residence for them. They found that its interior was dilapidated and in a poor state of decoration and repair, having been neglected since it was in multiple occupation during the war. Vandals had caused some damage to it. The [taxpayer’s] wife, though initially attracted when her husband secured the property by the prospect of living there, soon decided that it was not suitable. She thought it was too large, too difficult to run (it had no electricity); she feared the isolation; she was not qualified to drive a car and would not be able conveniently to travel to the post office which she managed; it was near a rubbish dump and she was afraid of rats. The [taxpayer] acquiesced in his wife’s decision, which was supported by his daughters.

f ‘5. Shortly after the acquisition the [taxpayer], assisted by his family and brothers-in-law, with some domestic help, cleaned up the property, fitted curtains so that it would not appear unoccupied, and cut the grass and hedges. He did not, however, spend any money on renovation and repair and he did not equip it with an electricity supply. His nephew, whom he installed there in effect as a caretaker, put in a fireplace and occupied two or three of the 17 rooms and a garage.

g ‘6. The property was scheduled as “White land” in the town plan. Acting on advice the [taxpayer] applied on 18th September, 1959, that is, before completion, for outline planning permission, which was refused. He appealed to the Minister who, in June 1960, allowed the appeal. At various times after his purchase the [taxpayer] was approached by persons interested in acquiring the property. He also considered using it as a country club. Ultimately, with the co-operation of the owner of adjoining land, he was able to submit a comprehensive plan for development which included a road connecting the property

(Inspector of Taxes) v Freedland (1961) 39 Tax Cas 636, CA; *Johnston (Inspector of Taxes) v Heath* [1970] 2 All ER 915, 46 Tax Cas 463, [1970] 1 WLR 1567; *Martin v Lowry* [1927] AC 312, 11 Tax Cas 297, HL; *Mitchell Brothers v Tomlinson (Inspector of Taxes)* (1957) 37 Tax Cas 224, CA; *Rutledge v Inland Revenue Comrs* 1929 SC 379, 14 Tax Cas 490; *Turner v Last (Inspector of Taxes)* (1965) 42 Tax Cas 517

with Taylor's Lane on the East side, thereby permitting development without a cul-de-sac which was disliked by the Planning Authority. When these arrangements had been made he secured on 16th and 22nd January, 1962, planning permission for the erection of 90 dwellings. a

'7. On the evidence before us we have reached the conclusion that the [taxpayer] had at no time a fixed and settled intention of buying the property for use as a residence. He would have liked to be able so to make use of it, but he meant to do so only if he could persuade his wife that going to live there would be acceptable to her, and it very soon became clear that it would not be. After buying it, he had, in our view, no more than a short-lived and doubtful hope or expectation that it might prove to be suitable for them as a residence. Once a detailed inspection had made its defects for habitation apparent he and his wife wholly abandoned any intention of living there. Having bought the property as he did at a low figure, he shortly afterwards proceeded to take steps to enhance its value with a view to development and, ultimately, sale. b

'8. Having carefully considered the whole of the evidence before us bearing on the matter, we are of opinion that the transaction which the [taxpayer] thus carried out in connection with the property constituted an adventure or concern in the nature of trade. We dismiss the appeal and leave the figures to be agreed.' c

10. Figures were agreed between the parties on 16th December 1971 and on 20th January 1972 the commissioners adjusted the assessment accordingly. d

11. The taxpayer immediately after the determination of the appeal declared his dissatisfaction therewith as being erroneous in point of law and on 21st January 1972 required the commissioners to state a case for the opinion of the High Court. e

12. The question of law for the opinion of the court was whether there was evidence to support the commissioners' finding that the taxpayer carried on an adventure or concern in the nature of trade in respect of the purchase and sale of Marle Hill Court.

Barry Pinson for the taxpayer. f

Patrick Medd for the Crown.

MEGARRY J. Initially straightforward, this became a somewhat troublesome case. It is an appeal from the Special Commissioners against an assessment to income tax of £48,895 for 1963-64 under Case I of Sch D. It concerns a house called Marle Hill Court on the outskirts of Cheltenham which the appellant taxpayer bought at an auction, on 23rd July 1959, for £5,100 and sold rather over four years later, on 17th September 1963, for £54,500. I am not concerned with the figures, but in substance the assessment is based on the difference of £49,400 between the two prices. g

By the Income Tax Act 1952, s 123 (1), Case I of Sch D imposes a charge of tax 'in respect of any trade carried on in the United Kingdom or elsewhere', and by s 526 (1), except so far as is otherwise provided or the context otherwise requires, 'trade' includes every trade, manufacture, adventure or concern in the nature of trade'. 'Manufacture' does not come into the question, and so the essential point is whether the taxpayer's activities in relation to the house fall within the words 'trade, . . . adventure or concern in the nature of trade'. The Special Commissioners held that they did; and from this decision the taxpayer appeals by way of case stated, while counsel for the Crown seeks to uphold the decision of the Special Commissioners. It is indeed understandable that the taxpayer, who has never been a property dealer, should object to being taxed on the fruits of what was in no sense his means of livelihood but was an isolated and somewhat unexpected transaction. h

At the outset I must say something about the form of the case stated. Paragraph 5 i

a of the case, which is divided into seven sub-paragraphs and extends over some six pages, sets out the facts proved or admitted. Apart from a failure to indicate either an exact or approximate date for many of the events mentioned, in a case where some of the dates are at least of possible importance, there has been little criticism of the statement of facts. Of course, dates may be absent because of an absence of evidence about them; but where there is a general deficiency of dates for this reason, it would
b be helpful if the case said so. In the next paragraph, para 6, there is a list of a dozen cases to which the Special Commissioners were referred, and then follow two paragraphs setting out the contentions of the taxpayer and the inspector respectively. Each consists of a single sentence, and each in effect is merely a simple denial and assertion respectively that the taxpayer was carrying on a trade or an adventure or concern in the nature of trade in the purchase and sale of the house. In view of the
c dozen authorities cited and what is said by the Special Commissioners in their decision, as well as what I shall say later, it seems highly improbable that the conflicting arguments were so Spartan. A mere assertion of the terminus ad quem, with no indication of the process of reasoning whereby that terminus is reached, is a poor record of an argument. A case stated should not, of course, record in full every fine point that was taken: but it should at least give some indication of the main reasons
d advanced for reaching the conclusion asserted. If, as I understand often happens, the commissioners simply insert summaries of the argument as drafted by the parties themselves, primarily any shortcomings are the responsibility of the parties: but no matter whose the responsibility, it is important for this court to have a note of the main reasons urged by each side before the commissioners in support of the conclusion put forward.

e The case stated then sets out the decision of the Special Commissioners in para 9, divided into eight sub-paragraphs. The first six of these mainly set out again most of the facts already found, some in a variant form, together with some additional facts. The second sub-paragraph, however, records a contention by the taxpayer which might well have found place in the statement of the taxpayer's contentions. It reads:

f 'It was contended on behalf of the [taxpayer] that his motive or purpose in buying the property was to acquire a residence for himself and his wife and, occasionally, his daughters.'

The eighth sub-paragraph states the conclusion of the Special Commissioners, namely, that the transaction in question constituted 'an adventure or concern in the nature of trade'. That leaves sub-para (7), in which virtually the whole of the process
g of reasoning whereby the Special Commissioners appear to have reached their conclusion is set out. To that sub-paragraph I shall return.

I pause there. I have spent a little time setting out the form of the case stated because it is so important to all concerned, to this court, as well as to the parties, their solicitors and their counsel, that cases should be stated properly. The cost and
h in particular the delay involved in remitting a case to the commissioners for amplification are such as to make this often a course of last resort. I appreciate that sometimes there are many difficulties for the commissioners. In the present case, they heard the appeal, with oral evidence, on 21st January 1971, over 11 years after the purchase in question. Their decision was dated 16th February 1971, but not until the figures had been agreed, nearly a year later, were they asked, on 21st January
i 1972, to state a case. I appreciate the difficulties; but I express the hope that in future cases it may prove possible to give more dates where dates are important, to set out at least the main headings of the rival contentions, in the shape of the reasoning rather than the mere conclusion, and to avoid making it necessary on appeal to this court for all concerned to compare and contrast two sets of statements of the facts in variant language which overlap but do not coincide.

With that, I turn to the facts in what is a somewhat unusual case. I do no more

than summarise those facts necessary for an understanding of my decision, and although I do not repeat all the facts set out in the case stated, I do not forget them. In 1959 the taxpayer and his wife were carrying on two businesses in Cheltenham, one a retail grocery and the other a newsagent and post office, in shops nearly next door to each other. They lived in a two-bedroomed flat over the grocer's shop. They have three daughters, two married and one not, as well as a grandchild. They both knew the house in question, which had been built in the Regency period; for the taxpayer and his parents had all worked there in days gone by. It was a 'gentleman's residence', with some 17 rooms, a garage and outhouses, and it was sold with about one acre of garden and some 8½ acres of pasture. Until about 1934 the property had been well maintained, but it then declined, and during the war six families were billeted there. Gas was laid on, but not electricity. The Special Commissioners found that it had only one bathroom, but the auction particulars attached to the case describe two bathrooms with some particularity, one on the first floor of the principal wing and the other on the ground floor of the secondary wing.

Despite its condition, the house was occupied in some way until 1958 or early 1959. In July 1959 the taxpayer saw that it was up for auction, and two or three days before the auction he looked round it from the outside and decided to bid for it. He did not expect to succeed, and did not even take his cheque book to the auction. At the auction on 23rd July 1959 there was only one other bidder, and after the bidding had reached £5,000 the taxpayer's bid of £5,100 proved to be the last bid: and somewhat to his surprise the house was knocked down to him. His state of mind is stated in the findings of fact as follows:

'At the time of the auction the [taxpayer] had not decided what to do with the property if he bought it; but had in mind going with his wife to live in it if this proved to be feasible. It had a sentimental attraction to him in view of his, and his parents', connection with it.'

In their decision, the Special Commissioners say, in sub-para (7):

'On the evidence before us we have reached the conclusion that the [taxpayer] had at no time a fixed and settled intention of buying the property for use as a residence. He would have liked to be able so to make use of it, but he meant to do so only if he could persuade his wife that going to live there would be acceptable to her ...'

Having thus unexpectedly become the owner in equity of this property, the taxpayer took his wife to see it that evening, though they could not go inside it as they had no key. At some stage (I do not know when) the taxpayer took his bank manager to see the property, though it does not appear whether he saw it inside as well as out: and the bank manager agreed an overdraft to make completion possible. I do not know when completion took place, save that there is a statement that 18th September 1959 was 'before completion'. The Special Commissioners say that the taxpayer and his wife discussed the possibility of living in the house because their flat was too small to have their daughters and grandchild to stay with them. I think this discussion must have been soon after the auction, because the Special Commissioners state that 'subsequently' the taxpayer, his wife and two of their daughters saw the interior of the property, and it seems unlikely that the taxpayer would fail to obtain access to the interior until long after the house had been knocked down to him. When they saw the interior of the house, the taxpayer's wife 'soon realised that their thoughts of using it as a residence for themselves were impracticable'. There was much rubbish in the house: 'the bathroom' had a gas geyser (this, I think, is the first floor bathroom); there was no electricity; and the decoration was in a very poor state. The taxpayer said that all this could be put right, but his wife then raised other objections. Her daughters did not think it was practical or convenient; it was too

a large and difficult to run; she was troubled by its isolation; it was far from the news-agent and post office that she managed, and she could not drive a car; it was near a rubbish dump and she was afraid of rats; and vandals had damaged it, and boys raided the orchards. Her daughters supported her, and, not surprisingly, the taxpayer acquiesced 'in his wife's decision' (which must mean a decision that she would not live in the house), and he 'abandoned the idea of living in the property'. I do not know when this decision was reached, but from both the version in the findings b of fact and the version in the decision of the Special Commissioners I infer that it was within a very few days after the auction.

c 'Shortly after the acquisition', say the Special Commissioners, the taxpayer, helped by his family and brothers-in-law, and with some domestic help, took certain steps in relation to the house. It looks as if these steps were taken after the decision not to live in the house had been made, but before completion. Some of the rooms were cleaned, a start was made on clearing out the rubbish, curtains were fitted so that the house would not appear unoccupied, and the grass and high hedges round the property were cut. 'After a time', say the Special Commissioners, the taxpayer installed his nephew in two or three rooms, rent free and in effect as a caretaker; and the nephew put in a fireplace. Whether this was before or after completion I do not know. The nephew remained there for some three years.

d Again I pause. Up to this point, there had been the taxpayer's initial idea of going to live in the house with his wife 'if this proved to be feasible'. This initial idea had soon foundered on his wife's understandable objections, and the taxpayer had then rendered what I may call 'first aid' to the property. The prospects for the house at this stage may fairly be called indeterminate. However, there then came a somewhat protracted stage which is of considerable importance, relating to planning e permission; for when the taxpayer realised that he could not live in the house, instead of reselling it as it was, with or without improvements to its condition, he took steps to enhance the value of the property by obtaining planning permission. On 18th September 1959, before completion, some town planning consultants acting on behalf of the taxpayer made an outline application for planning permission for f residential purposes in respect of, it seems, part of the property. The consultants advised the taxpayer that the land was 'white' land for planning purposes and that it was unlikely that planning permission would be granted, but that there was nothing to be lost by applying. On 16th November 1959 the local planning authority refused planning permission. The taxpayer appealed, a public inquiry was held at some stage, and on 23rd June 1960 the Minister allowed the taxpayer's appeal. The taxpayer then, in co-operation with the owner of the neighbouring land fronting on to g a road which enabled problems of access to the taxpayer's property to be solved, made a further application on 23rd November 1961. This was for outline planning permission for the erection of 90 dwellings on the whole of the land; and after negotiations with the planning authorities, planning permission was granted in January 1962.

h During this time the taxpayer had not been advertising the property for sale. Immediately after the auction he had refused an offer which would have shown him a profit of £250. He received no other offers until 'after he had obtained planning permission'; and from one of the documents annexed to the case stated this seems to be a reference to the earlier planning permission, granted by the Minister on appeal. But after this, he received a number of offers, some of which he referred to his solicitors, who then negotiated with the developers who had made the offers. Finally, there was the offer of £54,500, for which contracts were exchanged on 17th September 1963; i and doubtless that contract was completed some while later. Apart from a suggestion within the family that the house should be used as a country club, a suggestion that was not pursued, nothing save sale for development seems to have been in mind in any real way once it had been decided not to live in the house.

I now return to sub-para (7) of the Special Commissioners' decision as set out in para 9 of the case stated. This sub-paragraph contains virtually the whole of their

expressed reasons for dismissing the appeal. I have already read part of this, but I think I should read it in its entirety. It reads as follows:

'On the evidence before us we have reached the conclusion that the [taxpayer] had at no time a fixed and settled intention of buying the property for use as a residence. He would have like to be able so to make use of it, but he meant to do so only if he could persuade his wife that going to live there would be acceptable to her, and it very soon became clear that it would not be. After buying it, he had, in our view, no more than a short-lived and doubtful hope or expectation that it might prove to be suitable for them as a residence. Once a detailed inspection had made its defects for habitation apparent he and his wife wholly abandoned any intention of living there. Having bought the property as he did at a low figure, he shortly afterwards proceeded to take steps to enhance its value with a view to development and, ultimately, sale'.

The Special Commissioners then, as I have mentioned, held in sub-para (8) that the transaction constituted an adventure or concern in the nature of trade.

Initially, counsel for the taxpayer attacked this conclusion primarily on the ground that the Special Commissioners had misunderstood and misapplied the law: and this attack was in the main directed at the first sentence of sub-para (7). The true question, said counsel for the taxpayer, was not whether the taxpayer had at any time 'a fixed and settled intention of buying the property for use as a residence'. The words 'fixed and settled' were wrong, and formed no part of the taxpayer's argument before the Special Commissioners; for his contention, as recorded by the Special Commissioners in para 7, was essentially that in relation to the transaction in question the taxpayer was not carrying on a trade or adventure or concern in the nature of trade. That, of course, is so: but in para 9 (2), as part of their decision, the Special Commissioners record the taxpayer's contention that his motive or purpose in buying the property was to acquire a residence for himself and his wife, and, occasionally, his daughters. Indeed, it would be surprising if he had not contended this. If a house is bought with the intention of providing a home for the purchaser, that is a valuable element in a contention that in so doing the purchaser was not trading, especially if the intention is fixed and settled. Having recorded the basic contentions, which I may put shortly as trading *vel non*, and having both reached a decision and stated the case in those terms, I cannot see how the conclusion of the Special Commissioners that there was no fixed and settled intention to buy the house for use as a residence can be fairly read as being more than the rejection of an important argument by the taxpayer to refute the allegation that he was trading within the meaning of the Act.

Even if the house was purchased with no thought of trading, I do not see why an intention to trade could not be formed later. What is bought or otherwise acquired (for example, under a will) with no thought of trading cannot thereby acquire an immunity so that however filled with the desire and intention of trading the owner may later become, it can never be said that any transaction by him with the property constitutes trading. For the taxpayer, a non-trading inception may be a valuable asset: but it is no palladium.

The proposition that an initial intention not to trade may be displaced by a subsequent intention, in the course of the ownership of the property in question, is, I think, sufficiently established by *Mitchell Brothers v Tomlinson (Inspector of Taxes)*¹. In that case the appellants, who were window cleaners and dealers in surplus army stores, decided to set up an investment fund for their old age. By the outbreak of war in 1939 they had acquired 60 houses, and between April 1942 and September 1948 they bought 239 more houses that were available at low prices. Initially, the appellants relet any house when it fell vacant; but in the words² of the General Commissioners, after the war they 'changed their policy and ceased to let houses

¹ (1957) 37 Tax Cas 224.

² (1957) 37 Tax Cas at 229.

a that fell vacant; instead from 1946 onwards they invariably offered them for sale'. On these facts Danckwerts J said this¹:

b 'I will assume that the principles require that the intention should be established as to what the alleged traders were doing in regard to these matters, that is to say, what the intention and purpose of the Mitchell brothers was at the material time. I am quite prepared to accept that sub-paragraphs (e) and (f) taken together show an original intention to set up land as an investment to support the Appellants in their old age, and that it will no doubt be correct to say, as argued by Mr. Borneman, that that intention having been established, if you say that subsequently, in altered circumstances, if you like, the Mitchell brothers decided to indulge in a business, a trade of selling and buying land, you must establish the facts to support that there was a change in intention. As c has been pointed out in a number of cases, that is a question of fact, which is primarily one for the Commissioners to decide. I am not sitting as a second tribunal to decide matters of fact. I have merely to see whether that decision of the Commissioners is one which they could reasonably have reached upon the facts which they found and the evidence before them.

d 'Now it seems to me that there are in paragraph 3 (h) ample facts upon which the Commissioners could infer an intention to depart from their policy of investment and retaining the houses for purposes of investment, but instead to take advantage of the opportunities provided for making profits in the conditions which existed after the termination of the war and indulge in an adventure in the nature of a trade by making profits out of the purchase and sale of land. It seems to me impossible for me to say there was no evidence on which the Commissioners could reach that conclusion, or that such a conclusion is one which could e not be reasonably reached upon the evidence and the facts found by the Commissioners. Accordingly, it seems to me this is a case in which I ought not to disturb the finding of the Commissioners, which I have not yet read out, but it seems to me it has been perfectly properly expressed. They found as a fact that the Appellants carried on the trade of buying and selling properties and they held that the profits therefrom were assessable to Income Tax. I do not feel at liberty to f interfere with that finding, so the appeal must be dismissed.'

On appeal, the Court of Appeal dismissed the appeal without delivering a reasoned judgment, saying² that it was 'a perfectly hopeless appeal'.

g What the appellants in that case had done, as it seems to me, was to build up a large stock of houses with no intention of trading. They then decided that when houses fell vacant they should be sold instead of being let; and as from the change of policy they were held to be trading. This plainly supports the conclusion that what is bought h otherwise than in the course of trade may be sold in the course of trade. The case is not on all fours with the present case, in that here there is only one house whereas there there were many houses; and after the change of policy to selling instead of letting, there seems to have been some purchasing as well: for the changed policy operated 'from 1946 onwards', and some of the houses seem to have been bought up until September 1948. But that, as it seems to me, does not affect the principle. The principle also derives some support from a dictum in *Cooksey and Bibbey v Rednall (Inspector of Taxes)*³; and see also *Lucy & Sunderland Ltd v Hunt (Inspector of Taxes)*⁴ and *Leach v Pogson (Inspector of Taxes)*⁵.

i Quite apart from authority, I would hold that property acquired with no thought of trade may afterwards become the subject of trade. I have, of course, been using

1 (1957) 37 Tax Cas at 229, 230

2 (1957) 37 Tax Cas at 230

3 (1949) 30 Tax Cas 514 at 519

4 [1961] 3 All ER 1062 at 1065, 1066, [1962] 1 WLR 7 at 12, 40 Tax Cas 132 at 138

5 (1962) 40 Tax Cas 585 at 593, 594

'trade' and 'trading' as shortened references to 'trade' as defined by the Income Tax Act 1952, s 526 (1); and I shall continue to do so. It is significant that this definition includes an 'adventure or concern in the nature of trade'. As Lord Normand, the Lord President, said in *Inland Revenue Comrs v Fraser*¹:

'It would be extremely difficult to hold that a single transaction amounted to a trade, but it may be much less difficult to hold that a single transaction is an adventure in the nature of trade';

and see *Rutledge v Inland Revenue Comrs*²: By itself, 'trade' has a flavour of recurrence which 'adventure' lacks. With Peter Pan one may say 'To die will be an awfully big adventure': but for none will death recur.

Counsel for the taxpayer submitted as part of his argument a useful memorandum setting forth a series of factors which he urged as indicating the absence of the characteristics of trade. These I have considered; but I do not propose to discuss them in detail, for the question is not what I would decide, but whether I could and should reverse the decision of the Special Commissioners. If one takes the celebrated passage in Lord Radcliffe's speech in *Edwards (Inspector of Taxes) v Bairstow*³, then whether one puts it as a question of whether there is any evidence to support the decision of the Special Commissioners, or whether the evidence is inconsistent with or contradicts the determination, or whether the true and only reasonable conclusion contradicts the determination, in my judgment the answer must be the same. However much the transaction initially lacked the characteristics of trade, once the series of transactions relating to the obtaining of planning permission had begun, there came into existence material on which it was possible for the Special Commissioners to reach the conclusion that thereafter the transaction as a whole fell within the statutory definition of 'trade'. Once the slate had been wiped clean of whatever initial residential aspirations the taxpayer had, there was little to displace, and the new intention certainly had some of the characteristics of trading. Action was being taken and money was being spent with a view to enhancing the value of the property for the purpose of selling it. In the taxpayer's hands, the house had never been a residence or home, and never became anything save a source of future profit. True, although he owned a few small properties as investments, he was in no sense a dealer in property. True also, he did not advertise the property for resale, although in fact a sufficiency of offers came in. True, the obtaining of planning permission was unexpected; but then so is success in a number of admittedly trading transactions. True again, there is nothing to show that the taxpayer could not afford to retain the property: but what he did was to pursue a course which would realise the best price on a sale. That by itself does not necessarily establish that there was trading: the owner-occupier of a house may improve it before he sells it without it being held after the sale that he has been engaging in trade. But a process of enhancing the value of a house which the owner has never lived in with a view to selling it at a profit, especially if that enhancement consists not merely of improving the house as it is but of a prolonged process of obtaining planning permission for an entirely new development, certainly provides some evidence which can support a finding of trading.

Accordingly, whatever I might have held myself if I had heard the evidence, it seems to me impossible to say, after examining the facts with 'the decent respect for the tribunal appealed from' that Lord Radcliffe enjoined in *Edwards (Inspector of Taxes) v Bairstow*⁴, that there was not sufficient evidence to support a decision by the Special Commissioners that at some time after the auction the taxpayer was trading.

1 1942 SC 493 at 498, 24 Tax Cas 498 at 502

2 1929 SC 379 at 382, 383, 14 Tax Cas 490 at 496, 497

3 [1955] 3 All ER 48 at 57, [1956] AC 14 at 36, 36 Tax Cas 207 at 229

4 [1955] 3 All ER at 59, [1956] AC at 39, 36 Tax Cas at 231

a After all, it was the Special Commissioners who saw and heard the witnesses and were able to give the evidence appropriate weight.

In his reply, however, counsel for the taxpayer advanced a powerful contention to the effect that to hold that at some time after the auction the taxpayer was trading showed that the Special Commissioners had gone wrong. After much discussion, it came down, I think, to this. Counsel for the taxpayer accepted, as I think he was forced to, that assets acquired with no thought of trading could subsequently become the subject of trading; and for brevity the phrase 'supervening trading' was used for trading of this type, as distinct from cases where assets were both bought and sold with the object of trading, which were referred to as 'trading ab initio'. He also accepted that he could not contend that there was no evidence which could support a finding of supervening trading in this case, although he said that the right conclusion was that there had not even been supervening trading. However, this, he said, was not what the Special Commissioners had held. Their decision was one of trading ab initio, as their references to 'purchase and sale' showed. Indeed, the sole contention of the inspector himself is recorded in para 8 as being one that 'the purchase and sale' of the house by the taxpayer constituted trading. There was in fact no evidence whatever to support a finding of trading ab initio, and counsel for the Crown, said

d counsel for the taxpayer, had not attempted to support such a finding. Furthermore, said counsel for the taxpayer, the contention of supervening trading was never advanced before the Special Commissioners, and counsel for the Crown was trying to take a point which had not been taken below, and without giving any notice of it. This he could not do. Even if the contention of supervening trading had been sufficiently taken below, it was plain that the Special Commissioners had not appreciated it: for in a case of supervening trading, the property traded with had to be

e brought into account at its value not when acquired but when appropriated to trading, which might be quite a different time, and there was no trace of the Special Commissioners having considered any question of appropriation or the time of valuation. Indeed, he himself had considered this question of appropriation before he had appeared before the Special Commissioners, wondering whether to raise it, and so, being sensitised to the point, he would have noticed it had it been raised: but it was

f not. Furthermore, when the Special Commissioners had decided the question of principle and the parties had then agreed the figures, this had been done on the footing of trading ab initio, so that if the true conclusion was one of supervening trading, the taxpayer had agreed the figures on a wholly wrong basis. That was the argument.

A procedural difficulty arose out of this argument. Counsel for the taxpayer, who had appeared before the Special Commissioners, made various assertions about what had happened and what had not happened before the Special Commissioners.

g Counsel for the Crown, who had not appeared before the Special Commissioners, on instructions (and without objection at the time by counsel for the taxpayer) read me a passage from a note of the proceedings which, he said, was made shortly after the hearing, in support of his submission that supervening trading was not a new point taken for the first time before me. Right at the end of his reply, counsel for the taxpayer

h said that there was no evidence whatever before me that the point on supervening trading had been taken before the Special Commissioners, so that the passage read to me from the note of the argument ought to be ignored, and that nothing except what appeared in the case stated should be considered.

This is a point on which I must say something. The cases stated that come before

i this court vary considerably in quality: and sometimes even the best of them proves inadequate in the face of some unexpected turn of argument or some question by the judge. Often in such cases counsel, doubtless realising the cost and delay of sending the case back to the commissioners, state on instructions such additional facts as may be needed to supply the deficiency. Sometimes they agree, and sometimes they disagree, though only on immaterial points; and in these cases the expense and delay of sending a case back to the commissioners is avoided by the exercise of a little

common sense on the technicalities. Sometimes such a course is objected to, or, if not objected to, produces an irreconcilable conflict on essentials; and in such cases the court has to do the best it can on the materials that are legitimately before it. There may indeed be cases in which it is very proper for counsel to object to any informal supplements of this kind being made to the case stated, and to require the court to confine itself within the four corners of the case stated. If, however, counsel does not object, and material is put before the court in this informal way, I do not think that counsel can subsequently object to the material on the score of informality. It is open to counsel on a case stated to make admissions or agree additions to the case, and if these or other additions are made without objection I think that it then becomes too late to object to them later in the argument.

Now in this case it seems to me that the point of supervening trading is one that must have been before the Special Commissioners in some form. *Mitchell Brothers v Tomlinson (Inspector of Taxes)*¹ is recorded in the case stated as being one of the cases cited; and I find it impossible to see why that case should have been cited except to support the concept of supervening trade. I cannot see what other significance that case could have had. Even if I leave on one side the note of the argument based on the *Mitchell* case¹ that was read to me (and, incidentally, I was told that the Tomlinson of that case was the inspector of taxes who in fact appeared before the Special Commissioners in the present case), and even if I confine myself strictly to the case stated, I think that I would infer that the point had been sufficiently taken: taken, that is, though probably not emphasised or reiterated, or, perhaps, sufficiently appreciated by others. If, as I think, I may consider what was recorded in the note of the argument that counsel for the Crown read out to me without objection, this reinforces my view. Nor do I forget that counsel for the Crown had advanced the whole of his argument on supervening trading before counsel for the taxpayer contended that the point was not open to the Crown because it had not been taken below. I therefore think that this point is open to the Crown.

Next, I cannot see any real indication in the case stated that the Special Commissioners ever reached any decision on supervening trading. The main thrust of the argument below on both sides seems to have been on whether the whole transaction, from purchase to sale, was trading, with supervening trading as what may perhaps be called a subsidiary alternative. The contentions on each side are stated in terms of 'purchase and sale': the question that the Special Commissioners state in para 9 (1) as the question for their determination is 'whether the transaction concerning the purchase and sale' of the house was trading; the question of law stated in para 12 for the opinion of the court is whether there is evidence to support the Special Commissioners' finding that the taxpayer was trading 'in respect of the purchase and sale' of the house. Even para 9 (8), where the Special Commissioners state their opinion that the 'transaction' was trading, may well fall into this category, in view of the meaning given to 'transaction' in the passage I have quoted from para 9 (1) above. The only statement that gets away from the purchase is the Special Commissioners' initial statement, in para 2, that the question for their decision was whether 'the surplus on realisation from the sale' of the house 'was a profit derived from' trading, or was a capital increment.

In those circumstances, counsel for the taxpayer contended forcefully that the only answer to the question of law stated for the opinion of the court, namely, whether there was evidence to support the finding of the Special Commissioners that the taxpayer 'carried on an adventure or concern in the nature of trade in respect of the purchase and sale' of the property, must be No: for *quoad* the purchase there was no evidence. Literally, I think counsel for the taxpayer is right: but as Coke² observed, qui haeret in litera haeret in cortice. There is a finding of trading: that

1 (1957) 37 Tax Cas 224

2 See Coke upon Littleton 283 b

- a* finding covers the whole period including the initial acquisition: as to the initial acquisition the finding is unsupported by evidence: as to the rest it is supported by some evidence. In those circumstances, to say that the court must say that the whole determination is wrong seems to me unreal. The finding of trading cannot, as it seems to me, be totally destroyed merely because there is no evidence to support the finding during the initial period of acquisition, even though there is evidence to support such
- b* a finding during all subsequent stages. If from a finding of trading throughout one discards the one period which may be said to point against trading, what remains must surely be more, rather than less, strongly supported. Put another way, if the finding is that from purchase to sale the transaction as a whole constituted trading, despite the lack of any indicia of trading in the purchase itself, a finding of trading for a period subsequent to the purchase must be a fortiori. Nevertheless, trading (or an 'adventure') must have a commencement, and I do not see how a finding of trading throughout can stand. A man cannot trade before he begins to trade, nor embark on an adventure before he has thought of it.
- c*

- The question, then, is what order I ought to make. I bear in mind that it is for the taxpayer to displace the assessment made on him. I confess that I have been troubled by this case, with some of the problems (though not all) arising from the way in which the case has been stated. Without accepting it as a precedent, counsel for the Crown
- d* very properly said, on instructions, that he would not seek to hold the taxpayer to the figures agreed if there had been some misunderstanding. I think there must have been some misunderstanding on the point of supervening trading, both by the Special Commissioners and by the taxpayer, not least in relation to the figures. I think the least unsatisfactory course would be to remit the case to the Special Commissioners to determine, consistently with this decision, when the trading (as defined in the Act) began, and what value (if not agreed) the property had when it became the subject of trading, so that the true profit derived from the trade may be determined. In doing this, neither side is to be bound by the figures already agreed. Each side must be at liberty to advance further arguments; and I think that each side must be at liberty to adduce further evidence. Any arguments and evidence must, however, be
- e* confined to the matters remitted to the Special Commissioners for determination. I shall, of course, hear any submissions that counsel may wish to make as to these and any other directions that should be given to the Special Commissioners. Subject to that, I dismiss the appeal.
- f*

- Finally, in view of what I have said about the form of the case stated, it seems proper that a copy of this judgment should be sent forthwith to the Special Commissioners for their information. If, as I understand to be the case, the Solicitor of
- g* Inland Revenue does this as a matter of course in all appeals from the Special Commissioners (as distinct from appeals from the General Commissioners), that, of course, will suffice; otherwise I direct the registrar to procure it to be done.

Appeal dismissed. Case remitted to the Special Commissioners.

- h* Solicitors: Vizards (for the taxpayer); Solicitor of Inland Revenue.

Rengan Krishnan Esq Barrister.

Bourlet v Porter

HOUSE OF LORDS

LORD REID, LORD MORRIS OF BORTH-Y-GEST, VISCOUNT DILHORNE, LORD DIPLOCK AND LORD CROSS OF CHELSEA

11th, 12th APRIL, 11th JUNE 1973

Road traffic – Driving with blood-alcohol proportion above prescribed limit – Evidence – Provision of specimen – Specimen for laboratory test – Hospital patient – Requirement to provide specimen at hospital – Requirement made while motorist a patient at hospital – Motorist subsequently discharging himself – Motorist providing specimen at hospital following discharge – Whether necessary that motorist should be a patient at hospital when specimen provided there – Road Safety Act 1967, s 3 (2).

Road traffic – Driving with blood-alcohol proportion above prescribed limit – Evidence – Provision of specimen – Specimen for laboratory test – Hospital patient – Right of medical practitioner to object – Right a condition precedent to requirement to provide specimen – Right to object to provision of specimen not continuing after requirement made – Road Safety Act 1967, s 3 (2).

Road traffic – Driving with blood-alcohol proportion above prescribed limit – Evidence – Provision of specimen – Breath test – Arrest following test – Right of person arrested to have opportunity of providing a further specimen of breath for a breath test while at police station – Whether person arrested must be taken to police station and given opportunity of providing a further specimen for breath test – Road Safety Act 1967, s 2 (7).

The respondent was the driver of a motor vehicle which was involved in a road accident. He was taken to hospital and became a patient there. Subsequently a police officer in uniform arrived at the hospital. He notified the doctor in immediate charge of the respondent's case that he proposed to require the respondent to provide a specimen of breath for a breath test under s 2 (2) of the Road Safety Act 1967; he also told the doctor that, if the test proved positive, it would be his intention to require the respondent to provide a specimen of blood or urine for a laboratory test under s 3 (2)^a of the 1967 Act after warning him of the consequences that would result from his failure to do so. The doctor replied that he had 'no objection to the giving of the warning formula, or to the requirement to provide a specimen of breath, or to the provision of the specimen'. The breath test was then administered and proved positive. The respondent was then required to provide a specimen for a laboratory test; he agreed to supply a specimen of blood. Before the specimen had been provided the respondent discharged himself from the hospital; as he was walking out, however, the constable arrested him, as he was entitled to do under s 2 (4)^b of the 1967 Act, and prevented him from leaving. Subsequently a police surgeon arrived and took a sample of the respondent's blood at the hospital. On the basis of that specimen, the respondent was convicted of driving a motor vehicle having consumed alcohol in excess of the prescribed limit, contrary to s 1 (1) of the 1967 Act. The Court of Appeal quashed his conviction holding (i) that, after his arrest, the respondent should have been taken to a police station and given an opportunity to take a further breath test, in accordance with s 2 (7)^c, before being asked to provide the specimen of blood and (ii) that the specimen could not be provided at the hospital once the respondent had ceased to be a patient there and there was no

^a Section 3 (2) is set out at p 804 f to h, post

^b Section 2 (4) is set out at p 804 b c, post

^c Section 2 (7), so far as material, is set out at p 805 e, post

- a longer a doctor in charge of his case who could object to the provision of the specimen. On appeal,

Held (Lord Morris of Borth-y-Gest dissenting) – The appeal would be allowed and the conviction restored for the following reasons—

- (i) The effect of ss 2 (7) and 3 (1)^d was not that a person who had been arrested had to be taken to a police station and given an opportunity to take a second breath test but only that, if he were taken to a police station, he was to be given an opportunity to take another test (see p 802 a b, p 807 b c, p 808 a to c, p 813 c and f and p 814 d, post).
- (ii) The right of a medical practitioner in immediate charge of the case to object to the provision of a specimen was a condition precedent to the requirement to provide a specimen and not a right which continued after the requirement had been validly made. It was therefore immaterial that, because the respondent had discharged himself after the requirement had been made but before the specimen had been provided, there was no longer a doctor in charge of his case who could object to the provision of the specimen. Accordingly a specimen for a laboratory test which had been required from a person while he was a patient at a hospital did not have to be provided while the person was still a patient there. It followed therefore that the procedure prescribed by the 1967 Act had been correctly followed in that the respondent had been validly required to provide a specimen of blood while a patient in hospital and, in accordance with s 3 (2), the specimen had been provided at the hospital where the requirement had been made (see p 802 b c, p 808 e to j, p 809 b, p 811 d e and f, p 812 g and h j, p 813 h to p 814 a and d, post); dictum of Cooke J in *Bosley v Long* [1970] 3 All ER at 288 disapproved.

Notes

For driving with undue proportion of alcohol in the blood and for requirement of specimen for a laboratory test, see Supplement to 33 Halsbury's Laws (3rd Edn) para 1061A, I, 7.

- f For the Road Safety Act 1967, ss 1, 2, 3, see 28 Halsbury's Statutes (3rd Edn) 459, 462, 465.

As from 1st July 1972, ss 1, 2 and 3 of the 1967 Act have been replaced respectively by ss 6, 8 and 9 of the Road Traffic Act 1972.

Cases referred to in opinions

- Bosley v Long* [1970] 3 All ER 286, [1970] 1 WLR 1410, 134 JP 652, [1970] RTR 432, DC,
- g Digest (Cont Vol C) 933, 322mb.
- Butler v Easton* [1970] RTR 109, [1970] Crim LR 45, DC, Digest (Cont Vol C) 929, 322ea.
- Director of Public Prosecutions v Carey* [1969] 3 All ER 1662, [1970] AC 1072, [1969] 3 WLR 1169, 134 JP 59, [1970] RTR 14, HL, Digest (Cont Vol C) 936, 322aa.
- Milne v McDonald* 1971 SLT 291.

Appeal

- h Alan Robert Bourlet, a superintendent of Kent county constabulary, appealed against a decision of the Court of Appeal, Criminal Division (Orr LJ, Milmo and Phillips JJ) dated 1st December 1972 allowing an appeal by the respondent, Edward Charles Thomas Porter, against his conviction on 10th February 1972 in the Crown Court at Canterbury before Judge Forrest QC of driving a motor vehicle on a road having consumed alcohol in such a quantity that the proportion thereof in his blood exceeded the prescribed limit, contrary to s 1 (1) of the Road Safety Act 1967.
- i On the application of the appellant the Court of Appeal certified that a point of law of general public importance was involved in the decision to allow the appeal against conviction, i.e. 'whether in the case of a defendant charged with an offence contrary to s 1 (1) of

d Section 3 (1) is set out at p 805 g to j, post

the Road Safety Act 1967 a specimen of blood taken from him by a medical practitioner with his consent at a hospital pursuant to a requirement lawfully made of him by a constable while the defendant was at the hospital as a patient can be regarded as a specimen provided by the defendant under s 3 of the said Act, when the defendant, after the requirement made by the constable, and after having agreed to provide the specimen was arrested while at the hospital in consequence of him discharging himself from the hospital and before the specimen of blood was taken'. The court however refused leave to appeal to the House of Lords; on 22nd February 1973 the appeal committee granted leave. The facts are set out in the opinion of Lord Morris of Borth-y-Gest.

K G Jupp QC and *Michael Lewis* for the appellant.
O B Popplewell QC and *M Gale* for the respondent.

Their Lordships took time for consideration.

11th June. The following opinions were delivered.

LORD REID. My Lords, I would allow this appeal for the reasons given by my noble and learned friends, Viscount Dilhorne and Lord Diplock.

LORD MORRIS OF BORTH-Y-GEST. My Lords, this case furnishes yet another example of the infinite and, perhaps, surprising variety of the sets of circumstances which give rise to prosecutions for an offence under s 1 of the Road Safety Act 1967. In all these cases once the facts are ascertained the only safe course is to consider step by step whether the provisions of the Act have or have not been observed. Only if they have been ought a conviction to be obtained or sustained.

The charge which was brought against the respondent was that of driving a motor vehicle having consumed alcohol exceeding the prescribed limit, contrary to s 1 (1) of the Road Safety Act 1967. He was the driver of a motor vehicle which was involved in an accident on the road on 13th August 1971. He was taken to a hospital—the Medway Hospital. As was found by the learned judge he became a patient there some time before 11.30 p.m. on 13th August. At 11.30 p.m. a police constable in uniform arrived at the hospital. He wished to require the respondent to take a breath test. As the respondent was in the hospital as a patient (see s 2 (2)) the police constable had to notify the medical practitioner who was in immediate charge (see s 2 (2)) of the respondent's case. The medical practitioner was Dr Banner-Martin. The police constable did notify Dr Banner-Martin. All that he had to do at that stage was to notify the doctor that he proposed to require the respondent to provide a specimen of breath for a breath test. The doctor could object (see s 2 (2)) either on the ground that the provision of a specimen of breath would be prejudicial to the proper care or treatment of the respondent or on the ground that the requirement to provide a specimen of breath would similarly be prejudicial.

In fact the police constable not merely notified the doctor of his proposal to make the requirement of a specimen of breath but also said that if the breath test was positive it would be his intention to require the respondent to provide a specimen of blood or urine for a laboratory test and to give him the warning (see s 3 (10)) of the consequences that would result from a failure so to provide. Such a requirement to provide a specimen (which would be of a person while in hospital as a patient) could only be made (see s 3 (2)) if the medical practitioner in immediate charge of the case, after notification of the proposal to make the requirement, did not object. The objection to the provision of a specimen could be on any one of three grounds, viz (a) that the provision of the specimen would be prejudicial to the proper care or treatment of the respondent or (b) that the requirement to provide it would be similarly prejudicial or (c) that the warning would be similarly prejudicial.

- a Employing a measure of anticipation the doctor at the early stage now reached in the narrative of facts then said—I quote from the ruling of the learned judge:

‘... that he had no objection to the giving of the warning formula, or to the requirement to provide a specimen of breath or to the actual provision of the specimen.’

- b At 12 minutes past midnight the police constable saw the respondent who admitted that he was the driver of the motor vehicle involved in the accident. The proper procedure was then (at 15 minutes past midnight) carried out for taking a specimen of breath. The test proved positive. The police constable then required the respondent (who was at the hospital as a patient) to provide a specimen of blood or urine for a laboratory test (see s 3 (2)). He was first requested (see s 3 (6)) to provide a specimen of blood. He agreed that he would but he asked that his solicitor should
- c be present before he actually provided the specimen. The solicitor was (at 12.30 a m) sent for.

- The next development was somewhat surprising. At 12.45 a m the respondent said to the sister in charge of his case that he wished to be discharged from hospital. The sister tried unsuccessfully to dissuade him. So did Dr Banner-Martin. It was thought that he ought to be kept in hospital for observation for possible concussion.
- d The respondent dressed himself and prior to walking out of the ward he signed a document declaring that he was taking his own discharge from the hospital at his own desire and was doing so contrary to the advice of the medical staff and that having had the risks explained to him he was accepting full responsibility. So he walked out of the ward. Meanwhile the police constable had had news of what was happening. The constable then arrested him and prevented him from leaving.
- e He said: ‘As you have provided me with a positive breath test and have now discharged yourself from this hospital I am arresting you’.

- There is no doubt that the police constable was entitled to arrest the respondent (see s 2 (4)). There had been a breath test carried out under s 2 (2) and the indication was that the proportion of alcohol exceeded the prescribed limit and the respondent
- f was no longer a patient at the hospital.

- What in fact happened thereafter was that at 1 a m the respondent’s solicitor arrived and at 1.20 a m a police surgeon took a sample of blood. On the basis of what that sample showed the respondent was later prosecuted and convicted. After the sample of blood had been taken the respondent apparently abandoned his previous hope of leaving and he was in fact readmitted in the ward. In these somewhat strange circumstances the problem arises whether the conviction can stand
- g or whether, as the Court of Appeal held, it would have to be quashed.

- At the close of the case for the prosecution at the trial a submission was made on behalf of the respondent that there was no case to answer because there had not been compliance with the procedure laid down by ss 2 and 3 of the Road Safety Act 1967. That submission was rejected and it is accepted that it involved a question of law for the learned judge and did not involve any question of fact for the jury. The only
- h question which arose in the Court of Appeal and which now arises is whether the learned judge was wrong in law in rejecting the submission. The Court of Appeal held that he was. At the trial after the rejection of the submission of law there was an issue of fact for the jury to decide whether the respondent had had a drink of vodka after the accident. The jury rejected his evidence on this matter. If therefore the submission of law was correctly rejected the conviction will stand but if, as the
- i Court of Appeal held, it was incorrectly rejected then the Court of Appeal were right in quashing the conviction.

For the prosecution it is urged that the requirement to provide a specimen for a laboratory test was made while the respondent was a patient at a hospital and that it matters not that at the time when the specimen was provided he was no longer a patient at a hospital and further that it matters not that at the time of the providing

of the specimen there was no 'medical practitioner in immediate charge' of the case (see s 3 (2)) who would be in a position to object to the provision of a specimen. Furthermore, the prosecution virtually say that the fact of the arrest can be ignored.

My Lords, it seems to me that the only proper course is to follow faithfully the provisions of the Act even if by so doing there results an acquittal which may be unmeritorious. I have related the provisions of the Act to the facts down to the moment when the police constable arrested the respondent. The arrest was validly made under s 2 (4). That subsection is in the following terms:

'If it appears to a constable in consequence of a breath test carried out by him on any person under subsection (1) or (2) of this section that the device by means of which the test is carried out indicates that the proportion of alcohol in that person's blood exceeds the prescribed limit, the constable may arrest that person without warrant except while that person is at a hospital as a patient.'

The breath test had been carried out at the hospital and the procedure appropriate in the case of a patient at a hospital had been followed. The test indicated an excess above the prescribed limit. The respondent had then ceased to be in the hospital as a patient. The arrest was therefore a valid arrest.

In my view, it is clear that the Act makes certain provisions which must be followed if a person is 'at a hospital as a patient' in which event he cannot be arrested and other provisions which must be followed where an arrest may lawfully be made and is made. As was said by the Divisional Court in *Bosley v Long*¹ if one of the two procedures provided for by the Act is not carried to a conclusion the other must be followed.

What, then, was the position at the time when the specimen of blood was given by the respondent? Was there a compliance with s 3 (2) of the Act? That subsection reads as follows:

'A person while at a hospital as a patient may be required by a constable to provide at the hospital a specimen for a laboratory test—(a) if it appears to a constable in consequence of a breath test carried out on that person under section 2 (2) of this Act that the device by means of which the test is carried out indicates that the proportion of alcohol in his blood exceeds the prescribed limit; or (b) if that person has been required, whether at the hospital or elsewhere to provide a specimen of breath for a breath test, but fails to do so and a constable has reasonable cause to suspect him of having alcohol in his body; but a person shall not be required to provide a specimen for a laboratory test under this subsection if the medical practitioner in immediate charge of his case is not first notified of the proposal to make the requirement or objects to the provision of a specimen on the ground that its provision, the requirement to provide it or a warning under subsection (10) of this section would be prejudicial to the proper care or treatment of the patient.'

The requirement addressed to the respondent to provide a specimen for a laboratory test and the request to him to provide a specimen of blood were made while the respondent was at the Medway Hospital as a patient: the requirement and request were to provide the specimen at that hospital. As I have indicated the 'medical practitioner in immediate charge' of the respondent's case had been notified of the proposal to make the requirement and had stated prospectively that he did not object in any of the ways that would be open to him. But, in my view, the Act draws a distinction between a requirement to provide a specimen and the provision of a specimen. Furthermore, the scheme of s 3 (2) is that there are certain safeguards in the case of a person who is at a hospital as a patient. One safeguard is that the medical practitioner in immediate charge of his case could in certain circumstances object (on

- a the specified grounds) to the actual provision of the specimen even though prior to the moment for the actual provision of the specimen he had raised no objection. I agree with the view expressed by the Divisional Court in *Bosley v Long*¹ that the safeguard is a continuing one. This all shows that what s 3 (2) contemplates is that the requirement to provide a specimen may be made to a person while at a hospital as a patient, that the requirement is to provide the specimen at that hospital ('the hospital must refer to the same hospital as designated by 'a' hospital), and that the actual provision must be made in circumstances enabling 'the medical practitioner in immediate charge' of the person's case to veto the actual provision of the sample.
- b Though in the words 'A person while at a hospital as a patient may be required by a constable to provide at the hospital' there is not a repetition after the second mention of 'hospital' of the words 'as a patient' the words which follow, and which enable the medical practitioner in immediate charge of the case to object, clearly contemplate the case of someone who continues to be in hospital as a patient and having a medical practitioner in charge of his case.
- c

- d In the present case the procedure started under s 3 (2) could not be continued once the respondent ceased to be a patient. The specimen was, therefore, not provided under s 3 (2) of the Act. It matters not that in this particular case the respondent does not appear to have been in any condition which would make it prejudicial to him to provide a specimen: nor is the position affected by the fact that Dr Banner-Martin, who had been in charge of the respondent when he was in hospital as a patient, was present. The enquiry is to decide which provisions of the Act were applicable to the fact as found.

- e As it is not doubted that the respondent could only be arrested after he had ceased to be a patient and as it is not doubted that his arrest was valid, the question arises whether the procedure was followed which warranted the conviction of a person who had been arrested. In my opinion, it clearly was not. It is provided by s 2 (7) as follows:

- f 'A person arrested under this section . . . shall, while at a police station, be given an opportunity to provide a specimen of breath for a breath test there.'

- g The word 'shall' is to be noted: the words 'while at a police station' are not synonymous with such words as 'provided he is taken to a police station'. If the question is asked 'Was the respondent while at a police station given an opportunity to provide a specimen of breath for a breath test there?'—the answer clearly must be No. Then regard must be had to the provisions of s 3 (1) of the Act. That subsection is as follows:

- h 'A person who has been arrested under the last foregoing section or section 6 (4) of the [Road Traffic Act 1960] may, while at a police station, be required by a constable to provide a specimen for a laboratory test (which may be a specimen of blood or urine), if he has previously been given an opportunity to provide a specimen of breath for a breath test at that station under subsection (7) of the last foregoing section, and either—(a) it appears to a constable in consequence of the breath test that the device by means of which the test is carried out indicates that the proportion of alcohol in his blood exceeds the prescribed limit; or (b) when given the opportunity to provide that specimen, he fails to do so.'

- j In my view, it is abundantly clear that the procedure applicable in the case of an arrested person was not followed. The arrest of the respondent was definite and deliberate. It cannot just be ignored or conveniently forgotten.

The consequence is that the procedure embarked on under s 3 (2) could not be completed and in any event was positively halted by the arrest. The procedures

which must be followed after an arrest were not in any way followed. However regrettable the result may be I think that the Court of Appeal were right in holding that the statutory requirements must be complied with before a conviction can be upheld.

I would dismiss the appeal.

VISCOUNT DILHORNE. My Lords, on 10th February 1972 the respondent was found guilty at Canterbury Crown Court of the offence created by s 1 (1) of the Road Safety Act 1967, namely, of driving a motor vehicle, having consumed alcohol in excess of the prescribed limit.

On 13th August 1971, at about 10.30 p m, the respondent was involved in an accident while driving a van. He was taken to Medway Hospital. While a patient there he provided a specimen of his breath. The test indicated that he had in his blood alcohol in excess of the prescribed limit. He was then required to provide a specimen of his blood or urine for a laboratory test. He agreed to supply a specimen of his blood and then, before he had done so, he decided to discharge himself from the hospital. He was advised not to do so. While dressing, he asked the nurse if there was any way of getting out of the hospital without having to pass the policeman. She pointed out that the window was the only way out. He signed a declaration that he was taking his discharge from the hospital at his own desire 'and contrary to the advice of the Medical Staff'. Pc Dale was told of this, and when the respondent sought to leave, prevented him from doing so and arrested him.

After his arrest and at the hospital after he had ceased to be a patient, he provided a specimen of his blood. His solicitor, whom he had wanted sent for, was then there. After providing the specimen, he was readmitted into the hospital as a patient. The laboratory test showed that there were 123 milligrammes of alcohol in 100 millilitres of blood so that there was a substantial amount of alcohol in excess of the prescribed limit in his blood.

At his trial the respondent's defence was that he had drunk vodka after the accident and before the breath test so the laboratory test did not show what alcohol he had in his body while driving. This defence was rejected by the jury. It was submitted on his behalf that the provisions of the Road Safety Act 1967 had not been complied with. After his arrest, it was submitted, he should have been taken to a police station and have been asked to take another breath test before being asked to provide a specimen of his blood, and after his arrest, it was contended, it was only at a police station that he could, under the Act, be required to provide a specimen of his blood or urine. The Act does make provision for the provision of such a specimen at a hospital but it was submitted that such a specimen could, under the Act, only be provided while he was a patient at the hospital. These submissions were rejected by Judge Forrest QC but found favour with the Court of Appeal (Criminal Division) who quashed the conviction. The prosecutor now appeals with the leave of the House.

Sections 2 and 3 of the Act state not only when a person can be required to provide a specimen of breath, blood or urine but also, save in one instance, where he is to be required to provide one. If he has reasonable cause to suspect a driver of having alcohol in his body or of having committed a traffic offence, a police constable in uniform can require the driver to provide a specimen of breath 'there or nearby' (s 2 (1)). If there has been an accident, he may require the driver of a vehicle involved to provide one 'either at or near the place where the requirement is made or, if the constable thinks fit, at a police station specified by the constable' unless the driver is at a hospital as a patient, in which case the driver may be required, if certain conditions are complied with, to provide it at the hospital.

The conditions to be complied with before a breath test is given at a hospital are that the medical practitioner in charge of the driver must first be notified of the proposal to make the requirement, and also that the medical practitioner does not

- a object to the provision of the specimen 'on the ground that its provision or the requirement to provide it would be prejudicial to the proper care or treatment of the patient'. If the medical practitioner does object on these grounds, then the patient cannot be required to provide a specimen of his breath. Failure without reasonable excuse to provide a specimen of breath when required to do so in accordance with the Act is made a criminal offence by s 2 (3). Unless the driver is in hospital as a patient, the constable may, if he fails to pass the breath test, arrest him (s 2 (4)); and if arrested, the driver 'shall, while at a police station, be given an opportunity to provide a specimen of breath for a breath test there' (s 2 (7)).
- b

I do not think that the respondent's contention that, once an arrest under s 2 had been made, the arrested person must be taken to a police station and there given an opportunity to take another breath test before being required to provide a specimen of blood or urine is well founded. The Act does not say that after an arrest, the arrested person must be taken to a police station. In the vast majority of cases the arrested person will be taken to a police station for it is only at a police station or at a hospital while he is there as a patient that a man can be required to provide a specimen of blood or urine (s 3 (1) and (2)). A patient in hospital cannot be arrested under s 2.

- c
- d A man arrested after an accident and after failing to pass the breath test, may show symptoms which lead a constable to conclude that he should be taken to hospital. If the Act provided that after his arrest he had to be taken to a police station, that would not be permissible.

The obligation to give an arrested man while at a police station the opportunity to have another breath test may have been imposed on account of the possibility that the test taken outside may have been faulty. There is no obligation to give an opportunity for a second breath test if the person from whom one is required is a patient in hospital.

- e
- f While ss 2 and 3 (2) specify the place at which the specimen is to be provided, s 3 (1) does not. That subsection states that the requirement must be made at a police station but does not state where he is required to provide the specimen of blood or urine. The fact that it does not say that he is to be required to provide it at that station has led to a difference of judicial opinion in England and Scotland. In *Butler v Easton*¹ Lord Parker CJ, delivering the judgment of the Divisional Court, said that s 3 (1)—

- 'can only envisage that the breath test, the actual words asking for him to provide a specimen for the laboratory test and the actual provision of the specimen, shall all take place in the same police station.'

g He said¹ that he was influenced by the fact that s 4 of the Act provides that:

- 'Any person required to provide a specimen for a laboratory test under section 3 (1) of this Act may thereafter be detained at the police station until he provides a specimen of breath [which passes the test].'

h If the requirement is made at one police station and the specimen provided at another, which is 'the police station' at which he may be detained under s 4? In Scotland in *Milne v McDonald*² the High Court in *Justiciary* did not follow *Butler v Easton*³ but held that the requirement could be made at one police station and the specimen provided at another.

- i It is unfortunate that the Act should be differently interpreted in Scotland and England, and tempting though it is to endeavour to resolve the conflict, that question

1 [1970] RTR 109 at 111

2 1971 SLT 291

3 [1970] RTR 109

does not arise in this case and anything said with regard to it will be obiter. I therefore express no opinion on which decision is to be preferred. a

In my opinion, the fact that the respondent was arrested did not mean that the provisions of the Act were not complied with. He was arrested after he had been required to take a breath test in accordance with the provisions of the Act and required to give a specimen of his blood in accordance with the provisions of the Act and arrested after he had consented to give one. The Act does not require that after his arrest, he should be taken to a police station, only that, if he is taken to a police station, he must be given the opportunity of taking a second breath test there and it provides that only if he is arrested and has been given that opportunity and fails the breath test or fails or refuses (s 7 (1)) to provide a specimen of breath can he be required at a police station to provide a specimen for a laboratory test. b

The Act does not require that having been properly required at the hospital to provide a specimen of blood or urine, that in consequence of his arrest he should be taken to a hospital and after another breath test again required to provide a specimen. c

There are only two places where the requirement to provide such a specimen can be made under the Act, at a police station or at a hospital. Section 3 (2) it should be noted, deals with requirement. At a hospital it can only be made while a person is a patient and then only if the person has failed a breath test or has been required to provide a specimen of breath and has failed or refused to do so. It can only be made if the medical practitioner in charge of the case has first been notified of the proposal to make the requirement and does not object to the provision of a specimen 'on the ground that its provision, the requirement to provide it or a warning' in accordance with s 3 (10) 'would be prejudicial to the proper care or treatment of the patient'. d

These conditions precedent to the making of the requirement for a specimen of blood or urine were complied with as were the conditions precedent to the requirement to provide a specimen of breath. The constable notified the medical practitioner of his proposal to require a breath test and at the same time notified him that, if the test proved positive, it was his intention to require a specimen for a laboratory test. The doctor had no objection. I do not think that the Act requires a notification of intention to require a breath test and then, if the test proves positive, a separate notification of intention to require a specimen. I can see no need for separate notifications though a doctor might say 'You can give him a breath test now and I will see how he stands that before consenting to his being required to give a specimen'. e

Section 3 (2) provides that the requirement to be made is that a specimen should be provided 'at the hospital'. It does not say that it is to be provided while the person is a patient at the hospital. The respondent's contention that the provision of a specimen at the hospital after a requirement to provide one there has been properly made, only complies with the Act if at the time when the specimen is provided, the person is still a patient, appears to me to involve reading into the Act words which are not there and for the inclusion of which I can see no justification. f

If such an interpretation is placed on s 3 (2) it means that there is a loophole in the Act through which the respondent and others who are shown by the laboratory test to have had more than the permitted amount of alcohol in their blood can escape conviction. I do not think that there is any such loophole. This Act requires to be construed strictly and though it does provide that the requirement must be made while the person is a patient at a hospital, it does not provide that the specimen is to be provided while he is still a patient. g

In this connection, I must refer to *Bosley v Long*¹ where Cooke J, delivering the judgment of the Divisional Court, made some observations with regard to the last part of s 3 (2) which lend some support to the respondent's contention and with which I am unable to agree. In that case the accused was convicted of the offence created by s 1 (1) of the Road Safety Act 1967. He was required while a patient in a hospital to h

- a provide a specimen of his blood. He refused to do so there but later gave one at a police station. In my opinion, the decision to quash the conviction was right as the requirement to provide a specimen being a requirement to provide it at the hospital, providing it at the police station did not comply with the requirement and with s 3 (2). Cooke J¹ referring to s 3 (2) read the last part of the subsection as if it provided that the medical practitioner was entitled to object at any time to the provision of a specimen. I do not so read the subsection. The medical practitioner is given power to object on one of the specified grounds to the requirement being made. It does not give him power to object thereafter. Presumably Parliament did not think that it was necessary to do so for a medical practitioner would not consent to the requirement being made if he thought that the provision of the specimen, the making of the requirement and the giving of the warning would be prejudicial to the patient.
- b If, having given his consent, the condition of the patient deteriorated unexpectedly so that it became unwise to provide the specimen, then no doubt a doctor would say so and the constable would not pursue the matter; and a doctor would say so, even had the patient discharged himself contrary to medical advice, if he was at the hospital.

For these reasons, in my opinion this appeal should be allowed and the conviction and the fine and disqualification imposed restored.

- d The appellant asked that an order should be made under the Criminal Justice Act 1972, Sch 3, for the payment of his costs in this House out of central funds. As this case involves a point of law of general public importance, in my view the prosecutor's costs in this House should not be paid out of local funds and an order should be made that they should, after taxation, be paid out of central funds.

- e **LORD DIPLOCK.** My Lords, Part I of the Road Safety Act 1967, by s 1, makes it an offence for a person to drive or attempt to drive or to be in charge of a motor vehicle on a road or other public place when, as a result of his consumption of alcohol, the proportion of it in his blood, as subsequently ascertained, exceeds the prescribed limit. Proof of any of these offences calls for analysis of a specimen of the offender's blood or urine and this can only be obtained with his consent—if the use of force be excluded, as it has been, as a means of obtaining it.

- f Since no motorist would be likely voluntarily to provide evidence which might lead to his own conviction and consequent disqualification from driving, unless his failure to do so exposed him to a similar penalty, the Act, to be effective, had to provide for an alternative offence of failing to provide a specimen of blood or urine when required to do so. It did this by s 3 (3). This made it necessary to define the circumstances in which the requirement must be made if non-compliance with it were to be an offence. It would have been quite possible for Parliament to enact that the result of the analysis of any specimen of blood or urine obtained from the offender with his consent should be proof of the offence, even though it had been obtained otherwise than in compliance with a requirement made in circumstances such that failure to comply with it would have constituted the alternative offence.
- g But Parliament did not do so. In *Director of Public Prosecutions v Carey*² it was accepted by this House that on the true construction of the Act no offence is committed under s 1 unless the specimen of his blood or urine from which the proportion of alcohol in the defendant's blood has been ascertained was obtained from him in compliance with a requirement made to him in conformity with the provisions of ss 2 and 3 of the Act. These set out the conditions which must be fulfilled if the requirement is to be such that failure to comply with it will constitute the alternative offence created by s 3 (3).

So whether the accused is charged with the substantive offence under s 1 or the

1 [1970] 3 All ER at 288, [1970] 1 WLR at 1413

2 [1969] 3 All ER 1662, [1970] AC 1072

alternative offence under s 3 (3), it is necessary for the prosecution to show that the full procedure laid down in ss 2 and 3 of the Act for obtaining a specimen of his blood or urine has been followed. a

In the instant appeal your Lordships are concerned only with the substantive offence under s 1. The respondent did provide a specimen of blood for a laboratory test. It was taken with his consent by a medical practitioner. Subsequent analysis of the specimen disclosed that the proportion of alcohol in his blood was considerably in excess of the prescribed limit. The only question is whether the correct procedure was followed in obtaining the specimen of blood. In what follows I shall accordingly omit reference to any variations of the procedure in consequence of a suspect's electing to provide a specimen of urine instead of blood. b

My Lords, I shall reserve for later consideration the powers of a police constable under the Act to control the movements of a person from whom he is entitled to require a specimen of breath for a breath test or blood for a laboratory test. The procedure laid down in Part I of the Act involves two separate and consecutive stages which it is convenient to refer to as 'the breath test stage' and 'the blood test stage'. In *Director of Public Prosecutions v Carey*¹ this House was primarily concerned with the breath test stage. In the instant appeal it is primarily concerned with the blood test stage, but the two stages are closely interrelated. c

Each stage involves two separate and consecutive steps, (1) the requirement made by a police constable on the defendant to provide a specimen, in the one stage of breath, and in the other stage of blood, and (2) the provision of the specimen by the defendant when invited to comply with the requirement. The requirement and the provision of the specimen necessarily take place at different times—one precedes the other. The Act also contemplates that the requirement and the provision may take place either at the same place or at different places. It deals with them throughout as separate and distinct steps in the procedure. d

Subsections (1) and (2) of s 2 lay down alternative conditions which must be satisfied before a constable is entitled to require a person to provide a specimen of breath. It was under sub-s (2) that the constable acted in the instant case. That subsection deals with breath tests after accidents and imposes no restriction on the place where the requirement may be made by the constable. He may make it wherever the person to whom it is made happens to be. But if that person happens to be at a hospital at which he is a patient, the constable is not permitted to make it unless his proposal to do so is first notified to the medical practitioner in immediate charge of the case and that medical practitioner does not object to the provision of a specimen by his patient. He may object only on the ground that the communication of the requirement to the patient or the provision of the specimen pursuant to it would be prejudicial to his proper care and treatment. Once the doctor in charge of the patient has been notified of the constable's intention to make the requirement and though given an opportunity to object has not done so, the constable may go ahead and make the requirement. e

Subsection (2) does, however, impose restrictions on the place at which a person may be invited to comply with the requirement by providing a specimen of his breath. This must be at or near the place where the requirement itself is made or, if the constable thinks fit, at a police station specified by him; but while that person is at a hospital as a patient it may only be at that hospital and not elsewhere. f

If the result of a breath test lawfully administered under sub-s (1) or (2) of s 2 is positive the person who has taken it (whom it is now appropriate to call 'the suspect') becomes liable to be required to take a blood test. Subsections (1) and (2) of s 3 lay down conditions which must be satisfied before a constable is entitled to require the suspect to provide a specimen of his blood for a laboratory test. In contrast to the corresponding provisions relating to the breath test stage, these do impose restrictions g

a on the places where the requirement to provide a specimen of blood may be made by the constable. It may be made only at a police station at which the suspect is detained or at a hospital at which the suspect is present as a patient. In both cases it must be accompanied by a warning as to the penalties to which the suspect will be liable if he fails to provide a specimen; and, in the case where the requirement is made at a hospital at which the suspect is present as a patient, the constable's right to make it is subject to restrictions as to notification and absence of objection by the doctor in charge of the case, similar to those applicable at the breath test stage.

b In the instant case the requirement to provide a specimen of blood for a laboratory test was made on the respondent at a hospital while he was there as a patient. The provision of the specimen also took place at that hospital, but at a time when the respondent's presence there was no longer as a patient but as a person who had been arrested and detained there by a constable. The relevant subsection is sub-s (2).
c It imposes a restriction on the place where the suspect may be invited to provide a specimen of his blood in compliance with a requirement made on him while he was at a hospital as a patient. The relevant words of the subsection are the opening words: 'A person while at a hospital as a patient may be required . . . to provide at the hospital a specimen for a [blood] test . . .'

d My Lords, this sentence is typical of the economy of language which is characteristic of the draftsman of the Act. On the literal meaning of the words I see no justification for holding that the subsection is not complied with if the person on whom the requirement is made is present at the hospital when he provides the specimen even though his continued presence there is no longer in the capacity of a patient. As a matter of syntax, the words 'while at a hospital as a patient' are used as an adjectival clause. They qualify the noun 'person' which is the subject of the principal verb
e 'may be required'. The requirement may only be made on a person who satisfies that description. The later words 'at the hospital' are used as an adverbial clause to qualify the dependent verb 'to provide'. They impose a restriction on the place where that person is obliged to provide the specimen; it must be provided at the hospital where he was a patient when the requirement was made. But they impose no restriction on the capacity in which he must be there when the provision of the sample
f actually takes place.

The Court of Appeal reached a contrary conclusion, not, as I read their judgment, by construing the express words of the Act, but by applying to the facts of the instant case the reasoning of the Divisional Court in the earlier case of *Bosley v Long*¹. That was a case where the only requirement on the defendant to provide a specimen of blood was made on him while he was at a hospital as a patient; but the specimen
g of blood was actually provided not at that hospital but at a police station to which the defendant had subsequently gone. The actual decision of the Divisional Court that the specimen was not provided in compliance with the provisions of s 3 (2) of the Act was, in my view, right for the reason I have already given; but part at least of the reasoning of the Divisional Court was erroneous. More important, it seems to have encouraged the fallacy which I believe to have misled the Court of Appeal in the
h instant case, that the Act provides for two separate and distinct procedures between which the constable must make his election at his peril. These are referred to as 'the hospital procedure' and 'the police station (or arrest) procedure', and the suggestion is that if the constable takes any step under the one procedure he cannot thereafter change over to the other without starting afresh.

i My Lords, I believe the fallacy to be due, at any rate in part, to the unique character of the powers of arrest conferred by the Act. Because of the nature of the offence created by s 1 the power of a constable to require a person to take a breath test is not made dependent on his having reasonable cause to suspect that person of committing an offence under the Act. The constable's power of arrest accordingly does not arise until either the breath test has been taken and the result has proved to be positive or

the person whom he has required to take a breath test has refused or failed to do so. The only express limitation on this power of arrest is that a person may not be arrested while he is at a hospital as a patient. Apart from this the power is discretionary not mandatory. The constable has a discretion not only as to whether to make use of it or not, but also as to how to make use of it to achieve the purpose for which the power is conferred. a

That purpose differs fundamentally from that of ordinary arrests in connection with arrestable offences. The arrest is not a step which leads directly to any charge against the person arrested or to any requirement of bail as a condition of his release. Its only purpose is (i) in the first instance to take the suspect to a place where the procedure for requiring him to provide a specimen (of blood or urine) for a laboratory test may lawfully be carried out, and (ii) to detain him while he is being given an opportunity to provide the specimen pursuant to that requirement and has either provided it or refused or failed to do so, and thereafter, but only if the place to which he has been taken initially was a police station, (iii) to detain him there until he takes another breath test of which the result is negative. When these purposes have been served the arrest ends: for no charge of an offence under s 1 can be made until the results of the subsequent laboratory analysis of the specimen are known. b

Since there are only two places where the requirement may be made on a person to provide a specimen for a laboratory test—a police station and a hospital—the constable must take the arrested person to the one place or the other if he is not already there. I see nothing in the language of the Act to debar a constable from exercising his discretion to take an arrested person to whichever he honestly considers is the more appropriate in the particular circumstances of the arrest. If the person who has taken the breath test with positive results at some place other than a hospital, appears to the constable to be in need of medical examination or treatment but refuses to go to a hospital voluntarily the constable is entitled to arrest him and to take him there. If he is admitted as a patient at the hospital, the requirement may be made on him there to provide a specimen for a laboratory test, if the doctor in charge of his case is notified and does not object. But the arrest must be suspended on his admission as a patient. If he is not admitted as a patient, the constable cannot make the requirement at the hospital, but may take the arrested person on to a police station and make the requirement there. c

Similarly, as regards the next part of the purpose of an arrest under the Act. If the requirement to provide a specimen for a laboratory test has been lawfully made on a person while at a hospital as a patient, the opportunity to provide the specimen must be given to him there and he is under no obligation to provide it elsewhere. So long as he remains as a patient of that hospital, the power to keep him under arrest continues to be suspended. Ex hypothesi it is not needed for the purpose of detaining him there while he is being given the opportunity to provide the specimen there and has either done so or refused or failed to do so. But if before this stage is completed he discharges himself or ceases for some other reason to be a patient, there is, in my view, nothing in the Act to debar the constable from arresting or re-arresting him and, in the exercise of the constable's discretion, either (a) detaining him at the hospital until he can be given the opportunity of providing a specimen there pursuant to the requirement already made or (b) taking him to a police station for the purpose of making on him at the police station a fresh requirement to provide a specimen elsewhere than at the hospital. d

If the constable exercises his discretion to take an arrested person to a police station either at the outset (which would be the normal course unless the arrested person appeared to be injured) or after he has been at a hospital as a patient but has ceased to be a patient before providing a specimen for a laboratory test pursuant to a requirement made on him there, in either of these events the combined effect of ss 2 (7) and 3 (1) of the Act is to entitle the arrested person (whether or not he has previously taken a breath test) to be given an opportunity to take a breath test at the police e

a station, before any requirement may be made on him there to provide a specimen for a laboratory test. It is only if he fails to avail himself of the opportunity or the result of the breath test taken at the police station is positive, that a requirement may be made on him to the police station to provide a specimen for a laboratory test.

Section 2 (7) is in the following terms:

b 'A person arrested under this section or under . . . section 6 (4) [of the Road Traffic Act 1960] shall, while at a police station, be given an opportunity to provide a specimen of breath for a breath test there.'

These words do not impose in express terms any obligation on a constable to take an arrested person to a police station. All that they do expressly is to say what must be done if he is taken there. To construe them as imposing an obligation to take every arrested person to a police station would involve departing from the literal in favour of a purposive construction of the Act. But if a purposive construction be adopted I find it impossible to impute to Parliament the intention that an arrested person, however much in need of urgent hospital treatment, must be taken to a police station and not to a hospital, when the Act itself provides that the purpose of his arrest, viz the requirement to provide and the actual provision of a specimen for a laboratory test, may be achieved as well at a hospital as at a police station.

d My Lords, ss 2 (7) and 3 (1) are no doubt drafted with the ordinary circumstances in mind in which a person arrested under the Act or under s 6 (4) of the 1960 Act is taken to a police station. Normally he will have been taken there after at best a roadside breath test or it may be no breath test at all. I suggested in *Director of Public Prosecutions v Carey*¹ that the reason for giving an opportunity for a breath test at the police station was that there was less likelihood of error there than in a test taken on the road or other public place where any previous breath test would have been taken. But the requirement is explicit. It applies however free from possibility of error any previous breath test may have been. So if after having taken a breath test but not a blood test while at a hospital as a patient, a person on ceasing to be a patient is arrested and instead of being kept at the hospital is taken, in the exercise of the constable's discretion, to a police station for his blood test, he must be given an opportunity of taking another breath test there. It was this that was omitted in *Bosley v Long*². This omission too would justify the actual decision in that case.

f My Lords, it is no doubt legitimate to describe as 'safeguards' both the opportunity to take a breath test which is a condition precedent to requiring a suspect who is under arrest at a police station to undergo a blood test, and the notifying and acquiescence of the doctor in charge of his case which is a condition precedent to requiring a suspect who is a patient at a hospital to undergo a similar test. But they are imposed for quite different objects: the object of the first is to protect the suspect's liberty by gaining his release from arrest if the breath test has negative results; the object of the second is to protect the suspect's health. They are alternative not cumulative. The suspect is entitled either to the one or to the other according to the category into which he falls. They are conditions precedent to the making of the requirement to undergo a blood test. Once it has been made these conditions precedent are spent. What the suspect is entitled to thereafter is an opportunity to provide a specimen for a blood test in compliance, both as to the place and manner of provision, with a requirement which had already been lawfully made.

h The Divisional Court in *Bosley v Long*³ fell into error in regarding the condition precedent in the case of a suspect who is at a hospital as a patient as being a 'continuing safeguard', which the Court of Appeal in the instant case has taken to mean that the doctor must be given a continuing opportunity to object not only before the requirement has been made but also after it has been made until the specimen has actually

i 1 [1969] 3 All ER 1662 at 1676, [1970] AC 1072 at 1093

2 [1970] 3 All ER 286, [1970] 1 WLR 1410

3 [1970] 3 All ER at 288, [1970] 1 WLR at 1413

been provided. From this they drew the conclusion that the provision of the specimen for the blood test, though it took place at the hospital, would not be in compliance with the Act if, as a result of the doctor's ceasing to be in charge of the suspect's case, that safeguard were withdrawn. a

My Lords, I have already indicated why this conclusion is not warranted by the express words of s 3 (2). What the Court of Appeal has done is not to construe the words of the Act itself, but to start with the concept of a 'continuing safeguard' to which, a passing, though mistaken, reference was made by the Divisional Court in *Bosley v Long*¹ and to carry that concept to its logical conclusion. This is an Act in which, as experience has shown, the express words used by the draftsman sometimes compel the courts to give effect to technical defences by those who drink too much and drive, which it can hardly be supposed that Parliament envisaged when the Act was passed. The express words of the Act do not compel this House to give effect to the technical defence, devoid as it is of any merit, on which the respondent relies in the instant case. And I see no other reason which would justify this House in doing so. b

I would allow this appeal. c

LORD CROSS OF CHELSEA. My Lords, for the reasons given in the speeches of my noble and learned friends, Viscount Dilhorne and Lord Diplock, which I have had the opportunity of reading, I would allow this appeal. d

Appeal allowed.

Solicitors: *Sharpe, Pritchard & Co*, agents for *A C Staples*, Maidstone (for the appellant); *Stigant, Son & Taylor*, Chatham (for the respondent). e

S A Hatteea Esq Barrister.

Re Castle, Coulson & MacDonald Ltd f

CHANCERY DIVISION

TEMPLEMAN J

16th, 17th APRIL 1973

Company – Winding-up – Costs – Compulsory winding-up – Substitution of petitioner – Original petitioner's debt and costs paid by company and another creditor substituted as petitioner – Winding-up order made – No provision made for costs of original petitioner – Costs of petition to include original petitioner's costs – Original petitioner's costs limited to fee on presentation of petition and costs of advertisement – Form of 'usual compulsory order' in such circumstances. g

N Ltd, the original petitioner for the compulsory winding-up of a company, having been paid the debt claimed and costs, including the fee on presentation of the petition and costs of advertising, dropped out, and another creditor, who had appeared to support the original petition and been substituted as petitioner, obtained a winding-up order against the company, but no provision was made at the hearing of that petition for the original petitioner's costs. N Ltd applied to the court under the slip rule for an order amending the winding-up order so as to include its costs. The application was opposed by the joint liquidators of the company. h

Held – Although N Ltd had dropped out when the substituted petitioner came in, there was no reason why, in justice and fairness, it ought not to be awarded costs i

- a* incurred while it was a party if it was entitled to them on general principles. Since there had been an accidental omission both by the court and everybody concerned in the case to provide for N Ltd's costs, an order would be made that the costs of the petition should include the costs of N Ltd, limited to the costs of advertising and the fee on presentation of the petition (see p 817 f and h and p 818 a b, post).

Re Bostels Ltd [1967] 3 All ER 425 applied.

- b* Per Templeman J. Where a company is wound up by the court at the behest of a substituted petitioner, the term 'usual compulsory order' will, unless the court otherwise directs, contain a provision including in the costs of the petition, the fee on presentation and the costs of advertising the petition so far as they have been paid or have been agreed to be paid by the company (see p 818 e f, post).

Notes

- c* For costs on winding up by the court, see 6 Halsbury's Laws (3rd Edn) 554, 555, para 1066, and for cases on the subject, see 10 Digest (Repl) 896, 897, 6040-6048, 6054. For substitution of the petitioner, see 6 Halsbury's Laws (3rd Edn) 551, para 1062. For correction of clerical or accidental mistakes, see 22 Halsbury's Laws (3rd Edn) 786-788, para 1666, and for cases on the subject, see 50 Digest (Repl) 530-535, 1970-2013.

d Cases referred to in judgment

Bostels Ltd, Re [1967] 3 All ER 425, [1968] Ch 346, [1967] 3 WLR 1359, Digest (Cont Vol C) 115, 6058a.

Edginton v Clark [1963] 3 All ER 468, [1964] 1 QB 367, [1963] 3 WLR 721, CA, Digest (Cont Vol A) 324, 845a.

- e* *Inchcape, Re, Craigmyle v Inchcape* [1942] 2 All ER 157, [1942] Ch 394, 111 LJCh 273, 167 LT 333, 50 Digest (Repl) 534, 1998.

Cases also cited

Fritz v Hobson (1880) 14 Ch D 542, [1874-80] All ER Rep 75.

- f* *Sheringham Development Co, Re* [1893] WN 5.

Tak Ming Co Ltd v Yee Sang Metal Supplies Co [1973] 1 All ER 569, [1973] 1 WLR 300, PC.

Motion

- On 16th October 1972 a winding-up order was made against Castle, Coulson & MacDonald Ltd ('the company'), on the petition of the Department of Health and Social Security ('the department'), and it was ordered that the costs of the department and of the company in respect of the petition be taxed and paid for out of the assets of the company. The winding-up petition had originally been presented by Nickeloid Ltd ('the original petitioner') but it had dropped out and the department, another creditor of the company, had been substituted by the court as petitioner on 10th July 1972.
- g* By notice of motion dated 6th April 1973 the original petitioner applied to the court under the slip rule (RSC Ord 20, r 11) for an order that the order made on 16th October 1972 to wind up the company be amended so as to include its costs, such costs to be taxed and paid out of the assets of the company. The application was opposed by the joint liquidators of the company.

- h* *D B Nathan* for the original petitioner.
- i* *W A Blackburne* for the joint liquidators.

TEMPLEMAN J. In this case a petition was presented by Nickeloid Ltd, the original petitioner, to wind up a company, Castle Coulson & MacDonald Ltd. In connection with that petition the original petitioner had to advertise and pay the fee on presentation of the petition. When the case came before the court the company paid the original

petitioner the debt claimed and costs, including the fee on presentation and the costs of advertising. a

But another creditor who appeared to support the original petition claimed to be substituted, and he was substituted; and in the event a winding-up order was made at the behest of the substituted petitioner. The result is that the winding-up order dates back to the original petition and all the money which has been received by the original petitioner must be paid back to the liquidators. The original petitioner dropped out of the case when the substituted petitioner was substituted and never subsequently appeared to argue about costs or for any other purpose. Now the original petitioner, having to pay back all the costs and all the debt he had been paid, appears to say: 'Please let me have the costs of advertising the original petition and the fee on presentation of the petition because they were inevitably incurred in order to wind up this company; there has been a winding-up as the result of the petition and the result of the costs I incurred and therefore I ought to have those costs; it is unfair that the other creditors should benefit from my expenditure which was necessary in order to get them the relief which they got at the end of the day, namely, a winding-up.' b

In *Re Bostels Ltd*¹ a similar point arose. There, when the original petitioner dropped out and a substituted petitioner came in, the original petitioner took the precaution of becoming a supporting creditor. At the end of the day there was an argument whether the original petitioner should be allowed any and, if so, what costs. According to the headnote² Pennycuik J held that— c

'In so far as the activities of the original petitioner contributed to the obtaining of a winding-up order the costs of those activities ought to be included in the costs of the petition; that such costs usually comprised the fee on presentation of the petition and the costs of advertisement, but not the costs of preparing and appearing upon the petition, which costs had to be incurred for a second time; and that accordingly the costs of the petition would include the original petitioner's costs limited to the fee on presentation of the petition and the costs of advertising.' d

'*Per curiam*: Where a company offers a petitioner payment in full of his debts and costs, that offer carries the detriment that on a winding-up order being made at the instance of a substituted petitioner the original petitioner will lose his prospective right to receive the costs already incurred; accordingly, the original petitioner may choose whether to accept or refuse the payment.' e

That proviso of course, applies to the costs which a petitioner loses if he opts out, namely his costs of appearing on the petition. But so far as the costs of advertising and the fee on presentation are concerned, *Bostels'* case¹ clearly decides that these were activities which enured for the benefit of creditors, they saved money in that there was no need to go again through the process of advertising or presenting a petition, and that it was right and proper that in those circumstances the original petitioner's costs, limited to the fee on presentation of the petition and costs of advertising, should be allowed. f

The only difference between that case and this, which counsel for the liquidators says is a vital difference, is that in *Bostels'* case¹ the original petitioner, instead of dropping out altogether, became a supporting creditor. That meant that he presumably had to appear by counsel whenever the petition was adjourned from time to time; if ultimately all the creditors had been satisfied and the petition dismissed, then the original petitioner's counsel would have folded up his tent and gone away saying nothing. If on the other hand there was no satisfaction of all the creditors and a winding-up order was made then it was the duty of counsel acting for the original petitioner g

¹ [1967] 3 All ER 425, [1968] Ch 346

² [1968] Ch at 346 h

- a** on the very last day, after all the adjournments and alterations which one knows take place when companies are fighting to satisfy all their creditors and succeeding in satisfying some but not others, at the very last moment just as the drop fell and the company was executed, to get up and ask in as few words as possible that the original petitioner be allowed the fee on presentation of the petition and the costs of advertising—and the court would automatically make an order accordingly. Of
- b** course the original petitioner can ask the substituted petitioner to allow his counsel and solicitor to represent the original petitioner but this takes a little time and some arranging and is not always desirable or possible to effect.

In the present case the original petitioner did not see fit to waste expense or the time of counsel. In the event an order was made on the winding-up which did not provide for the costs of the original petitioner. The original petitioner now appears under the slip rule¹, asking me to correct the order and insert a provision which will enable him to retain those costs which Pennycuik V-C has plainly decided ought, in fairness to original petitioners, to be allowed.

- c** Counsel for the liquidators submits that the court has no jurisdiction to accede to the request of the original petitioner because he is not a party. He cited for that proposition one sentence in *Edginton v Clark*². The sentence he cited was in a judgment of the Court of Appeal delivered by Upjohn LJ³:
- d**

‘The High Court still has in our view a full and ample power to make such order as to costs as between plaintiffs, defendants and third and subsequent parties as the justice of the case may require, and so ex concessis has the county court.’

- e** It does not seem to me that that sentence sheds any light on the present problem. The case was not read to me but so far as I can ascertain there was no question there of whether a party was entitled to costs or whether the costs were ordered against a person who was not a party. In the present case the original petitioner was a party. True he dropped out when the substituted petitioner came in but I see no reason why in justice and fairness he ought not to be awarded costs, if he is entitled to them
- f** on general principles, incurred while he was a party. It is clear to me that it cannot be said that the mouth of the court is closed merely because an actual order was not made in favour of the original petitioner at a time when he was a party.

- The matter does not end there. The order made did not provide for the costs of the original petitioner. Counsel for the original petitioner accepts that the only way he can now get his costs provided for is under the slip rule¹. He cited to me *Re Inchcape, Craigmyle v Inchcape*⁴ and in particular the passages⁵ where Morton J accepted that the slip rule could be used to correct an accidental omission on the part of counsel to make an application as well as accidental omissions by solicitors engaged in the case and accidental omissions, if any, by the officials of the court themselves. Counsel for the liquidators says that in the present case there was no accidental omission because all that happened was that the original petitioner did not turn up. But
- h** in my judgment there was an accidental omission both by the court and everybody concerned in the case. Of course nobody was to blame. But the fact of the matter was that if the judge had had his attention drawn to *Re Bostels Ltd*⁶ he would have said: ‘What about the costs of the original petitioner? Ought we not to provide for them?’ and after a certain amount of observation I have no doubt that an order would have been made.

- j**
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- ¹ 1e RSC Ord 20, r 11
- ² [1963] 3 All ER 468, [1964] 1 QB 367
- ³ [1963] 3 All ER at 476, [1964] 1 QB at 384
- ⁴ [1942] 2 All ER 157, [1942] Ch 394
- ⁵ [1942] 2 All ER at 160, [1942] Ch at 398, 399
- ⁶ [1967] 3 All ER 425, [1968] Ch 346

If counsel for the liquidators is right, then whenever the original petitioner drops out altogether he has to waste the time of his own solicitor and counsel by turning up at every adjournment on every day and make arrangements to protect the original petitioner. It seems to me proper to make an order that the costs of the petition shall include the costs of the original petitioner limited as set out in *Re Bostels Ltd*¹, namely, the costs of the advertising and the fee on presentation, just as in trust cases if anybody dies or drops out his costs can be included in the costs of some other party who is in the same interest. Counsel for the liquidators says that the costs may not have been paid by the company. So be it. All that is required is an order that the costs of the petition are to include the costs of the original petitioner limited to the fee on presentation of the petition and the costs of advertisement so far as they have been paid or have been agreed to be paid by the company. Of course in practice there will be no necessity for another payment if the company have already paid the original petitioner. The original petitioner will simply hang on to the costs he has already been paid by the company. He will not have to pay them back. If the liquidators think they are excessive then they can require a taxation.

Counsel for the liquidators had a further argument: he said that even if I had jurisdiction, which he stoutly denied, I should not exercise my discretion in favour of the original petitioner because there had been delay and the amount involved might be only £16—or, as appears from *Bostels'* case¹, might in certain cases be up to £30 or £50. In my judgment I am putting right something which ought to have been attended to in accordance with the principles of *Bostels'* case¹ earlier on. The fact that the amount is small does not affect me. There is nothing in the point on delay. This argument may lead to a certain amount of saving of costs and avoidance of time wasting by counsel. In future where a company is wound up by the court at the behest of a substituted petitioner the term 'usual compulsory order' will, unless the court otherwise directs, contain a provision including in the costs of the petition the fee on presentation and the costs of advertising the petition insofar as these have been paid by the company. No doubt the exact form of the order can be hallowed by the officials of the Companies Court.

In respect of the costs of the present motion I think the proper course is to make no order. The liquidators will get their costs out of the company and the original petitioner will have to bear his own costs. I so decide for these reasons. The original petitioner claimed by his motion much wider relief than he has in fact received. Secondly, he applied under the slip rule. He could have taken the precaution of becoming a supporting creditor. It does not seem to me that he is entitled to his costs. So far as the liquidators are concerned, it is true that they could not have acceded to any request without an order of the court. But the amounts involved in the costs of presenting the petition and advertising are small. There could have been an agreed order which costs little. There has been a useful and wide ranging argument on the principle, and the liquidators thought fit to argue that nothing should be allowed. On that argument I have briefly found against them. In all the circumstances I make no order for costs.

Order accordingly.

Solicitors: *Medlicott & Benson* (for the original petitioner); *Wm F Prior & Co* (for the liquidators).

Jacqueline Metcalfe Barrister.

R v Fazackerley

COURT OF APPEAL, CRIMINAL DIVISION

STEPHENSON LJ, PARK AND KILNER BROWN JJ

8th FEBRUARY, 16th MARCH 1973

Criminal law – Obtaining pecuniary advantage by deception – Evasion of debt – Meaning of evasion – Evasion of payment – Agreement by creditor to cancel or forgive debt – Worthless cheque – Representation that cheque good and valid order for payment – Acceptance of cheque by creditor as payment – Cheque dishonoured – Whether debt ‘evaded’ although no agreement on part of creditor that debt should be cancelled or forgiven – Theft Act 1968, s 16 (1), (2) (a).

The appellant had a bank account which was overdrawn. The appellant was told by the bank manager not to issue any more cheques. Thereafter the appellant issued five cheques drawn on the account to different people as payment for goods and services supplied to him. The cheques were all dishonoured. The appellant was charged on five counts with obtaining a pecuniary advantage by deception, contrary to s 16 (1)^a of the Theft Act 1968. Each count alleged that the appellant had dishonestly obtained for himself a pecuniary advantage, namely the evasion of a debt, by deception, namely by a false oral representation that the cheque was a good and valid order for payment of the sum in question. The appellant was convicted on each count and appealed, contending, inter alia, that the Crown had failed to establish that he had obtained the ‘evasion’ of the debts as charged in the indictment for, to establish that the debts had been ‘evaded’ within s 16 (2) (a) of the 1968 Act, it had to be shown that he had deceived his victims into agreeing to forgive or cancel those debts altogether and there was no evidence that the victims had done that.

Held – A person ‘evaded’ a debt for which he was liable if he evaded payment of the debt; the word evaded referred to the acts of the debtor not those of the creditor; it was the debtor who evaded the debt, not the creditor. Accordingly a debtor could dishonestly obtain the advantage of having the payment of his debt evaded by falsely pretending that his cheque was a good and valid order to pay without his creditor agreeing to cancel or forgive the debt. All that had to be found was that as a result of the deception the creditor had done, or refrained from doing, something which enabled the debtor to get out of payment even though the creditor did not appreciate that that was the effect of what he was doing or not doing. Accordingly the appellant had been properly convicted and the appeal would be dismissed (see p 825 b c and d e and p 826 a b, c, e and g h, post).

R v Page [1971] 2 All ER 870 applied.

R v Locker [1971] 2 All ER 875 distinguished.

Notes

For the offence of obtaining a pecuniary advantage by deception, see Supplement to 10 Halsbury's Laws (3rd Edn), para 1586A.

For the Theft Act 1968, s 16, see 8 Halsbury's Statutes (3rd Edn) 793.

Cases referred to in judgment

R v Aston, R v Hadley [1970] 3 All ER 1045, [1970] 1 WLR 1584, 135 JP 89, 55 Cr App Rep 18, CA, Digest (Cont Vol C) 262, 10,264a.

R v Eidinow (1932) 23 Cr App Rep 145, CCA, 14 Digest (Repl) 518, 5016.

R v Locker [1971] 2 All ER 875, [1971] 2 QB 321, [1971] 2 WLR 1302, 135 JP 437, 55 Cr App Rep 375, CA.

R v Page [1971] 2 All ER 870, [1971] 2 QB 330, [1971] 2 WLR 1308, 55 Cr App Rep 184. a

R v Plunkett [1973] Crim LR 367, CA.

Ray v Sempers [1973] 1 All ER 860, [1973] 1 WLR 317, DC.

Selvey v Director of Public Prosecutions [1968] 2 All ER 497, [1970] AC 304, [1968] 2 WLR 1494, 132 JP 430, 52 Cr App Rep 443, HL, Digest (Cont Vol C) 217, 5016b. b

Cases also cited

R v Hudson [1965] 1 All ER 721, [1966] 1 QB 448, CCA.

R v Royle [1971] 3 All ER 1359, [1971] 1 WLR 1764, CA.

Selby v Director of Public Prosecutions [1971] 3 All ER 810, [1972] AC 515, HL.

Appeal

This was an appeal by Eric Baker Fazackerley against his conviction in the Crown Court at Liverpool on 14th July 1972 before Judge Davies QC and a jury on five counts of obtaining a pecuniary advantage (the evasion of a debt) by deception (counts 1, 4, 5, 6 and 7), contrary to s 16 of the Theft Act 1968, and one count (count 3) of obtaining property by deception, contrary to s 15 of that Act. He was sentenced to concurrent terms of two years' imprisonment. It was also ordered that a suspended sentence of six months' imprisonment imposed on 2nd June 1971 for obtaining property by deception should be activated and ordered to run consecutively, making 2½ years' imprisonment in all. He appealed against his conviction by leave of the single judge. His principal ground of appeal was that the trial judge had wrongly rejected a submission made on his behalf that the payment of an existing debt by a cheque which was not met on presentment was not an 'evasion' of a debt within the meaning of s 16 of the Theft Act 1968. The facts are set out in the judgment of the court. c

Gerard Wright for the appellant.

R Z H Montgomery for the Crown. d

Cur adv vult e

16th March. **STEPHENSON LJ.** The judgment I am about to read is the judgment of the whole court including Park J, who is unable to be here today. The appellant was convicted on 14th July 1972 at Liverpool Crown Court on five counts of obtaining a pecuniary advantage by deception contrary to s 16 of the Theft Act 1968, and one count of obtaining property by deception contrary to s 15. He was sentenced to two years' imprisonment concurrent on each count, and a suspended sentence of six months for obtaining property and pecuniary advantage by deception was activated consecutively. f

He appeals against his convictions by leave of the single judge. Count 1 alleged that the appellant on 13th January 1972 in the county of Lancaster dishonestly obtained for himself a pecuniary advantage, namely the evasion of a debt for which he was then liable to Douglas Bolton, by deception, namely by a false oral representation that his brother Derek Fazackerley was a solicitor in Preston and would that day give to him the sum of £2,500 to be paid into the appellant's bank account and that a cheque for £793·62 drawn on Barclays Bank Ltd which the appellant then handed to Douglas Bolton was a good and valid order for the payment of £793·62. All the other counts charging offences against s 16 were in the same form, except that the only oral representation charged in them was that the cheque was a good and valid order. g

The appellant was the owner of a catering business. In December 1971 he decided to combine that business with 'show' business and on New Year's Eve he put on a 'pop' show at a hall in Southport, running the buffet in conjunction with it. The show was a success and thereafter he and a man named Mahony, who used the stage name h

- a of Brian King, decided to put on some 'pop' shows with the help of £500, which, according to the appellant, King agreed to put into the venture. According to King the payment of £500 was discussed but not finally agreed. The appellant at the time had a bank account at the Formby branch of Barclays Bank in the name of 'Eric Baker Fazackerley, Personal Caterers'. This account was overdrawn and at the end of December 1971 the bank manager telephoned the appellant and told him not to issue any more cheques as his account was without funds. The Crown's case was
- b that in spite of this warning from his bank manager the appellant subsequently issued six cheques amounting in all to £2,118.62 for goods and services with full knowledge that they would not be met, and that thereby the debts for which he was liable were evaded.

- The appellant's case was that he did not himself speak to the bank manager but merely got a message from which he did not understand that his account was empty.
- c His defence to all charges was that he was not dishonest but honestly believed that his cheques would be met either from King's £500 or from the proceeds of 'pop' shows. It was common ground that the appellant was almost illiterate and signed blank cheques to be filled in either by King or a woman employee or by the payee. The facts in chronological order of the offences of which he was convicted are as follows.
- d On 6th January 1972 he gave Miss Webster of Granada Television a cheque for £200 in payment for two seven second television advertisements. The advertisements were transmitted as agreed on 8th January but the cheque was not honoured. The appellant said that when he made out the cheque he thought he had in his account King's £500 and other sums of money received from the sale of tickets and paid into his account by King. King, on the other hand, said that the appellant knew full well that he was unable to raise the £500. On 10th January the appellant purchased a Ford Zodiac motor
- e car for £175 from Robert Farrington and paid for it by cheque. Robert Edwin Farrington, the son of Robert Farrington, gave evidence that he filled in the cheque when he received it from the appellant after questioning the appellant about the cheque and being told by him 'Yes, there is money in my account'. The cheque was dishonoured. This was the subject of count 3 alleging an offence against s 15. The
- f appellant denied that he had obtained this car from the son; he said that he had obtained it from the father. He denied the conversation about the cheque and said that he thought that the cheque was good. On 13th January Mr Bolton of Modcor Ltd demanded payment for goods obtained by the appellant in November and December to the value of £793.62. The appellant gave him a cheque for that amount informing him that his account was low but the cheque would be met by the afternoon because his brother, who was a solicitor, was backing him and would supply
- g the money. The story about the brother being a solicitor was false and the cheque was subsequently dishonoured. The appellant denied that he had said anything about a brother or a solicitor. All he said to Mr Bolton was that his account was low and if he had waited until the following week before presenting the cheque he would get paid because the appellant was expecting to receive money from two shows on 14th and 15th January. On 14th January the appellant gave Mr Durkin, a theatrical agent,
- h a cheque for £250 for supplying the stage artists who were appearing at his shows. Mr Durkin enquired if the cheque was good and the appellant replied: 'It is, my backer is Lord Lilford. He is prepared to back me for £80,000.' (There was no reference to the representation about Lord Lilford and the £80,000 in the indictment.) This cheque was dishonoured. The appellant admitted saying that Lord Lilford was backing him and that it was a lie, but he denied mentioning £80,000. He thought that
- i the cheque would be met and had taken no steps to stop it, although he claimed to have given in to a threatening demand for money from the stage groups by payments of over £250, including £120 in cash. On 15th January the appellant gave Mr Latham a cheque for £400 for the hire and installation of electrical equipment for his shows and Mr Jones, the manager of the Winter Gardens, a cheque for £300 for the hire of the hall. He overcame Mr Latham's reluctance to accept the cheque by assuring

him it was good and would, if Mr Latham wished it, be cashed by the manager of Dixieland. The cheque was not cashed by the manager of Dixieland, who was in fact Mr Jones, manager also of the Winter Gardens, and who would have refused to cash the cheque if he had been asked. These two cheques were, like the others, dishonoured. The appellant claimed to have been expecting a great deal of money from his shows from which these cheques would have been met, but the shows on 14th and 15th January were, in fact, financial 'flops', and the Crown claimed that the appellant must have known that when he gave these cheques. a
b

On 13th February the appellant made a written statement ending with these words:

'I would estimate that from the 7th to the 14th January, 1972 I made out about nineteen cheques for the sum of about £2½ thousand pounds. I was aware that I did not have sufficient money in the bank to meet these cheques.'

Counsel for the appellant first submitted that the jury's verdicts on all counts should be quashed on the ground that the judge had wrongly admitted evidence of the appellant's bad character and previous convictions for offences of dishonesty. Counsel for the appellant has convinced us that he has cause to complain of the manner in which the evidence was introduced by the judge but not that the evidence ought to have been excluded. The evidence was admitted not because the appellant had given evidence of his good character (though that was at one stage canvassed) but because the nature or conduct of his defence was such as to involve imputations on the character of two witnesses for the Crown, Mahoney known as Brian King and Farrington, or to give him his full name, Robert Edwin Farrington. In deciding whether their characters were attacked we have not the help of a transcript of much of the evidence because the shorthand-writer has emigrated; or of complete agreement between counsel as to what all the most material questions and answers were. What is, however, clear is that while the appellant was giving evidence-in-chief the judge himself anticipated an application by counsel for the Crown for leave to cross-examine the appellant on his previous convictions and raised the question with counsel in the absence of the jury. It appears that the appellant had said in chief of King that he had used money, which the appellant expected to be paid over to him, for financing other shows (whether the appellant said for other shows which had nothing to do with him was disputed), and that after it had been suggested to Farrington in cross-examination that he had not himself been concerned in taking the appellant's cheque but the whole transaction had been between the appellant and his father, the judge had himself driven the appellant, while still giving evidence-in-chief, to allege that Farrington's evidence had been a tissue of lies. We are reluctant to criticise the judge without a transcript of what exactly he asked, but we call attention to the observations of the Court of Criminal Appeal in *R v Eidinow*¹, to which counsel for the appellant referred us. Counsel pointed out to the judge that as regards King the appellant had been at pains to disclaim any suggestion that he was dishonest and that as regards Farrington counsel himself had been put in a difficulty when young Farrington entered the witness box instead of his father, and he had to improvise his cross-examination and suggest more about the falsity of his evidence than he was later able to substantiate; Farrington was, in fact, recalled to be cross-examined further not only about his own convictions but also to meet the suggestion that if he had filled in the cheque which the appellant had signed, he had filled it in after the deal with his father had been completed and the appellant had left. c
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We would not encourage counsel to think that they can attack the honesty of a witness in fact but avoid the damaging consequences of the attack by disclaiming any intention to do so. We cannot, however, on the material we have, safely uphold the judge's admission of the appellant's criminal record on the ground that he had made imputations on King's character, but we can and do uphold it on the ground i

a that he had made imputations on Farrington's character before ever the judge drove him to admit that he had in effect done so. We bear in mind that a mere denial of the charge, expressed it may be in emphatic language, will not expose a defendant's bad character to the jury (*Selvey v Director of Public Prosecutions*¹) but we think that counsel is right in submitting for the Crown that what was put to Farrington went beyond such denial into suggestions that his evidence was a complete invention, and that the judge was right in holding that there was no possibility of mistake and this was perjury if it was not true. Farrington gave evidence of, among other things, a specific assurance by the appellant in answer to a question that there was money in his account; but the appellant's case put to Farrington in cross-examination (and we have a transcript of this) was that 'everything you have said about this transaction is wrong, because you weren't there, the whole transaction was carried out with your father'. This ground of appeal therefore cannot succeed.

c We take next two further grounds of appeal which concern all the counts on which the appellant was convicted. First it is said that the judge's direction to the jury on the burden of proof was defective in that having properly told them that they had to be satisfied by the prosecution so that they were sure of guilt, he repeatedly told them thereafter that they had to be satisfied but never repeated that what he meant by satisfied was what he had already told them, or reminded them that they had to be sure. In our opinion, this was quite unnecessary. There was nothing wrong with the judge's direction in this respect. There is nothing in this ground.

d Next it is said that the judge's direction to the jury on corroboration of the witness King was defective; he directed them to treat King as an accomplice, gave them a correct warning of the danger of acting on his evidence unless it was corroborated but never told them what corroboration meant or what matters were capable of corroborating his evidence. All this was true and might in another case be material. But it was only the judge who thought, wrongly, that King was an accomplice. We are told that neither counsel had suggested that he was but the judge unfortunately suggested it for the first time in his summing-up—unfortunately because it is the fate of ideas which come from the Bench without being initiated by the Bar or submitted to the Bar for comment to provide unnecessary and not always unsuccessful grounds for appeal. There is nothing in this ground either.

f We come last to a ground of appeal which does not affect count 3. On the other counts charging offences against s 16 counsel for the appellant submits that what the Crown established was not the obtaining of the evasion of a debt for which the appellant was liable, as charged in the indictment, but as at best the obtaining of the deferment of a debt, of which of course he was not and could not be convicted. The appellant in fact evaded these six debts, that is to say, the payment of these debts: *R v Page*², approved on that point in *R v Locker*³; but he did not, it is submitted, obtain that evasion by giving 'dud' cheques. To obtain that particular pecuniary advantage by deception he had to deceive his victims into agreeing to forgive or cancel those debts altogether, and that was not in accordance with the evidence or with the directions of the trial judge. In effect we are asked to adopt the view of Professor Smith that *R v Page*², a decision on evasion, was wrongly decided, even if it was not impliedly overruled by *R v Locker*³, a decision on deferment which applies to evasion as well: see his *Law of Theft*⁴.

The judge told the jury that they were concerned with—

j 'evading a debt, evading the payment of a debt. That is the advantage which the prosecution say the [appellant] obtained' in the case of each of these six offences on this count, with which he is charged. Now, evading a debt doesn't

1 [1968] 2 All ER 497 at 508, [1970] AC 304, at 339

2 [1971] 2 All ER 870, [1971] 2 QB 330

3 [1971] 2 All ER 875, [1971] 2 QB 321

4 2nd Edn (1972), paras 256 et seq

mean cancelling it, it doesn't mean destroying it for ever, indeed, although a debt can be cancelled there are probably only two or three ways in which that can be done—by paying it, of course, by having a creditor let you off, of himself, by limitation—that is by a lapse of time that sort of thing. None of these situations affect us here; what is alleged against the [appellant] here is not that he got the debt cancelled altogether, but that he evaded payment of it, and, of course, as you can see at once, there must be many ways in which you can evade payments, and after all to evade only means, to use a colloquialism, to dodge. In this case [the learned judge went on] it is said the [appellant] evaded payment in each case by presenting a cheque and a cheque which was, in fact, a false cheque, in the sense that at the time that it was presented and indeed, say the prosecution, in the expectation of the [appellant] that it was to be cashed, there would be no money to meet it. So it is what ordinary people would call a 'dud' cheque. The prosecution say that by means of that deception in each case, because obviously to put forward a false cheque, pretending it is a good cheque is deception, by means of that deception in each case, say the prosecution, the [appellant] managed to evade payments of money that he owed to the person who received the cheque.' a
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c

But, says counsel for the appellant, the judge did not tell the jury that before they could convict on any of these counts they must be satisfied that the representations expressly made at the time the cheques were given or implied in the giving of the cheques operated on the mind of the victims or induced them to accept a cheque instead of cash. He is criticised for that, although no point has been taken that some of the representations may have been made by conduct only, yet all were charged in the indictment as oral. But what he did say before reviewing the different charges and with particular reference to the first and fifth counts was that there must 'be proof of deception', and I read from the transcript: d
e

'... a deception done by the [appellant] and deliberately done. Of course, no accidental deception could possibly give rise to a criminal charge of this kind—deliberately done, that that deception deceived the victim, in this case the representative. And the particular cheque—if you hand a false cheque to someone and he knows it is a false cheque or even strongly suspects it is a false cheque, so as to put him on a serious enquiry, well then, he has not been deceived and this offence has not been proved in that case against the [appellant]. But, if there is a deception and he has deceived and if, as a result of that deception, the [appellant] obtains the advantage even though only temporarily, of evading the payment of the debt, and if you are satisfied that in the course of that transaction the [appellant] was acting dishonestly, and that members of the jury, like all matters of fact, is very much a matter for your common sense, if you are satisfied on all these matters, that the charge in that case is proved.' f
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Later he said: '... it will matter, in relation to these offences [including count 3] whether the witnesses were, in fact, deceived or not.' He did not repeat this sort of language in dealing with counts 2 and 7 but dealing with the others he referred either to the victims being deceived or to their questioning the cheques at the time the appellant gave them. For instance in relation to count 4 he asked if Miss Webster, the Granada Television representative, was deceived: h

'Was she given a cheque which she thought was a good cheque? You may think it perfectly obvious that she would never have dreamed of accepting it, had she thought anything else.' j

We think that there was no need for the judge to underline the obvious any further and that the jury must have understood that before they could convict they had to be satisfied that the victims believed the cheques to be good and would not have

- a taken them if they had not. None of the appellant's creditors was in the peculiar position of *Locker's* landlord¹, who had taken his cheques in payment of rent before, and there was, in our judgment, enough evidence (not much being needed) for the jury to draw the inference that his creditors were in fact and as a matter of cause and effect induced by the appellant's representation that these cheques were good into doing or refraining from doing something whereby he was enabled to evade the debts: *R v Locker*²; *Ray v Sempers*³. Were taking a cheque and refraining from taking immediate payment in cash things which enabled the appellant to obtain the pecuniary advantage of evading (payment of) his debts?
- b

We think that they were and that thereby the appellant did obtain an evasion of his debts. We reconsider with some trepidation the language of s 16, of which the material parts are the following:

- c '(1) A person who by any deception [that is as defined in s 15 (4) of the Act] dishonestly obtains for himself . . . any pecuniary advantage shall on conviction on indictment be liable to imprisonment for a term not exceeding five years.
- (2) The cases in which a pecuniary advantage within the meaning of this section is to be regarded as obtained for a person are cases where—(a) any debt . . . for which he . . . is . . . liable . . . is reduced or in whole or in part evaded or deferred . . .
- d

- This section appears to be concerned primarily with advantage to the debtor obtained from a creditor, more with what the debtor gets than with what the creditor loses, as was pointed out in *R v Locker*². One kind of advantage is the evasion of a debt. A debtor may evade or get out of paying a debt for a time (when it is 'deferred') or in part (when it is 'reduced' or 'in part evaded') or indefinitely and completely (when it is 'in whole evaded'). We would have thought that the word 'evasion' could have covered all those cases and reduction and deferment would then be simply particular species of evasion. If that is right a cheque may be a means of evading payment of a due debt altogether, where there are no funds and no likelihood of there ever being funds in the bank on which it is drawn to meet it and no authority from the bank to overdraw; or of deferring payment, where there is authority to overdraw or there are funds or will be by or soon after the date on which it is given or presented; or of reducing payment, where there is authority to overdraw or there are funds but not to an amount large enough to meet the cheque in full. Where in fact one of these results is achieved by a debtor pretending that his cheques will be honoured, why does he not obtain an evasion, deferment or reduction? Why should he not be convicted of thereby obtaining an evasion, as in *R v Page*⁴, or a deferment, as in *R v Plunkett*⁵, unless the circumstances, including the creditor's state of mind, are as peculiar as they were in *R v Locker*⁶.
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- g

- We know that this view conflicts with the opinion already noticed that the creditor must agree to the evasion, deferment or reduction before the debtor can offend against the section, and that it may be inconsistent with the reasoning in *R v Locker*⁶, although it seems to be in accord with the observations of this court in *R v Aston*, *R v Hadley*⁷.
- h

- As we have to decide whether the appellant obtained the advantage of evading a debt by deception, not of deferring it, we do not have to say whether in what circumstances a debt may be deferred by a worthless cheque. We can see good, though perhaps not conclusive, grounds for holding that there must be an agreement by the

j 1 See *R v Locker* [1971] 2 All ER 875, [1971] 2 QB 321
 2 [1971] 2 All ER at 879, [1971] 2 QB at 328
 3 [1973] 1 All ER 860, [1973] 1 WLR 317
 4 [1971] 2 All ER 870, [1971] 2 QB 330
 5 [1973] Crim LR 367
 6 [1971] 2 All ER 875, [1971] 2 QB 321
 7 [1970] 3 All ER 1045 at 1048, [1970] 1 WLR 1584 at 1588

creditor to defer—or to reduce. It is the creditor who defers—or reduces—a payment, as it is the creditor who allows the debtor to borrow or take out a policy under s 16 (2) (b) and the creditor who gives the debtor the opportunity to earn remuneration or win money under s 16 (2) (c). But it is the debtor who evades the debt. It is only by a most unnatural stretch of language that the creditor can be said to evade the debt. If what was meant by 'in whole or in part evaded' was not 'evaded by the debtor' but 'forgiven or cancelled by the creditor', it seems odd that the section does not say so and substitute remission or cancellation for evasion. And if 'cancelled' is substituted for 'evaded' how does 'in part cancelled' differ from 'reduced'? It is perhaps significant that in equating evasion with cancellation Professor Smith never refers to 'in part evaded' but appears to confine his discussion of evasion to total evasion.

We start by giving 'evaded' its ordinary meaning, so familiar in connection with liability for tax, and we see no reason why a debtor cannot dishonestly obtain the advantage of having the payment of his debt evaded by his deception of falsely pretending that his cheque is a good and valid order to pay without his creditor agreeing to cancel or forgive the debt, either in whole or in part. That may have been this court's approach in *R v Page*¹. We do not see anything inconsistent with it in what this court said in *R v Locker*² about deferment or evasion. About deferment the court said that there must be a deception which is intended by the debtor to induce the creditor to refrain from requiring or enforcing the payment of the debt on the due date and that the deception has in fact been effective in causing or inducing the creditor so to refrain. About evasion the court, invited to say whether *R v Page*¹ was correctly decided, said that it was correctly decided on the point that evasion of a debt meant evasion of the payment of the debt, but by its silence declined to express any view on the correctness of the decision that Page had, by giving worthless cheques to a car hirer, obtained the evasion of a debt.

Even if there must, therefore, be an agreement by the creditor to defer (or reduce) a debt we are not bound to hold that there must be an agreement by the creditor to evade it—or to let the debtor evade it—in whole or in part. Indeed to do so would do violence to the English language, would make 'in part evaded' a tautologous repetition of 'reduced' and would restrict the application of this part of the subsection to kind-hearted creditors taken in by 'hard luck' stories and to such odd cases as that suggested by counsel for the appellant of a passenger deceiving an official by brandishing a bogus pass into letting him travel by public transport without paying his fare. In our judgment, all that must be found is that as a result of the deception the creditor has done or refrained from doing something which enables the debtor to get out of payment, even without the creditor appreciating that that is the effect of what he is doing or not doing.

On the facts of this case there can be no question that the appellant evaded or 'dodged' all payment of the debts referred to in the indictment (although no creditor agreed to cancel any of them) and in our opinion the jury were entitled to find that the evasion was caused or achieved by the appellant's deception of his creditors into believing that his cheques would be met. We are, therefore of opinion that this ground of appeal fails.

It was argued also that there was no proper direction that young Farrington must have been induced to part with the motor car which was the subject of count 3 before the jury could convict the appellant of an offence against s 15, in that the judge had told the jury in effect that it did not matter whether it was young Farrington or his father who was deceived. In his summing-up the judge said:

'... he gave it [his cheque] to old Mr Farrington and he got the car from old Mr Farrington, but is there any doubt at all that he did pass the cheque? It was,

1 [1971] 2 All ER 870, [1971] 2 QB 330

2 [1971] 2 All ER 875, [1971] 2 QB 321

- a* in fact, a useless cheque, and he did obtain the motor car by means of that cheque—was that a deception? Well, members of the jury, what else could it be; is there any possible way in which you could consider that either old Mr Farrington or young Mr Farrington would have allowed their motor car to pass out of their possession if they had known or even really suspected that that cheque was anything but what it seemed? You are entitled to use your common sense
- b* in drawing inferences at that time. You must ask yourselves specifically in relation to that count, as you did in relation to the others, did the [appellant] know, are you satisfied he knew that his account was not there to meet the cheque, and was that his intention? Was his intention dishonest?

- We think that this direction correctly directed the jury's minds to the real issue on this part of the case and could not have misled the jury into thinking that they could
- c* convict the appellant if they disbelieved young Farrington's evidence. This was a plain case on the facts. The appellant in his statement had virtually pleaded guilty to what would once have been offences of obtaining property by falsely pretending that his cheques were good. There was no misdirection on the law on our view of it. The appeal against conviction on all counts fails.

- d* We would add that there were 34 other charges of obtaining the evasion of debts by worthless cheques which ultimately the appellant refused to have taken into consideration. If *R v Page*¹ was wrongly decided and *R v Plunkett*² was rightly decided, if we are wrong and counsel for the Crown is right, we see no reason on what we have been told why the Crown should not proceed to prosecute the appellant for obtaining the deferment of a debt in respect of those other cheques.

- e* Appeal dismissed. The court certified that the following point of law of general public importance was involved in the decision: 'whether the dishonest offering of a worthless cheque purporting to satisfy a debt for which the drawer is then liable, there being no deception made to the creditor other than the implied representation that the cheque is a good and valid order, and which thereby induces the creditor to believe that he has been paid, constitutes an offence of obtaining a pecuniary advantage by deception in that a debt for which the drawer is then
- f* liable is evaded within s 16 (1) of the Theft Act 1968.' The court, however, refused leave to appeal.

Solicitors: Registrar of Criminal Appeals (for the appellant); Goffey & Co, Southport (for the Crown).

- g* N P Metcalfe Esq Barrister.

¹ [1971] 2 All ER 870, [1971] 2 QB 330

² [1973] Crim LR 367

R v Turner

COURT OF APPEAL, CRIMINAL DIVISION
LORD WIDGERY CJ, JAMES LJ AND NIELD J
20th, 29th MARCH 1973

Criminal law – Obtaining pecuniary advantage by deception – Evasion of debt – Meaning of evasion – Antecedent debt – Worthless cheque – Accused having already incurred liability for debt before cheque handed over – Cheque dishonoured – Whether debt ‘evaded’ – Theft Act 1968, s 16 (2) (a).

The appellant employed B to do decorating work for him. It was agreed that the appellant should pay B £24 per week for the work. At the end of the first week the appellant owed B £24 and a further £14 to B's brother who had assisted B. He gave B a cheque for £38, and B paid his brother £14. At the material time the appellant knew that he had insufficient funds in his account at his bank to meet the cheque. He was convicted of dishonestly obtaining a pecuniary advantage, i.e. the evasion of a debt, by deception, contrary to s 16^a of the Theft Act 1968. On appeal against conviction,

Held – Where an accused was liable to his creditor for an antecedent debt the handing over of a worthless cheque to the creditor did not amount to an ‘evasion’ of the debt, within s 16 (2) (a) of the 1968 Act, unless the creditor was shown to have had the opportunity of taking cash but had been induced by deception to take the cheque instead. For that purpose no distinction could be drawn between the ‘evasion’ and the ‘deferment’ of a debt. Accordingly since B and his brother had already furnished the consideration for the appellant's debt when the appellant handed over the worthless cheque, the appellant could not be said to have ‘evaded’ the debt and the appeal would be allowed (see p 830 a b and c to g, post).

R v Locker [1971] 2 All ER 875 followed.

R v Page [1971] 2 All ER 870 distinguished.

R v Fazackerley p 819, ante, not followed.

Notes

For obtaining a pecuniary advantage by deception, see Supplement to 10 Halsbury's Laws (3rd Edn) para 1586A, 2.

For the Theft Act 1968, s 16, see 8 Halsbury's Statutes (3rd Edn) 793.

Cases referred to in judgment

R v Fazackerley p 819, ante, [1973] 1 WLR 632, CA.

R v Locker [1971] 2 All ER 875, [1971] 2 QB 321, [1971] 2 WLR 1302, 135 JP 437, 55 Cr App Rep 375, CA.

R v Page [1971] 2 All ER 870, [1971] 2 QB 330, [1971] 2 WLR 1308, 55 Cr App Rep 184, CA.

Case and authorities also cited

R v Plunkett [1973] Crim LR 367, CA.

Griew, *The Theft Act 1968*, pp 93-95.

Smith on the Law of Theft (2nd Edn, 1972), pp 91-93, paras 256-258.

Appeal

On 17th May 1972 at Liverpool Crown Court before Judge Nance and a jury the appellant, John Eric Turner, was convicted on four counts of obtaining property

^a Section 16, so far as material, is set out at p 829 h j, post

- a* by deception (counts 1 to 4) and one count (count 7) of obtaining a pecuniary advantage by deception. He was sentenced to 18 months' imprisonment concurrent on counts 1 to 4 and to six months' consecutive on count 7, making two years' imprisonment in all. He appealed against his conviction on count 7, on the following grounds: (i) that the trial judge had been wrong in law in rejecting his counsel's submission that there was no case to answer on that count, the ruling being incorrect in the light of *R v Locker*¹; (ii) that the trial judge had been wrong in law in holding that 'to evade a debt' meant 'to evade the payment if only temporarily of the debt for which he was then liable'; that construction did not arise, nor had it been approved in *R v Page*²; further, the construction given was a more accurate description of the term 'defer'; (iii) the trial judge had failed to direct the jury on the meaning of the word 'evasion'; and (iv) the trial judge had failed to direct the jury on the distinction between the evasion and the deferment of a debt; on the facts it was open for them to conclude that the payment of the debt had been deferred and not evaded. The facts are set out in the judgment of the court:
- b*
- c*

R K Atherton for the appellant.

D J Hale for the Crown.

d

Cur adv vult

- 29th March. **LORD WIDGERY CJ** read the following judgment of the court. The court will now give its reasons for the conclusion already announced that the appeal in this case will be allowed and the conviction quashed. On 17th May 1972 the appellant was convicted at the Liverpool Crown Court on five counts of an indictment including one (count 7) charged as follows:
- e*

'At Liverpool in the county of Lancaster dishonestly obtained for himself a pecuniary advantage, namely, the evasion of a debt for which he was then liable to Charles Richard Black and another, by deception, namely, that he presented a cheque to Charles Richard Black for the amount of £38 . . . when he well knew that there were insufficient funds in his bank account to meet the said cheque.'

f

- The evidence relevant to this count may be summarised as follows. At the end of July 1971 Black met the appellant who asked Black to do some decorating work on his behalf. It was agreed that Black should receive £24 per week. It was further agreed between the appellant and Black's brother that the latter should do similar work for the appellant. At the end of the first week the appellant owed Black £24 and his brother £14. The appellant gave Black a cheque for £38 and Black paid his brother £14. The appellant knew that he had not sufficient funds to meet the cheque.
- g*

- The charge was laid under s 16 of the Theft Act 1968 which, so far as material, provides as follows:
- h*

'(1) A person who by any deception dishonestly obtains for himself or another any pecuniary advantage shall on conviction be . . . liable [to a penalty].

- '(2) The cases in which a pecuniary advantage within the meaning of this section is to be regarded as obtained for a person are cases where—(a) any debt or charge for which he makes himself liable or is or may become liable (including one not legally enforceable) is reduced or in whole or in part evaded or deferred
- j*
- ...

The sole question in this appeal is whether the admitted deception practised by the

1 [1971] 2 All ER 875, [1971] 2 QB 321

2 [1971] 2 All ER 870, [1971] 2 QB 330

appellant in tendering the worthless cheque resulted in the debt of £38 being 'evaded'. a

One of the earlier decisions on this section was *R v Page*¹. There, however, the worthless cheques passed by the accused were not given in respect of an antecedent debt, but were given in return for cash or kind. In one instance the accused hired a car and paid the deposit by cheque, and in others he had exchanged the cheque for cash. The Court of Appeal held that he was properly convicted in the case of each cheque of 'evading' a debt by deception. b

In *R v Locker*², a tenant who owed rent to his landlord gave the latter a cheque for the amount due, knowing that he had no funds to meet it. He was convicted under s 16 of deception whereby payment of this debt was 'deferred', but this conviction was set aside by a full court of five judges. It was argued by the prosecution that the handing over of the cheque had deferred the debt, even though the cheque (being a worthless piece of paper) had in no way affected the existence of the debt or the rights or liabilities of the parties in respect thereof. The court held, however, that an antecedent debt cannot be deferred by deception unless the deception had been effective so as to operate on the mind of the creditor and cause him to refrain from requiring payment on the due date. c

Since the decision in *R v Locker*² a number of unreported cases and comment by academic writers show considerable difference of opinion about the effect of these two decisions. We regard ourselves as bound by *R v Locker*² and do not think that the fact that the present charge refers to 'evasion' of the debt, rather than deferment, makes any difference. We do not think that the handing over of a worthless cheque 'evades' a debt unless the creditor is shown to have had the opportunity of taking cash but was induced by deception to take the cheque instead. If a penniless man owes a debt of £100 which he has no prospect of being able to pay, how does he evade that debt by giving the creditor a worthless cheque. In *R v Fazackerley*³, however, another division of this court appears to have decided otherwise. It is much to be hoped that this short but vital question may soon be considered by the House of Lords. d

We need not express any view on *R v Page*¹ save to say that we recognise a clear distinction between the passing of a worthless cheque as consideration for some contemporary advantage, and the giving of such a cheque in payment or reduction of an antecedent debt when the creditor has already furnished the consideration moving from him. The former was normally a criminal offence before the passing of the Theft Act 1968 whereas the latter was not. In the present case we regard *R v Locker*² as authority for the proposition that the appellant was wrongly convicted, and we have allowed the appeal and quashed the conviction. e

Appeal allowed. Conviction quashed. The court certified under s 33 of the Criminal Appeal Act 1968 that a point of law of general public importance was involved, i.e. whether the dishonest offering of a worthless cheque purporting to satisfy a debt for which the drawer was then liable, there being no deception made to the creditor other than the implied representation that the cheque was a good and valid order and which thereby induced the creditor to believe that he had been paid, constituted an offence of obtaining a pecuniary advantage by deception in that the debt for which the drawer was then liable was evaded within s 16 (1) of the Theft Act 1968. Leave to appeal was given. f

Solicitors: Registrar of Criminal Appeals (for the appellant); A G Harrison, Town Clerk, Wallasey (for the Crown). g

N P Metcalfe Esq Barrister. h

1 [1971] 2 All ER 870, [1971] 2 QB 330

2 [1971] 2 All ER 875, [1971] 2 QB 321

3 *Page* 819, ante, i

R. v Lennard

COURT OF APPEAL, CRIMINAL DIVISION

LAWTON, SCARMAN LJ AND PHILLIPS J

26th FEBRUARY, 8th MARCH 1973

a

b

Road traffic – Driving with blood-alcohol proportion above prescribed limit – Evidence – Failure to supply specimen – Specimen for laboratory test – Reasonable excuse – What amounts to reasonable excuse – Physical or mental inability to provide specimen – Risk to health in providing specimen – Consumption of alcohol by accused after ceasing to drive and before requirement – Whether a reasonable excuse – Road Safety Act 1967, s 3 (3).

c

The appellant while driving his car was involved in a minor road accident. When the police arrived he smelt of drink. He refused to take a breath test. He was arrested and taken to a police station where he again refused to take a breath test or to provide a specimen of blood or urine for a laboratory test. The appellant was charged on indictment with contravening s 3 (3)^a of the Road Safety Act 1967 by failing without

d

reasonable excuse to supply a specimen for a laboratory test. At his trial he contended that he had a reasonable excuse for not supplying the specimen in that, after he had ceased to drive but before being asked to supply either a specimen of blood or urine, he had consumed a substantial quantity of alcohol. No evidence was called and the trial judge ruled that the appellant's excuse was incapable in law of amounting to a reasonable excuse. Accordingly he directed the jury to convict. On appeal,

e

Held – No excuse for failing to provide a specimen for a laboratory test under s 3 (3) of the 1967 Act could be adjudged reasonable unless the person from whom it was required was physically or mentally unable to provide it or its provision would entail a substantial risk to his health. Accordingly, as the appellant's excuse did not fall within that category, he had been properly convicted and the appeal would be

f

dismissed (see p 834 g and p 835 f, post).
Per Curiam. (i) Statements by those suspected of driving with too much alcohol in them to the effect that they have drunk alcohol between ceasing to drive and being asked to take the breath test are easy to make and should be carefully tested in court unless the prosecution is prepared to make an admission (see p 833 j, post).

g

(ii) Whenever admissions are made the manner of doing so should be such that what has been admitted should appear clearly on the shorthand note (see p 834 a, post).

Notes

For failure to provide a specimen for a laboratory test and what amounts to a reasonable excuse, see Supplement to 33 Halsbury's Laws (3rd Edn) para 1061A, 8.

h

For the Road Safety Act 1967, s 3, see 28 Halsbury's Statutes (3rd Edn) 465.

As from 1st July 1972, s 3 of the 1967 Act has been replaced by s 9 of the Road Traffic Act 1972.

Cases referred to in judgment

Glendinning v Bell [1973] RTR 52, DC.

j

Law v Stephens [1971] RTR 358, DC.

R v Downey [1970] RTR 257, CA.

R v Kelly (HF) [1972] RTR 447, CA.

R v Seaman [1971] RTR 456, 55 Cr App Rep 569, CA.

^a Section 3 (3), so far as material, is set out at p 832 g, post

Rowlands v Hamilton [1971] 1 All ER 1089, [1971] 1 WLR 647, 135 JP 241, 55 Cr App Rep 347, [1971] RTR 153, HL. a

Scoble v Graham [1970] RTR 358, DC, Digest (Cont Vol C) 946, 454m.

Case also cited

Dibble v Ingleton [1972] 1 All ER 275, [1972] 1 QB 480, DC. b

Appeal

On 13th September 1972 in the Crown Court at Manchester before Judge Bailey and a jury, the appellant, Michael Lennard, was convicted of failing to supply a specimen of blood or urine for a laboratory test, contrary to s 3 (3) of the Road Safety Act 1967. He was fined £50 and disqualified from holding a driving licence for three years. He appealed against his conviction by leave of the single judge on the following grounds: (a) the trial judge had refused to allow the appellant to put his defence before the jury; (b) the judge had directed the jury to convict him without his defence being put; (c) the judge was wrong in ruling that the fact a driver had taken alcohol since driving or since an incident giving rise to a request for a specimen under s 3 of the 1967 Act could not be a reasonable excuse for a refusal by such driver to give such a specimen; and (d) the appellant was not guilty of the offence charged. The facts are set out in the judgment of the court. c
d

L R Portnoy for the appellant.

A C Jolly for the Crown.

Cur adv vult

8th March. **LAWTON LJ** read the following judgment of the court. On 13th September 1972 at the Manchester Crown Court the appellant was convicted after a trial before Judge Bailey and a jury, of failing to supply a specimen of blood or urine for laboratory tests and was fined £50 and disqualified from holding or obtaining a driving licence for three years. He now appeals against that conviction by leave of the single judge. e
f

He was charged under s 3 (3) of the Road Safety Act 1967 which provides as follows:

‘A person who, without reasonable excuse, fails to provide a specimen for a laboratory test . . . , shall be guilty of an offence . . .’

The sole question in this appeal is whether the excuse put forward by the appellant was capable in law of being a reasonable one. This excuse was that after ceasing to drive and before being asked to give a specimen of either breath or blood he had consumed a substantial quantity of alcohol. The jury were never asked to decide whether the appellant had consumed alcohol as he alleged because of the unusual, and in the judgment of this court, untoward course which the trial took. The judge ruled that this excuse was incapable in law of being a reasonable one and he directed the jury to convict. g
h

On 30th March 1972 the appellant whilst driving a motor vehicle was involved in a minor accident. When the police arrived he smelt of drink and in answer to their questions he was alleged to have said that he had just drunk a bottle of brandy. He refused to take the breath test. He was arrested and taken to a police station. There he again refused to take the breath test or to provide a specimen of blood or urine. i

It was accepted at the trial that the appellant had been properly arrested and that the requirements of ss 2 and 3 of the Act had been complied with. No evidence was called. That unusual situation came about in this way. Outside the court, counsel for the appellant told counsel for the Crown that his client admitted that the statutory conditions for requiring a blood or urine test had been complied with

a and that the defence would be that his client's drinking of alcohol after ceasing to drive was in law a reasonable excuse. Both counsel were anxious that the court's time should not be wasted and counsel for the appellant intended that his opponent should accept his statements as admissions for the purpose of s 10 of the Criminal Justice Act 1967, and they were. Counsel on both sides do not seem to have appreciated that the police evidence about the appellant's alleged consumption of brandy was nothing more than evidence of what he had said he had done. The fact that b he had consumed alcohol after ceasing to drive could only be established by his own evidence or that of someone who had seen him drinking. There could not be the beginnings of an argument that the drinking of alcohol provided a reasonable excuse until that drinking had been proved.

c Relying on what the appellant's counsel had said outside the court, counsel for the Crown opened the case to the jury on the basis that the appellant was not contesting the facts which had to be proved in order to justify the police requiring the appellant to provide a specimen of blood or urine; and he told the jury that in the Crown's submission it was not a reasonable excuse in law for the appellant to say, as he had said to the police, that he had been drinking since ceasing to drive. We were informed by counsel that towards the end of the opening speech the judge raised his eyebrows d implying that he wanted to know whether the appellant was making the admissions referred to by counsel for the Crown. Thereupon counsel for the appellant said that he was. As this all happened during the opening speech, nothing got on to the shorthand note. As soon as the opening had finished the judge referred to the Crown's submission that the taking of drink after ceasing to drive was no excuse for failing to provide a specimen and indicated that he agreed with it. Some discussion with counsel followed: counsel for the Crown said that if the judge ruled to that effect, there would e be no issue of fact for the jury to try. The following exchange then took place between the judge and counsel for the appellant: Judge: 'Is the refusal conceded to?' Counsel: 'Yes, your Honour. It seems to me that my friend is quite right. If your Honour is intending to give that direction to the jury, then there is no issue of fact before the jury.'

f Counsel then asked to be allowed to argue the point and did so. At the end of the argument the judge ruled as follows:

'I am quite satisfied that in law, as well as in common sense, even if he had consumed post hoc alcohol, that could not form any reasonable excuse of any kind for his refusal to supply any form of specimen . . . That being so, if the case proceeds I must tell the jury that there is no defence open to the [appellant].'

g Counsel for the Crown then said once again that there was no issue of fact for the jury to determine. The judge agreed and asked if there was any point in calling evidence. Counsel for the Crown said there was not. The judge asked if the appellant wanted to reconsider his plea. His counsel said he did not and went on to say: 'I think that it is necessary for your Honour to direct the jury in the circumstances.' h This the judge did and on his direction, the jury returned a verdict of guilty. This court does not approve of the informal way in which this trial was conducted. We appreciate that counsel were trying to save the time of the court; but experience has often shown that forensic short cuts do not always result in justice being done. If this case had been tried as it should have been, the jury might have decided that the appellant had not consumed alcohol after he had ceased to drive. The story he was alleged to have told the police was highly improbable and the one we were told by i his counsel he would have told had he given evidence was only a little more probable: he would have said that he had drunk a bottle of wine, not brandy. Statements by those suspected of driving with too much alcohol in them to the effect that they have drunk alcohol between ceasing to drive and being asked to take the breath test are easy to make and should be carefully tested in court unless the prosecution is prepared to make an admission. We would add, too, that the way the appellant's

admissions were dealt with was unsatisfactory. Admissions can be made in many ways and it is not for this court to issue a practice direction; but we do say that whenever admissions are made, the manner of doing so should be such that what has been admitted should appear clearly on the shorthand note. a

Whatever irregularities there were in the trial did not amount to a mis-trial nor did they cause a miscarriage of justice. The appellant benefited from them because the issue on which the judge ruled was whether the excuse foreshadowed by the appellant, but not proved to have had any factual basis, was capable of being a reasonable one. b

The problem whether an excuse such as that put forward by this appellant is capable of being a reasonable one necessitated the court construing s 3 (3) in its context and considering a number of authorities.

Part I of the Road Safety Act 1967 was clearly intended to overcome the problem of proof which often arose when a motorist was charged under s 6 of the Road Traffic Act 1960 with driving, or being in charge of, a motor vehicle when under the influence of drink or drugs. By s 1 of the 1967 Act Parliament established a limit to the amount of alcohol which a motorist could drink if he was going to drive, and this limit was to be fixed by reference to the proportion of alcohol in his blood when he was driving. Provision had to be made for getting evidence of this proportion. This was done by means of the statutory requirements for breath and blood or urine tests: see ss 2 and 3. The motorist who refuses to take the breath test or to provide a specimen of blood or urine obstructs the gathering of the evidence which Parliament has decreed is the reliable evidence for the purpose of establishing whether an offence has been committed under s 1. A motorist, however, may not be able to take the breath test or provide a specimen because of his physical or mental condition. The Act made provision for refusals which were excusable. Thus in *R v Kelly*¹, this court expressed the opinion (albeit obiter) that a man with a permanent tracheotomy would have had a reasonable excuse for refusing to take the breath test; and in *Scoble v Graham*² the Divisional Court expressed the opinion that a man who was in pain and confused might have a reasonable excuse for failing to provide a specimen. A state of affairs which does not affect ability to take a breath test or supply a specimen does not seem, on the authorities, to amount to a reasonable excuse. Thus, a motorist who declined to give a specimen saying that he wanted to see his solicitor was adjudged by the Divisional Court not to have had a reasonable excuse: see *Law v Stephens*³. The Court of Appeal gave judgment to the same effect in the case of an overseas visitor who wanted to speak to the diplomatic representative of his country before giving a specimen: see *R v Seaman*⁴. In our judgment no excuse can be adjudged a reasonable one unless the person from whom the specimen is required is physically or mentally unable to provide it or the provision of the specimen would entail a substantial risk to his health. c
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This being, in our judgment, the right test, how does the appellant's excuse stand up to it? It was submitted on his behalf that he was entitled to take up the stand that he should not be called on to provide a specimen when the result of his doing so would be useless for the purposes of a s 1 prosecution having regard to the decision of the House of Lords in *Rowlands v Hamilton*⁵. Why the appellant refused to provide a specimen is not known because of the course the trial took. His refusal may have been the result of alcoholic confusion; it may have been based on a lie; but for the purposes of this appeal we are prepared to deal with the problem on the basis of the stand suggested by his counsel. Our attention was drawn to *Glendenning v Ball*⁶. In h

¹ [1972] RTR 447

² [1970] RTR 358

³ [1971] RTR 358

⁴ [1971] RTR 456

⁵ [1971] 1 All ER 1089, [1971] 1 WLR 647

⁶ [1973] RTR 52 i

a that case the motorist had been involved in an accident and he drank some brandy whilst in the ambulance taking him to hospital. Later he refused to take either a breath test or to provide a specimen. The Divisional Court adjudged that the refusal to provide a specimen which would eventually be unreliable because alcohol had been drunk after he had ceased to drive was capable of being a reasonable excuse. Lord Widgery CJ delivered the leading judgment to which Melford Stevenson and Brabin JJ agreed. No reason was given for the conclusion which was reached.

b We find ourselves unable to agree with it. As we have already pointed out the object of requiring a motorist to provide a specimen is to provide evidence. Once that evidence has been provided the prosecuting authority can decide whether there will be a prosecution. If the alcohol proportion in the blood exceeds the prescribed limits, there will almost certainly be a prosecution; and when prosecuted the accused can try to establish in any way available to him that the evidence put forward by the prosecution is unreliable because after ceasing to drive he had consumed alcohol. That will be his defence and it will be for the court to decide whether, having regard to it, the prosecution have proved the offence charged. It is pertinent to remember that the Act seeks to expose the motorist who refuses to provide a specimen to the same penalties as if he had been convicted of an offence under s 1: see s 3 (3) (a) and (b). It would be a strange result if the motorist who refuses to provide a specimen could decide for himself whether the evidence which would be provided by a laboratory test was likely to be unreliable whereas one who did not refuse would have to submit himself to the judgment of a court on the results of a test which was made. In our judgment an excuse which would make a motorist the judge in his own cause is not a reasonable one. *R v Downey*¹ is in line with our judgment. In that case a motorist who had refused to provide a specimen sought to excuse himself by saying that he had not committed a traffic offence whilst his vehicle was in motion. The Court of Appeal adjudged that this could not be a reasonable excuse; but the reasons for judgment were different from ours. Nevertheless, this case and that both go to show that excuses which do not arise out of an inability to provide evidence, or a substantial risk to health by providing it, are not reasonable ones. The appeal is dismissed.

f *Appeal dismissed.*

Solicitors: *Registrar of Criminal Appeals* (for the appellant); *D S Gandy*, Manchester (for the Crown).

N P Metcalfe Esq Barrister.

¹ [1970] RTR 257

McGibbon v McGibbon

FAMILY DIVISION

FINER J

13th, 14th MARCH 1973

Injunction – Husband and wife – Restraint against molestation – Jurisdiction of court – Application by party to ‘cause or matter’ – Ex parte application by wife for leave to present petition for divorce within three years of marriage – Application by wife for injunction restraining husband from molesting her – Whether court having jurisdiction to grant injunction – Whether sufficient nexus between injunction sought and application for leave to present petition – Supreme Court of Judicature (Consolidation) Act 1925, s 225 – Matrimonial Causes Act 1965, s 2 – Matrimonial Causes Act 1967, s 10 (1) – RSC Ord 29, r 1.

The parties were married in April 1972 and in March 1973 the wife applied ex parte for an injunction restraining the husband from molesting her. The affidavit in support of the application set out a history of extreme and continuing physical violence on the part of the husband. At the time of the application the wife intended to take out an originating summons under s 2^a of the Matrimonial Causes Act 1965 for leave to present a petition, notwithstanding that three years had not expired from the date of the marriage, on the ground of exceptional hardship suffered by her or of exceptional depravity on the part of the husband.

Held – (i) The court had jurisdiction to grant an injunction in proceedings under s 2 of the 1965 Act since those proceedings constituted a ‘matter’, within s 225^b of the Supreme Court of Judicature (Consolidation) Act 1925, and, under RSC Ord 29, r 1 (1)^c, the court had jurisdiction to grant an injunction to a party in any ‘cause or matter’. In any event, since the enactment of s 10 (1)^d of the Matrimonial Causes Act 1967, the expression ‘matrimonial cause’ had included proceedings under s 2 of the 1965 Act (see p 838 h j, p 840 e and p 841 g h, post).

(ii) The injunction would be granted on the wife undertaking to issue proceedings under s 2 of the 1965 Act forthwith because in the circumstances there was amply sufficient nexus between the application under s 2, which necessarily raised questions of the husband’s conduct, and the relief sought by the injunction, to entitle the court to exercise its jurisdiction to prevent molestation (see p 840 d and p 841 j, post).

Winstone v Winstone [1959] 3 All ER 580 distinguished and doubted.

Des Salles d’Epinoix v Des Salles d’Epinoix [1967] 2 All ER 539 distinguished.

Notes

For injunctions in divorce suits, see 12 Halsbury’s Laws (3rd Edn) 477, para 1067, and for cases on the subject, see 27 (2) Digest (Reissue) 936, 7549-7559, and 938, 7581.

For the Supreme Court of Judicature (Consolidation) Act 1925, s 225, see 7 Halsbury’s Statutes (3rd Edn) 623.

For the Matrimonial Causes Act 1965, s 2, see 17 Halsbury’s Statutes (3rd Edn) 163.

For the Matrimonial Causes Act 1967, s 10, see *ibid* 230.

^a Section 2, so far as material, is set out at p 838 a to c, post

^b Section 225, so far as material, provides: ‘... “Matter” includes every proceeding in court not in a cause ...’

^c Rule 1, so far as material, is set out at p 838 g h, post

^d Section 10 (1), so far as material, provides: ‘... “matrimonial cause” has the same meaning as in the Supreme Court of Judicature (Consolidation) Act 1925, except that it includes an application under section 2 of the Matrimonial Causes Act 1965 ...’

Cases referred to in judgment

a *Carter v Fey* [1894] 2 Ch 541, 63 LJCh 723, 70 LT 786, CA, 28 (2) Digest (Reissue) 1115, 1104.

Des Salles d'Epinoix v Des Salles d'Epinoix [1967] 2 All ER 539, [1967] 1 WLR 553, CA, 27 (1) Digest (Reissue) 103, 709.

Montgomery v Montgomery [1964] 2 All ER 22, [1965] P 46, [1964] 2 WLR 1036, 27 (2) Digest (Reissue) 936, 7555.

b *Robinson v Robinson* [1963] 3 All ER 813, [1965] P 39, [1964] 2 WLR 138, 27 (2) Digest (Reissue) 936, 7557.

Silverstone v Silverstone [1953] 1 All ER 556, [1953] P 174, [1953] 2 WLR 513, 27 (1) Digest (Reissue) 299, 2240.

Stewart v Stewart [1973] 1 All ER 31, [1973] Fam 21, [1972] 3 WLR 907.

c *Winstone v Winstone* [1959] 3 All ER 580, [1960] P 28, [1959] 3 WLR 660, 27 (2) Digest (Reissue) 938, 7581.

Ex parte application

The wife applied ex parte for an injunction restraining the husband from molesting her. The parties had been married for under three years and at the time of the application the wife intended to take out an originating summons under s 2 of the Matrimonial Causes Act 1965 for leave to present a petition for divorce within three years of the marriage. The facts are set out in the judgment.

Betty Knightly for the wife.

Cur adv vult

14th March. **FINER J** read the following judgment. In this matter counsel applies on behalf of the wife, Maria Eva McGibbon, ex parte, and as a matter of urgency, for an injunction to restrain the respondent husband from molesting her.

f The parties were married on 1st April 1972 and, in the circumstances which are described in the wife's affidavit, she intended at the time of the application to take out an originating summons under s 2 of the Matrimonial Causes Act 1965 for leave to present a petition for divorce, notwithstanding that three years had not expired from the date of the marriage, on the ground that the case is one of exceptional hardship suffered by the wife, or of exceptional depravity on the part of the husband.

g The affidavit in support of the application for the injunction sets out a history of extreme physical violence by the husband towards the wife. It is not necessary for me to repeat what is in the affidavit. The violence alleged is gross and continuing and, apart from the particular legal problem to which the case gives rise, I would without hesitation grant ex parte, on the evidence as it stands, an injunction to restrain such behaviour. However, as counsel for the wife pointed out when making the application, there are authorities which cast some doubt on the power of the court to grant injunctions ancillary to proceedings under s 2 of the 1965 Act. Having considered the authorities, I concluded that it was open to me to grant the injunction sought, albeit in s 2 proceedings; and accordingly, on the wife's undertaking to issue such proceedings forthwith, I yesterday granted an injunction restraining the husband from molesting her. I now give my reasons.

i It is to be stressed that the injunctive relief sought and granted is confined to an order restraining the husband from molesting his wife. Injunctions of this kind are commonly, but not invariably, associated with a claim by the applicant that the respondent should quit the matrimonial home, or be kept out of the matrimonial home; but there is no claim in the present case—it would not arise on the facts—for relief of that particular kind. The wife simply asks the court to restrain the husband from committing assault and battery on her.

I will first state what the position in law would seem to myself to be, irrespective of authority. Section 2 (1) of the Matrimonial Causes Act 1965 provides: a

‘Subject to the next following subsection, no petition for divorce shall be presented to the court before the expiration of the period of three years from the date of the marriage . . .’

By s 2 (2): b

‘A judge of the court may, on an application made to him, allow the presentation of a petition for divorce within the specified period on the ground that the case is one of exceptional hardship suffered by the petitioner or of exceptional depravity on the part of the respondent . . .’

That subsection goes on to require the judge, in determining the application, to have regard to certain matters, including whether there is a reasonable probability of a reconciliation between the parties. c

The procedure for obtaining leave under s 2 is governed by r 5 of the Matrimonial Causes Rules 1971¹, which provides:

‘(1) An application under section 2 of the Act of 1965 for leave to present a petition for divorce before the expiration of 3 years from the date of the marriage shall be made by originating application . . .’ d

The respondent can, of course, defend the application. There is procedure established under the rule for that purpose; and there is no doubt that a s 2 application involves a *lis* just as much as any other issue which comes before the court for determination. e

The Supreme Court of Judicature (Consolidation) Act 1925 provides by s 45 (1):

‘The High Court may grant . . . an injunction . . . by an interlocutory order in all cases in which it appears to the court to be just or convenient so to do.’

Section 225 of the same Act defines ‘Matrimonial cause’ as meaning: ‘any action for divorce, nullity of marriage, judicial separation, jactitation of marriage or restitution of conjugal rights’; and it defines the word ‘Matter’ for the purposes of the 1925 Act as including ‘every proceeding in court not in a cause’. Hence, although proceedings under s 2 of the 1965 Act are not a ‘matrimonial cause’, within the meaning of the 1925 Act, they certainly are a ‘matter’ within the meaning of that Act. f

Then, by RSC Ord 29, r 1 (1), it is provided:

‘An application for the grant of an injunction may be made by any party to a *cause* or *matter* before or after the trial of the cause or matter, whether or not a claim for the injunction was included in that party’s writ, originating summons, counterclaim or third party notice, as the case may be.’ g

It follows, in my judgment, that there must be jurisdiction in appropriate circumstances to grant an interim injunction in proceedings under s 2 of the 1965 Act. On any showing, such proceedings constitute at least a ‘matter’ in which RSC Ord 29 expressly provides that an injunction may be granted. However, apart from the basic jurisdiction, other conditions must be present before the court will grant an injunction. One of these conditions is that the injunction as asked shall bear some sensible relationship to the cause of action. To take a crude illustration, a plaintiff is unlikely to obtain an injunction against trespass in an action in which his claim is for the price of goods sold and delivered. So, in addition to the existence of jurisdiction in the strict sense, there has to be a connection between the plaintiff’s claim and the injunction sought. h

a Now, in a 'matrimonial cause', in the nature of a suit for divorce or for judicial separation, there is unquestionably power in this Division to grant interim relief during the pendency of the cause to prevent one party from molesting the other. We often grant injunctions of this nature. Both of the necessary conditions exist, that is to say, first, the basic jurisdiction to grant an interim injunction in the cause; and secondly, a sufficient connection between the substantive relief and the ancillary relief being sought. The court, in dealing with such a cause, is essentially concerned with enquiring into and regulating the personal relationship of the parties to each other. It is seized of that relationship; and gross acts of interference by one spouse with the other, against his or her will, invade the very area within which the court is operating. Moreover, as was said in *Silverstone v Silverstone*¹ by Pearce J:

c 'This Division of the High Court deals with problems somewhat different from those of other Divisions, and the position pending trial is one of its particular problems. To protect the position of a wife pending trial this court may order a husband to pay her alimony pendente lite and give security for her costs even although she appears to have little chance of success in her litigation. It is desirable, if its powers allow, that it should prevent her being bullied out of her remedy or deterred by pressure from seeking the help of the court.'

d In fact, recent authority shows that the power of the court to regulate the conduct of the parties towards each other may, in appropriate circumstances, be exercised even after the making of the decree. I refer, for example, to *Stewart v Stewart*², a decision of Sir George Baker P, to *Robinson v Robinson*³ and *Montgomery v Montgomery*⁴. However, for the present purpose there is no need to explore the limits of the doctrine so far as it applies to a matrimonial cause such as a suit for divorce. It is enough to say that it is beyond doubt that during the pendency of such causes there is jurisdiction to restrain molestation and a sufficient nexus between the substantive relief being sought and the ancillary relief by way of the injunction against molestation to justify the exercise of that jurisdiction if the facts of the case require it.

f Now, apart from authority, I can for myself see no reason why the rules which I have just described should not in principle be just as applicable in s 2 proceedings as they are in other matrimonial proceedings. I ask: what possible distinction of principle can there be? A s 2 application may only be a preliminary to the presentation of a petition, but in the circumstances governed by s 2 it is an essential preliminary, and an indispensable and integral part of the process of obtaining the full relief which the petitioner seeks to obtain. It brings the material jurisdiction directly into play. g Indeed, so far as the conduct of the parties towards each other is concerned (and the consequent possibility that one will need protection from the other), there are many situations in the modern law of divorce in which, for the purposes of obtaining substantive relief, conduct may be irrelevant or of small importance; whereas in most s 2 applications this question of conduct will be the matter with which the court is most directly concerned. Then there is the risk of the would-be petitioner being bullied out of the assertion of her rights. That is certainly no less, it seems to me, in a s 2 situation than in other cases; and indeed, seeing that the wife will often, in the s 2 situation, be young and inexperienced, it may be a greater risk than it generally is. h

i Then again, in a case of the kind which I am considering, one asks: What is the alternative to the court intervening by way of injunction at this stage? The wife could petition for a judicial separation. She needs no leave of the court to present such a petition, notwithstanding that three years have not elapsed from the date of the marriage, and once such a petition were on the file, there could be no doubt that, for the

1 [1953] 1 All ER 556 at 557, [1953] P 174 at 177

2 [1973] 1 All ER 31, [1973] Fam 21

3 [1963] 3 All ER 813, [1965] P 39

4 [1964] 2 All ER 22, [1965] P 46

reasons I have already explained, she could properly move for an injunction. But why should a wife who sincerely wants a divorce have to present an insincere petition for judicial separation as a means of obtaining protection from this court against being menaced and beaten by her husband? a

Another expedient, I suppose, might be for the wife to sue her husband in the Queen's Bench Division for the tort of assault and battery, and to claim an injunction there as an adjunct to the claim in tort. Even then it is doubtful whether she would obtain an injunction, because that is rarely granted at common law against an assault: see Clerk and Lindsell on Torts¹. The proper remedy, it is said, is to resort to the magistrates to obtain an order binding over the husband to keep the peace. So that a wife who wants a divorce, and protection from assault while she goes about the business of getting one is, on this view, to be driven to invoke a quasi-criminal remedy; and invoke it, I may add, in a situation where in the s 2 proceedings, which would be on foot at the same time, this court has to enquire into the reasonable probability of reconciliation. b

Authority apart, I can see no justification for compelling an applicant to such an undesirable and, indeed, grotesque performance. I see nothing to prevent the wife from adopting the straightforward course of asking this court to protect her against the ill-treatment of her husband in the course of s 2 proceedings. It would seem to me both that the court has a jurisdiction, and that there is amply sufficient nexus between the s 2 application and the relief sought by the injunction to entitle the court to exercise that jurisdiction to prevent molestation. c

So far, I have dealt with the matter on the footing of the definitions of 'matrimonial cause' and 'matter' in the 1925 Act. However, in the Family Division the expression 'matrimonial cause' now also includes an application under s 2 of the 1965 Act: see the Administration of Justice Act 1970, s 1 (2) and Sch 1; the Matrimonial Causes Act 1967, s 10 (1); r 2 (2) of the Matrimonial Causes Rules 1971. A good illustration of the point occurs in r 8 of the 1971 Rules, which begins: '(1) Every cause other than an application under section 2 of the Act of 1965 shall be begun by petition.' So that if there ever was any relevant distinction between a matrimonial cause and a matter—and, for the reasons I have already stated, I do not understand why there should have been—that distinction is relevant no longer. d

I now have to consider *Winstone v Winstone*². That was a decision of Winn J given in vacation, but on consideration after full argument. A wife who had been married for less than three years sought leave, under s 2 of the Matrimonial Causes Act 1950 (corresponding to s 2 of the 1965 Act), to present a petition for dissolution of marriage. While this summons was pending, she applied for an injunction to restrain her husband from interfering with her occupancy of the matrimonial home. It is to be observed that the application was for an injunction to restrain the husband 'from interfering with or molesting the wife in her occupation of the matrimonial home'. The wife did not apply, as she does here, merely for protection against assault and battery. Winn J said³: e

"The question which troubles me, and the question on which I invited counsel to help me, is whether, before the filing of a petition for divorce, the court has become so seised of the control of the matrimonial relations of these two parties that it has jurisdiction to grant such relief as is asked for today. It is said by counsel for the wife that, according to *RAYDEN ON DIVORCE*⁴ . . . "When a matrimonial suit is pending . . . the court will restrain one spouse from forcing his or her society upon the other, and from other acts of molestation"; It is plain, however, f

1 13th Edn (1969), p 274, para 492

2 [1959] 3 All ER 580, [1960] P 28

3 [1959] 3 All ER at 581, [1960] P at 34

4 7th Edn (1958), p 435 g

a under the Matrimonial Causes Rules, 1957, that a matrimonial cause is commenced by the filing of a petition which is before the court.'

Pausing there, that, as I have mentioned, is no longer the exclusive position because the filing of an originating summons under s 2 of the 1965 Act also commences a 'matrimonial cause'. Winn J continued¹:

b 'That means that a matrimonial suit cannot be considered to have been commenced until a petition is filed under the rules. By analogy, it is plain that no action is pending in the Queen's Bench Division until a writ is at least issued; therefore, in the special circumstances where an individual is required by some statutory provision to obtain leave before he issues a writ, that individual cannot commence and cannot be regarded as having commenced an action until he
c has with the leave of the court issued a writ.'

Then further:

d 'I find myself unable to accede to the cogent and helpful submissions of Mr. Hunter that, once any proceedings have been competently and effectively commenced, as these proceedings for leave to file a petition within three years have been commenced, an injunction may be granted for relief on a subject-matter falling outside the ambit, scope and effect of the proceedings in which the injunction is sought. Here the pending proceedings have as their only object the obtaining of the leave of the court to file a petition within three years. Once that leave is obtained, then of course the whole matrimonial relations of the
e parties will be the subject-matter of any petition which is filed.'

The judge went on to express regret that he had to take that view of his jurisdiction, because he recognised that it led to most inconvenient results.

It will be observed that Winn J in that case made two different approaches to the problem. First, on what I have called the question of basic jurisdiction, he took the
f view that, since (as was indeed the case at that time) the issue of an originating summons for leave to present a petition did not involve the commencement of a 'matrimonial cause', there were no proceedings within which he was entitled to grant any injunctive relief: 'no action, no injunction'. With respect, it appears to me that this overlooked the fact that at the time when the decision was given, the application for leave constituted a 'matter', and the rule of court then corresponding to RSC
g Ord 29, r 1, in terms conferred jurisdiction to grant an interim injunction during the pendency of a 'matter'. However, I have already explained that the situation today is different, in that even if there is any relevant distinction between granting an injunction in a 'matter' and granting an injunction in a 'cause', s 2 proceedings now fall within the extended definition of 'matrimonial cause'.

The second grounds of decision in *Winstone v Winstone*² were that Winn J considered
h that there was not a sufficient nexus between the principal relief being sought, namely leave to file a petition, and the ancillary relief, namely an injunction to restrain the husband from interfering with the wife's occupancy of the matrimonial home. The judge put it that the injunction fell outside the ambit, scope and effect of the proceedings in which the injunction was being sought. On this point, *Winstone v Winstone*², in my judgment, is to be distinguished from the case before me, for reasons which
j I have already explained. I am dealing only with an injunction against physical molestation and there is, to my mind, an amply sufficient nexus between the principal and the ancillary relief claimed.

1 [1959] 3 All ER at 581, [1960] P at 34

2 [1959] 3 All ER 580, [1960] P 28

*Winstone v Winstone*¹ was cited in the Court of Appeal in *Des Salles d'Epinoix v Des Salles d'Epinoix*². The circumstances there were that the wife issued an originating summons claiming maintenance under s 22 of the Matrimonial Causes Act 1965 on the grounds of the husband's wilful neglect to maintain her. The matrimonial home was on joint tenancy; and before the wife had issued the originating summons, the husband had left the home. While the summons was pending, the husband attempted to return to the matrimonial home. The wife refused to admit him; and the judge at first instance made an order permitting the husband to return to the matrimonial home and restraining the wife from preventing him from doing so. On appeal, it was held that the husband's claim for relief—namely, to return to the matrimonial home—did not arise out of the wife's cause of action under s 22, nor was it incidental thereto. In my judgment, the decision in *Des Salles d'Epinoix v Des Salles d'Epinoix*² was not based on a finding of lack of intrinsic jurisdiction, but on the finding that on the facts there was no sufficient connection between the substantive relief being sought by the wife and the injunctive relief being sought by the husband to justify the grant of the injunction. I refer in particular to the passages in the judgments where Willmer LJ said³:

'... I do not think that it is either necessary or desirable to express any view on the question whether there is jurisdiction to grant an injunction in circumstances such as those of the present case. What I do say is that I am abundantly satisfied that on the authorities it would be contrary to well established principle to grant any such injunction.'

He then referred to *Winstone v Winstone*¹ in terms which indicate that he approved *Winstone*¹ so far as it had been decided that there was insufficient nexus between the substantive and ancillary reliefs that were being sought. Similarly, Willmer LJ said⁴:

'It seems to me that, when one comes to apply that principle to the facts of the present case, it simply cannot be contended that the husband's claim to relief by way of injunction arises in any way out of the wife's cause of action, or is in any respect incidental to it.'

Sachs LJ said⁵:

'I have come unreservedly to the conclusion that, even if there were jurisdiction, and if in addition it was in principle open to the husband to seek the remedy that he claims in the course of these proceedings which originated under s. 22 of the Matrimonial Causes Act 1965, I would regard the granting of relief as a wrong exercise of judicial discretion... Clearly any injunction sought by a defendant or respondent to proceedings initiated by a plaintiff or applicant must bear some appropriate relation to the subject-matter of the relief claimed in the proceedings already initiated, proceedings which may either have been commenced, or in certain cases may be in course of being commenced. That relationship may naturally include, for instance, that of being molested simply by reason of having started proceedings, but the relationship must be material and must exist.'

He then referred to *Winstone v Winstone*¹ and said⁶:

'One of the later authorities on the subject is that already mentioned of *Winstone v. Winstone*¹. There WINN, J., referred to the need for any injunction

1 [1959] 3 All ER 580, [1960] P 28

2 [1967] 2 All ER 539, [1967] 1 WLR 553

3 [1967] 2 All ER at 542, [1967] 1 WLR at 558

4 [1967] 2 All ER at 544, [1967] 1 WLR at 560

5 [1967] 2 All ER at 545, 546, [1967] 1 WLR at 563

6 [1967] 2 All ER at 546, 547, [1967] 1 WLR at 564

- a** claimed being on a subject-matter within the ambit, scope and effect of the proceedings already before the court.'

Finally he said¹:

- b** 'The result is that in principle this application by the husband cannot be entertained by the court in these proceedings. Whether the correct phraseology is that of LINDLEY, L.J., in *Carter v. Fey*², where he referred to its not being competent for the defendant to make such a motion, or whether the correct phraseology is that of LOPES, L.J., in the same case, where he refers to the matter as an important question of practice, or whether one should look on the matter from the point of view of WINN, J., in the *Winstone* case³, where he dealt with it as a matter of jurisdiction, it does not seem to be necessary to decide. It is enough
- c** to say that on principle, I . . . consider the position to be clear that this court cannot entertain the husband's application.'

- On this state of the authorities, I consider that it open to me to grant the wife an injunction against molestation in proceedings for leave to file a petition for divorce, brought under s 2 of the 1965 Act. Had I also been asked to exclude the husband
- d** from the matrimonial home, I should have felt considerably more difficulty. It is true that *Des Salles d'Epinoix v Des Salles d'Epinoix*⁴ is not itself a s 2 case, but the Court of Appeal there refers to *Winstone v Winstone*³, which was a s 2 case, in terms which plainly indicate approval of the result. I doubt whether it is possible to read *Des Salles d'Epinoix*⁴ otherwise than as indicating that the Court of Appeal agreed with Winn J that a s 2 application could not support an injunction relating to occupancy of the
- e** matrimonial home for lack of a sufficient connection between the principal and subsidiary reliefs. The practical consequences can be most inconvenient, but the remedy, if there is one, does not fall to be considered in the present case.

Injunction granted to wife on her undertaking to issue proceedings under s 2 of the 1965 Act forthwith.

- f** Solicitors: *Boyle & Ormerod*, Aylesbury (for the wife).

R C T Habesch Esq Barrister.

- g** ¹ [1967] 2 All ER at 547, [1967] 1 WLR at 565
² [1894] 2 Ch 541
³ [1959] 3 All ER 580, [1960] P 28
⁴ [1967] 2 All ER 539, [1967] 1 WLR 553

R v Guilfoyle

COURT OF APPEAL, CRIMINAL DIVISION
LAWTON, SCARMAN LJ AND EVELEIGH J
9th MARCH 1973

Road traffic – Dangerous driving – Causing death by dangerous driving – Sentence – Disqualification for driving – Principles of sentencing – Categories of offences and offenders – Conviction because of momentary inattention or misjudgment – Relevance of driving record to period of disqualification – Cases in which custodial sentence appropriate.

Where a driver is convicted of causing death by dangerous driving and the accident was due to momentary inattention or misjudgment on the part of a driver who has a good driving record, he should normally be fined or disqualified for driving or obtaining a licence for the minimum statutory period, or a period not greatly exceeding it, unless there are special reasons for not disqualifying. If his driving record is indifferent, the disqualification should be longer, perhaps two to four years, and if it is bad he should be put off the road for a long time. For those who have shown a selfish disregard for the safety of other road users or of their passengers or a degree of recklessness, a custodial sentence with a long period of disqualification may well be appropriate, and if the driver has a bad driving record the period of disqualification should be such as will relieve the public of a potential danger for a very long time (see p 845 h j, post).

Notes

For the penalty for causing death by reckless or dangerous driving, see 33 Halsbury's Laws (3rd Edn) 624, 625, para 1053.

Appeal

On 14th December 1972 the appellant, John Kenneth Guilfoyle, was convicted in the Crown Court at Wakefield before Mr Recorder Walker of causing death by dangerous driving. He was fined £75, disqualified for four years and his licence was endorsed. He was further ordered to pass a driving test before his licence could be restored. He appealed against sentence on the ground that the sentence was too severe in all the circumstances of the case having regard to the facts that (a) he had lost his job as a lorry driver as a result of his disqualification; (b) he had no previous convictions; (c) he was only 19 years old; and (d) he was guilty of an error of judgment rather than of taking any deliberate risk. The facts are set out in the judgment of the court delivered by Lawton LJ.

M R Swift for the appellant.

LAWTON LJ. On 14th December 1972 at Wakefield Crown Court, after a trial before Mr Recorder Walker and a jury, the appellant was convicted of causing death by dangerous driving and was fined £75 to be paid at the rate of £1.50 per week. He was disqualified from holding or obtaining a driving licence for four years and his licence was endorsed. It was further ordered that he must pass a driving test before his licence could be restored. He now appeals against sentence by leave of the single judge.

The facts are of a very common kind. On 13th July 1972 at about 5.30 p m the appellant was driving his employer's flat-backed motor lorry along Durkar Low Lane in Wakefield. At the junction of that lane with Denby Dale Road, which was an unrestricted, two-lane dual-carriageway, the appellant stopped at the 'Give Way' sign. At that moment a Ford motor car and a motor van, both coming from the

a direction of Wakefield, turned left from Denby Dale Road, which was of course the major road, into Durkar Low Lane. A mini car containing three passengers and driven by a Mr Senior came along the major road, at the rear of the two vehicles turning left and in the centre of the traffic lanes. It was approaching the junction of the major road and Durkar Low Lane at a speed of about 50 m p h.

b It would appear both from a written statement which the appellant made after the accident and his evidence that he did not appreciate the presence of that mini car on the road, and the court can understand how that could come about; but it is no answer for the appellant to say, as he did, that he did not see the mini car. It was his duty, before coming out of the minor road on to the major road, to make sure that it was safe for him to do so, and as long as that mini car was there it clearly was not safe.

c The appellant brought his lorry out of the minor road, across the carriageway of the major road, intending to turn to his right towards Wakefield. Unfortunately that manoeuvre brought him into the path of the oncoming mini car. There was a collision and all the occupants of the mini car were hurt, and the driver of it died later from his injuries.

d As I have said, that is a very common type of accident. Clearly, on those facts, the appellant was guilty of causing death by dangerous driving and he has not sought to appeal against his conviction. What he is saying is that the penalties imposed on him, in all the circumstances, were too severe. He is a young man aged 19 of hitherto good character, and although he has not been driving very long his driving record is satisfactory. He drives for his living. He has had three jobs as a driver since leaving school. His wages are low—at the time of the trial they were just under £11 per week.

e The problem of sentencing which the learned recorder had to solve was probably a new one for him. Since 1st January 1972 many circuit judges and recorders have had to cope with similar problems for the first time. The experience of this court has been that there have been many variations in penalties. Some variations are inevitable because no two road accidents are alike, but there are limits to permissible variations and it may be helpful if this court indicates what they are.

f Cases of this kind fall into two broad categories; first, those in which the accident has arisen through momentary inattention or misjudgment, and secondly those in which the accused has driven in a manner which has shown a selfish disregard for the safety of other road users or of his passengers, or with a degree of recklessness. A subdivision of this category is provided by the cases in which an accident has been caused or contributed to by the accused's consumption of alcohol or drugs.

g Offenders, too, can be put into categories. A substantial number have good driving records, a fair number have driving records which reveal a propensity to disregard speed restrictions, road signs or to drive carelessly, and a few have records which show that they have no regard whatsoever for either the traffic law or the lives and safety of other road users.

h In the judgment of this court an offender who has been convicted because of momentary inattention or misjudgment and who has a good driving record should normally be fined and disqualified from holding or obtaining a driving licence for the minimum statutory period or a period not greatly exceeding it, unless of course there are special reasons for not disqualifying. If his driving record is indifferent the period of disqualification should be longer, say two to four years, and if it is bad he should be put off the road for a long time. For those who have caused a fatal accident through a selfish disregard for the safety of other road users or their passengers or who have driven recklessly, a custodial sentence with a long period of disqualification may well be appropriate, and if this kind of driving is coupled with a bad driving record the period of disqualification should be such as will relieve the public of a potential danger for a very long time indeed.

i When these principles of sentencing are applied to this case the result is as follows: the recorder did right to impose a fine, but, having regard to the appellant's limited

means and small wage, £75 was too much. The fine should be reduced to £50. The period of disqualification was much too long as the accident was caused by momentary inattention, not by reckless driving. Further, the appellant has a good driving record and is dependent on possessing a driving licence to earn his living. In the view of this court the period of disqualification should be reduced to 12 months. a

The single judge has queried whether the order requiring the appellant to take a driving test before regaining a full licence was appropriate, having regard to the fact that he earned his living by driving and there was nothing to show that he was not normally a good and careful driver. b

In the judgment of this court the order was properly made. The appellant, being only 19, could not have had more than two years' experience on the road and he probably had not had time to develop the intuitive reactions which years of driving inculcate in some drivers. For him an interruption of 12 months in his driving career will be a substantial one and it is in the public interest that his driving skill should be checked before he returns to driving as an occupation. In general the longer the period of disqualification the more important it is that there should be a driving test before the driver again obtains a full licence. c

To the extent indicated the sentence will be quashed and the appellant will be fined £50 and disqualified for 12 months. The fine will be paid in the instalments ordered by the trial judge. d

Appeal allowed; sentence varied.

Solicitors: *Catterrall, Pell & Moxon*, Wakefield (for the appellant).

S A Hatteea Esq Barrister. e

Thompson v Price f

QUEEN'S BENCH DIVISION

BOREHAM J

5th March 1973

Fatal accident – Damages – Assessment – Widow – Remarriage or prospects of remarriage – Dependent child – Damages payable for benefit of child – Whether widow's remarriage or prospects of remarriage to be taken into account in calculating damages for child – Law Reform (Miscellaneous Provisions) Act 1971, s 4 (1). g

In July 1969 the deceased, while riding as a passenger in the defendant's car, was killed in an accident. He was then 24 years old. He left a widow aged 22 and a son aged 19 months. In October 1971 the widow remarried. Her second husband accepted the son as a child of the family and consequently came under a legal obligation to maintain him. The widow, as administratrix of the deceased's estate, brought an action against the defendant in respect of the deceased's death. The defendant admitted liability. On the issue of damages the widow contended that, under s 4 (1)^a of the Administration of Justice Act 1971, no account was to be taken of her remarriage in assessing the damages payable both to herself and for the benefit of the child. h

^a Section 4 (1) provides: 'In assessing damages payable to a widow in respect of the death of her husband in any action under the Fatal Accidents Acts 1846 to 1959 there shall not be taken into account the remarriage of the widow or her prospects of remarriage.' i

Held – The effect of s 4 (1) of the 1971 Act was that in assessing the damages payable to the widow she should receive a sum sufficient not only to maintain herself but also to maintain her son on the assumption that she had neither remarried, nor would remarry, and therefore the burden of maintaining him would fall on her. The scope of s 4 (1) was, however, limited to damages ‘payable to a widow’; accordingly that proportion of the damages which would be awarded to the child for the benefit which he might have expected to receive, over and above ‘the cost of his keep’, if his father had not died, was to be assessed having regard to the fact that the widow had remarried (see p 850 b to f, post).

Notes

For actions under the Fatal Accidents Acts 1846 to 1959 and deductions from damages, see 28 Halsbury’s Laws (3rd Edn) 100, 101, 103, 104, paras 110, 113, and for cases on the subject see 36 Digest (Repl) 211-214, 1111-1132.

For the Law Reform (Miscellaneous Provisions) Act 1971, s 4, see 41 Halsbury’s Statutes (3rd Edn) 1029.

Cases referred to in judgment

Howitt (widow and administratrix of Richard Arthur Howitt) v Heads [1972] 1 All ER 491, [1973] 1 QB 64, [1972] 2 WLR 183.

Reincke v Gray [1964] 2 All ER 687, [1964] 1 WLR 832, CA, Digest (Cont Vol B) 570, 1194e.

Action

By a writ issued on 5th May 1972 Christine Mary Thompson, suing as administratrix of the estate of her deceased husband, Rodney George Emens (‘the deceased’), brought an action against the defendant, John Keith Price, claiming (i) under the Fatal Accidents Acts 1846 to 1959 damages for herself and for Sean, the infant child of the deceased, and (ii) under the Law Reform (Miscellaneous Provisions) Act 1934 damages for the deceased’s estate. On 27th July 1969 the deceased was a passenger in the defendant’s car, which was being driven by the defendant, when it was involved in a collision with other motor vehicles in consequence of which the deceased was fatally injured. The plaintiff alleged that the collision had been caused solely by the negligence of the defendant.

R D M Naish for the plaintiff.

T H K Berry for the defendant.

BOREHAM J. This is a claim by Christine Mary Thompson, who sues as the administratrix of the estate of Rodney George Emens, her late husband. The claim arises by reason of the death of Rodney George Emens, to whom I shall refer as ‘the deceased’, in the circumstances which are set out in the statement of claim. It is, for reasons which will appear, unnecessary for me to go into detail as to the circumstances of his death. It is sufficient to say this, that he died as a result of a road accident on 27th July 1969—that being the date of the accident—and his death followed within about 48 hours. Liability is admitted and I am, therefore, not concerned with the precise circumstances in which the deceased came by his injuries which so quickly led to his death. The only issue which is before me is one of quantum.

The plaintiff sues on behalf of herself and on behalf of her infant son, both of whom are, as is acknowledged, dependants of the deceased. The issue of quantum has really been narrowed to two points. Dependency has been agreed. The first point is: what is the correct multiplier that I should apply to that agreed figure? The second point is this: to what extent, if at all, has the infant’s claim been affected by the provisions of the Law Reform (Miscellaneous Provisions) Act 1971? Let me deal with the facts that are relevant to those matters. These are agreed facts; I

have heard no evidence. As I have said, the deceased died on 29th July 1969; I am told that he was then aged 24 years, and he left as his widow the present plaintiff who was then aged 22. He left too a son, Sean, who was born in January 1968. I am told—and there is no dispute, again, about this—that both the deceased and his wife were in good health. They had been married a comparatively short time. I need go no further so far as the deceased is concerned. a

On 1st October 1971 the plaintiff remarried. Again there is no dispute, apparently, that she has married a man whose health and financial status at present, and whose prospects for the future, are certainly as good as those of the deceased. It is in those circumstances that these two questions arise for my decision. I should add that it has been agreed that the global dependency was somewhere about £12 a week, and this has been apportioned as follows; the dependency of the plaintiff (the widow) is put at £9 a week—and that takes into account the fact that certainly for a number of years, but for her remarriage, she would have had the burden of maintaining her infant son—and the balance of £3 a week is apportioned as the dependency of the infant son. It is accepted on both sides—indeed, there is no ground for argument to the contrary—that the plaintiff's present husband has treated the child Sean as a child of his family and is, therefore, under a legal obligation to maintain and support that child. I doubt if the precise figures of his earnings have any relevance; as I have indicated, certainly his status financially, and his prospects, are as good as were those of the deceased. For the sake of completeness I should perhaps say this, that he has a gross annual income of about £1,800 a year at the moment; his net take-home pay is about £30 a week and of that he allows his wife the present plaintiff £15 a week, out of which she has to pay for food, clothes for the children, and insurance. b

I now apply my mind to the first of the questions that I have to resolve. It is this: the plaintiff's dependency as a widow being £9 a week, what is the correct multiplier to be applied in these circumstances? Of course, I have to take into account, so far as any judge is able to do so, all the contingencies which might be foreseen for the future. I am asked in particular—and it is here really that the dispute has arisen—to say that marriage nowadays is a notoriously unstable institution, and because of that I ought not to assume that the marriage which came to an end through the death of the deceased would have lasted for any substantial period of time, or at least I ought to say that it might not have done. I am prepared to accept that some marriages are unstable, and it may be that there is force in the contention that I ought not to regard the present plaintiff, who had been married for such a short time, as being able to demonstrate such a manifestly stable marriage as one who, perhaps had been married for 10 or 15 years and was still happy. As I have said, I face the possibility that any marriage might break up even after 10 to 15 years, but at the end of the day it seems to me that the argument between the parties is a very narrow one indeed, for the defendant contends that a proper multiplier in the circumstances of this case would be one of 16 years. The plaintiff, on the other hand contends that I ought to take the figure—a figure which is not unheard of—of 18 years, chiefly because the parties were so young, and the deceased would have had before him at least, one would have thought, another 40 years of active working life. It is said that there is no evidence here of any instability in that marriage, nor is there any evidence of any financial instability. I have come to the conclusion that neither of these contentions can be said to be wrong or exaggerated one way or the other. It seems to me that both are contentions which are within the reasonable limits that one would expect from experienced counsel, and I find myself unable, perhaps a little unwilling, to say that one is definitely wrong and the other is definitely right. I have come to the conclusion that both of them being, as I have said, within what I might call 'the reasonable bracket', I propose to take a multiplier mid-way between the two of them, namely, a multiplier of 17. Let me hasten to say that I have taken this part of the case comparatively shortly for, having regard to the 1971 Act, to which I must shortly make closer reference, there is no doubt or dispute c
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a that so far as the wife's claim is concerned and so far as the application of a multiplier is concerned, I cannot have regard to the fact that she has remarried.

b That brings me to the second point, on which I am told there is no authority. There has been a reference to the particular point which arises before me in a recent decision, a judgment of Cumming-Bruce J in *Howitt v Heads*¹. As the learned judge pointed out in that case, this point was never argued before him, and it was conceded in the matter before him that the damages apportioned or assessed in favour of the infant there should follow the same line, should be assessed by the same principles, as the damages for the widow. Therefore he had no need to decide the point which now arises in this case.

c Let me first deal with the 1971 Act. Section 4 (1) of the Law Reform (Miscellaneous Provisions) Act 1971 provides that in assessing damages payable to a widow in respect of the death of her husband in any action under the Fatal Accidents Act 1846 to 1959 there shall not be taken into account the remarriage of the widow or her prospects of remarriage.

d I shall have to come back to the wording of that section in a moment, but first the contentions as I understand them. The defendant argues thus: the law was clear and beyond doubt before the passing of the section that I have just referred to; before that section came into operation both the widow's damages and her children's damages would have been reduced if she remarried or if, in the opinion of the court, there were prospects of her doing so. *Reincke v Gray*² was cited in support of that proposition. As I understand the ratio of that decision of the Court of Appeal it was this, that the widow's damages would be reduced because of her remarriage and by 1964 her dependent children's damages would have been reduced because—or perhaps I should say 'if'—the children had become children of the family of her new husband. As I have already indicated, there is no doubt in this case that the child whom I am considering has become the child of the new family. That, as I understand it, is the basis of the argument of the defendant, and it goes on in this vein: that s 4 (1) of the 1971 Act expressly gives to the widow an advantage which, but for that subsection, she would not have had, that the child cannot have the same advantage unless it is expressly provided in the Act and, it
f is contended, there is no such provision.

This is emphasised by a reminder that the Fatal Accidents Act 1846, s 2, provides that the damages are to be divided for the benefit of those on whose behalf the action is brought in such shares as the jury—now the court—should decide. Basing himself on that, counsel for the defendant says: 'You have to assess the child's damages separately; the child cannot be brought within the provision of s 4 (1) of the 1971 Act, and the old rules must, therefore, apply as they did in *Reincke v Gray*².'

g That is one side of the coin. Counsel for the plaintiff contends, on the other hand, that although there is no authority to support it, one ought not to take into account in assessing the child's damages the fact that his mother has remarried. He does not dispute, as I understand it, that the law was as the defendant contends prior to the 1971 Act, but he says that the 1971 Act has changed all that, and he puts his argument thus:
h 'The intention of that subsection is clear, and the intention is to relieve a judge completely of the duty of assessing a widow's marriage prospects—an unpleasant duty, it is said—and to relieve entirely the widow from the unpleasant experience of hearing her marriage prospects assessed. The argument goes on: if the court accedes to the defendant's contentions that unpleasant duty of the judge and unpleasant experience for the widow will remain wherever there is a dependent child'. It does not in
i fact occur in this case because the plaintiff has already remarried; I do not have to assess any prospects; the remarriage is an accomplished fact. But it seems to me that at the end of all the arguments I have but one duty, and that is to construe the

1 [1972] 1 All ER 491, [1973] 1 QB 64

2 [1964] 2 All ER 687, [1964] 1 WLR 832

Act as I find it, and I am concerned, let me add, with the intention of Parliament only
so far as that intention is made manifest by the express terms of the subsection or
by implication from the words used in the subsection. That is the limit to which
I can go. Though I have a very good idea, though I might accept the plaintiff's
contention, that it was intended that judges should be relieved of this duty, I must,
I repeat, look to the Act to see how far that has been achieved. It seems to me that
the crucial words are these: 'In assessing damages payable to a widow in respect of
the death of her husband . . . there shall not be taken into account [her] remarriage . . .'
I go no further for present purposes. It seems to me that the meaning of the words
'damages payable to a widow' is clear. Of course, I have to go on and ask myself:
what is included in the damages, or what was included in the damages at the time
this Act was passed? What were the damages payable to a widow? But I think I
ought to ask that question, having regard to the terms of the subsection, on the
assumption that there was no remarriage. In my judgment, of what I might call
the 'global' sum referred to in s 2 of the 1846 Act, she should receive such proportion
as represents her loss, having regard to the fact that for some years, but for her
remarriage, she would be obliged to maintain her infant son. What would be apportioned
to the child would be such sum (if any) as he might have expected to receive,
or by which he might have expected to benefit, if his father had not died, which
sum or benefit would have been over and above what I might call 'the cost of his
keep' which, in my judgment, is included in the dependency of the mother. I remind
myself that in this case the dependency of £9 per week which is apportioned
to the widow does in fact take into account the fact, or assumes, that she will have
to support her infant son. The dependency of £3 per week apportioned to the child
is intended to represent what he would have received over and above the cost of
his keep. In those circumstances, it seems to me that there is no room for the argu-
ment that the son's proportion of damages is to be assessed on the footing that the
court takes no account of the remarriage of his mother for, as I repeat, the subsec-
tion provides that it is only in assessing damages payable to the widow that the fact
or prospect of her remarriage should be excluded from consideration. In those
circumstances, I hold that the son's damages should be assessed having regard to
the fact, and taking into account the fact, that his mother has remarried.

It seems to me that those findings lead to the following result: the plaintiff's de-
pendency is £9 a week, which I calculate roughly at £470 per annum. That figure,
multiplied by 17, produces a sum of £7,990.

I now have to consider the son's damages under the Fatal Accidents Acts. It is
accepted that he is entitled to at least £337.50, which is the computation of his £3
a week loss over a period of two years and three months, i.e. the period between
his father's death and his mother's remarriage. I think I am entitled also to take
into account—indeed, both counsel agree that I should—a modest sum for the
fact that he might have received rather more from his father who died than perhaps
he will in the future (and I say that, let me emphasise, without reflection on the
new father) because the son now has another family to compete with; there are
more heads already. Taking this into account, though I am sure he will be well
looked after and I have no doubt that he will be well provided for, I think that a
proper sum to award him is to round that figure of £337.50 up to £500.

*Judgment for the plaintiff; damages of £592 (including £92 special damages) awarded to
the deceased's estate, £7,490 to the plaintiff, and £500 to the child.*

Solicitors: Marcan & Dean, agents for E T Ray & Co, Leighton Buzzard (for the
plaintiff); Poole, Birstow & Co, Bedford (for the defendant).

E H Hunter Esq Barrister.

Marsden (J L) v Marsden (A M)

FAMILY DIVISION

SIR GEORGE BAKER P

12th FEBRUARY, 19th MARCH 1973

- b* Divorce – Financial provision – Application – Application subsequent to petition or answer – Leave of court – Circumstances in which leave to make application will be refused – Need to show reason or explanation why leave should be given – Need to show reasonable prospect that application will be successful – Application made after decree absolute and remarriage of other party – Application by husband for leave to apply for transfer order or variation of settlement order in relation to matrimonial home – Wife having entered into commitments on basis that no such application would be made – Remarriage of wife precluding her from seeking financial relief – Matrimonial Causes Rules 1971 (SI 1971 No 953), r 68 (1), (2).

- c* Divorce – Financial provision – Application – Application subsequent to petition or answer – Estoppel – Duty of party to disclose to other party intention to make application for financial relief – Failure to disclose causing other party to act to his prejudice – Party estopped from making application.

- The husband and wife married in November 1960. In September 1962 the husband bought a 99 year lease of the matrimonial home for £24,000, putting down half and borrowing the balance on mortgage. The house was put into the joint names of the parties for the purpose of avoiding death duties. In February 1972 the wife committed adultery with the second respondent. In April the husband issued a petition for divorce based on the wife's adultery. His prayers were for dissolution, custody of the two children of the marriage and costs against the second respondent. At the time of the petition the husband, having forgotten that the matrimonial home was in joint names, instructed his solicitor that it was owned by him absolutely. In May the wife's solicitor wrote that, as the home was in joint names, the wife would be clearly entitled to half the current market value of the equity in the house. The parties were at that time more concerned about the custody of the children; in June terms were agreed whereby the husband was to have custody and the wife care and control of the children; the wife agreed to procure that the husband became the owner of an aeroplane for the purpose of visiting the children in Switzerland, where the wife proposed to live. On 13th June the agreement was approved by the court. Apart from the maintenance and school fees of the children the only outstanding matters were the division of certain chattels and the valuation and transfer of the wife's share in the house. On 14th June the husband was granted a decree nisi; by agreement the wife and the second respondent submitted to an order to pay costs. On 12th July the decree was made absolute and on 5th August the wife married the second respondent. On 13th October the husband applied under r 68 (2)^a of the Matrimonial Causes Rules 1971 for leave to apply for a transfer of property order and a variation of settlement order in respect of the matrimonial home for the benefit of himself or the children. The application was dismissed. On appeal the husband restricted the proposed application to a transfer or settlement order for the benefit of the children.

- j a* Rule 68, so far as material, provides:

'(1) Any application by a petitioner or by a respondent spouse who files an answer claiming relief, for . . . (f) a transfer of property order, (g) a variation of settlement order, shall be made in the petition or answer, as the case may be.

'(2) Notwithstanding anything in paragraph (1), an application for ancillary relief which should have been made in the petition or answer may be made subsequently—(a) by leave of the court, either by notice in Form 10 or at the trial . . .'

Held – The appeal would be dismissed for the following reasons—

(i) there must be some reason or explanation before leave was given under r 68 (2) of the 1971 rules; it was clear that in accepting the financial proposals the wife had been influenced by the belief that she was entitled to half the equity in the matrimonial home; in those circumstances it would be wrong to allow the application (see p 854 h to p 855 b and h, post); a

(ii) before leave could be given the husband ought to show that there was some prospect of a transfer order or settlement being made and that he had failed to do (see p 855 h, post); b

(iii) the husband was under a duty to disclose to the wife that he intended to seek a transfer order; in consequence of his failure to do so she had put herself in a worse financial position than that in which she might otherwise have been and, because of her remarriage, had lost the right to apply for financial relief; the husband was therefore estopped from making the application (see p 856 b c, post). c

Notes

For the practice relating to applications for ancillary relief, see Supplement to 12 Halsbury's Laws (3rd Edn), para 987A, 8.

For the Matrimonial Causes Rules 1971, r 68, see 10 Halsbury's Statutory Instruments (Third Re-issue) 224. d

Cases referred to in judgment

Evans v Bartlam [1937] 2 All ER 646, [1937] AC 473, 106 LJKB 568, sub nom *Bartlam v Evans* 157 LT 311, HL, 50 Digest (Repl) 169, 1458.

Greenwood v Martins Bank Ltd [1932] 1 KB 371, 101 LJKB 33, 146 LT 32, CA; *aff'd* [1933] AC 51, [1932] All ER Rep 318, 101 LJKB 623, 147 LT 441, 38 Com Cas 54, HL, 3 Digest (Repl) 254, 707. e

Jackson (S M) v Jackson (E L) [1973] 2 All ER 395, [1973] 2 WLR 735.

Macnaghten v Paterson [1907] AC 483, 76 LJPC 94, 97 LT 442, PC, 27 (1) Digest (Reissue) 267, 1982.

Smallman v Smallman [1971] 3 All ER 717, [1972] Fam 25, [1971] 3 WLR 588, CA, 27 (1) Digest (Reissue) 315, 2330.

Spill v Spill [1972] 3 All ER 9, [1972] 1 WLR 793, CA. f

Cases also cited

Collins v Collins [1972] 2 All ER 658, [1972] 1 WLR 689, CA.

Gwyther v Boslymon Quarries Ltd [1950] 1 All ER 384, [1950] 2 KB 59.

Huxford v Huxford [1972] 1 All ER 330, [1972] 1 WLR 210. g

Appeal

This was an appeal by the husband against the order of Mr Registrar Stranger-Jones made on 17th November 1972 refusing his application, under r 68 (2) of the Matrimonial Causes Rules 1971¹, for leave to apply for a transfer of property order in respect of the former matrimonial home, a leasehold property purchased in the joint names of the husband and wife, and a variation of settlement order. The husband had been granted a decree nisi of divorce against the wife which had been made absolute on 12th July 1972. The appeal was heard in chambers but judgment was given in open court. The facts are set out in the judgment. h

A B Hollis QC and *A S Hacking* for the husband.

J W Miskin QC and *Neil Taylor* for the wife. i

Cur adv vult

19th March. **SIR GEORGE BAKER P** read the following judgment. This is an appeal from the dismissal on 17th November 1972 by Mr Registrar Stranger-Jones of the husband petitioner's application under r 68 of the Matrimonial Causes

a Rules 1971¹ for leave to apply for a transfer of property order, and a variation of settlement order under s 4 of the Matrimonial Proceedings and Property Act 1970. Leave is required if the application for ancillary relief should have been made in the petition under r 68 (1), but has not been made there (r 68 (2)). I will call the parties husband and wife for convenience, although the latter has remarried. The property in question is the wife's share of the former matrimonial home. The original summons did not mention the children, but before the registrar the alternative proposals
b seem to have been that the wife's share should be transferred to, or settled on, the husband or the children, girls aged 11 and five, and that possibly the husband would settle his own share as well. On this appeal, however, the sole proposal is that the application will be for the benefit of the children, and that the wife's interest shall be transferred to or settled on them, and for variation for their benefit of any post-nuptial settlement. It is accepted that the original summons will have to be
c amended.

The parties married on 10th November 1960. In September 1962 the husband bought a 99 year lease of a house for £24,000, putting down half and borrowing half on mortgage. In 1971 the wife met the second respondent, a man called Hundt, a German, and committed adultery with him at the beginning of 1972. Efforts at reconciliation were in vain and in February the husband consulted
d solicitors, issuing a petition on 11th April 1972 seeking dissolution of the marriage on the ground of irretrievable breakdown, based on the wife's adultery. His prayers were for dissolution, custody, and costs against the second respondent. In her acknowledgment of service the wife answered 'Yes' to all the matters in para 6, 'Do you wish to make any application on your own account for . . .', except the last, 'Variation of a settlement', to which she answered 'No'.

e The house was put into the joint names of the parties at least to avoid death duties. The wife contends that prior to its purchase she worked throughout the married life as a model, except for short periods before and after the births of the girls, and that she paid for many improvements to be made to the property. The husband, while accepting that she worked, denies that she contributed anything to the marriage financially. He agrees, however, that he has said on a number of
f occasions that the wife should receive something from the house, and that it was for the lawyers to work out what should be done. At the time the divorce petition was filed it seems that the husband forgot that the house was in their joint names and instructed his solicitor that it was owned by him absolutely. Some time after 5th March 1972 the wife said that she had a half share in the house and wanted it, and on 12th and 17th May her solicitor was writing that, as the house was in joint names,
g the wife would clearly seem to be beneficially entitled to one-half of the present market value of the house minus the mortgage. The problem which was exercising the minds of the parties and their advisers before the hearing of the divorce suit was the future of the children. On 18th May 1972 the husband took out a summons for custody and the wife a cross-summons. In his supporting affidavit the husband said that he was prepared to make a home in London for the children 'either at [the former matrimonial home], which is in the joint names of myself and the [wife], or in another house yet to be obtained'. The wife was anxious to remarry. Terms were agreed, and put before Faulks J on 13th June 1972, who appears to have been content with them. Broadly speaking, the terms were that the husband was to have the custody and the wife the care and control of the children, with arrangements for access and schooling, the husband to pay the school fees. A further term was that
h the wife was to procure that the husband became the owner of an aeroplane which she had available. This was for the purpose of visiting the children in Switzerland, the husband having a pilot's licence. The agreement further provided:

'9. No order for costs in the contested custody application. 10a. Maintenance for children and all other financial matters to be agreed or determined later.'

At that time the outstanding financial matters, apart from the maintenance and the school fees of the children, were the contents of the house, an MG motor car which was claimed by the wife, the transfer of the aeroplane and the value of the house and the method by which the wife's share would be transferred to her. No step was taken at any time to amend the petition. a

The suit was heard the following day by Faulks J who granted a decree nisi to the husband and gave leave to expedite the making of the decree absolute. By an agreement made on the previous day, but not included in the written terms, the wife submitted jointly with the second respondent to an order to pay £300 costs in the divorce suit. On 12th July the decree was made absolute, and on 5th August the wife married the second respondent. b

On 23rd June the wife's solicitor wrote, 'at some stage we have got to think about the beneficial ownership of the matrimonial home'; and he followed this with a letter, dated 5th July, dealing with the outstanding matters, in which he said: c

'(2) [The house.] This is in joint names and we think there should be a valuation made and we would like your suggestions as to how and when [the wife] should be paid her half share of the equity.'

The husband's solicitors replied: d

'We have discussed with [the husband] how your client's interest in the [house] is to be dealt with. Is [the wife] envisaging giving any part of her share to the children?'

Her solicitors then asked for a valuation, and on 29th September that was produced by John D Wood & Co: it was £58,000. Her solicitors again asked for the husband's proposals for settling her interests in the property. On 12th October, speaking of the transfer of the aeroplane and the MG motor car, the husband's solicitors said: 'Our client sticks by his bargain.' When the husband was pressed to deal with the wife's half share in the equity of the house, his solicitors replied that they had issued the summons dated 13th October 1972 which initiated the present application. On 3rd November 1972 the wife issued an originating summons under s 17 of the Married Women's Property Act 1882 in respect of the house and the motor car. e

Up to 13th October, therefore, there was no indication of any kind that the husband was contemplating asking for a transfer or was in any other way seeking to obtain the wife's share of the house. His solicitor says in an affidavit dated 6th February 1973: f

'... it is true that it was never specifically suggested to the [wife's] legal advisers that the [wife's] interest if any should be settled in whole or in part for the benefit of the children.' g

An affidavit from the wife's solicitor and another from his legal executive, Mr Greenwood, make it clear that they were advising the wife on the basis that she was entitled to the half share and that this had been agreed in principle. I must accept that the belief that she was entitled to half the equity of the house influenced both the advice which she was given and the agreement and decisions which were reached. h

The rule is clear. The application must be made in the petition. If it is not the leave of the court is required. This cannot mean that leave is to be given for the asking. I am not fettered of course by the previous exercise of the registrar's discretion. I must give it the weight it deserves but I am in no way bound by it: see *Evans v Bartlam*¹. No excuse or reason has been given for the omission of the application from the petition, and there is certainly no satisfactory explanation of the husband's change of mind: cf *Spill v Spill*². In my opinion there must be some i

¹ [1937] 2 All ER 646, [1937] AC 473

² [1972] 3 All ER 9, [1972] 1 WLR 793

a reason or explanation before the court gives leave under r 68 (2). The husband may have started off with the belief that he was the sole owner, although this is disputed by the wife, but he was very soon aware that the house was in their joint names. The wife's solicitor contends in his affidavit that the husband's decision to apply for the order was no more nor less than an afterthought, and one which was in direct contradiction of what the wife had all along been led to believe by the husband and his advisers. This seems to me to be a sound view, particularly as the original application b on 13th October was for transfer to the husband, and the idea of transfer to the children came later. The only alternative seems to me to be that the husband was as it were, keeping the ace of trumps up his sleeve until all the other matters had been disposed of, but I am certain that his solicitors would not have been a party to any such scheme. Moreover, when the terms of settlement and on the following day c the agreement about costs was before Faulks J, there being no prayer for transfer or variation in the petition, it was, I think, incumbent on the husband to disclose that he intended to apply at a later stage. The equity was the most substantial asset of all and the knowledge that it might be taken from the wife could have influenced the judge's view about the terms of settlement and the plans for the children. It is now said that this is an adulterous wife going off with a substantial asset; but that was d true at the time of the divorce. Moreover, this is a dangerous argument. Damages awarded for adultery used often to be settled on the children. Such damages can now no longer be recovered, since the law, for better or worse, has been changed. It would, I think, be very undesirable for a court to appear to be trying to reintroduce the concept of damages, now against the wife, by taking away her share in the matrimonial home, or any other asset, and settling it on the children, solely in order that she should not take such an asset with her into her new marriage, to the possible e benefit of her new husband; and particularly is this so where the wife and the new husband have the care of the children. A woman should be allowed to use her assets in her own way, just as a former husband, subject to his duty to maintain the children, can use his assets in his own way, and it is only if a mother is unstable, or cannot be trusted to consider the children, or for some other compelling reason, that a court should curtail her freedom to handle her own affairs. There is no evidence here that f either party is unsuitable or untrustworthy in relation to the children; the husband has agreed to the wife having care and control of the children and I cannot see any reason why a transfer or like order should be made. Because of the provisions of s 7 (4) of the Matrimonial Proceedings and Property Act 1970, the mother, having remarried, has lost her right to apply for an order under s 4 of that Act for a transfer or settlement etc of property unless such application was initiated before her remarriage: see g *Jackson (SM) v Jackson (EL)*¹. Counsel for the husband says that what he wants is for the court to be seised of this matter so that it can investigate the whole circumstances and decide if the wife's interests or any part of the wife's interest should be settled on the children. I think before I give leave I ought first to be satisfied that there is some prospect of a transfer order or settlement being made. I do not think there is any such chance, but in any event, in all the circumstances of this case, I think h it would be wrong as a matter of discretion to allow this application.

But that is not the end of the matter because counsel for the wife submits there is an estoppel. First the husband was under a duty to disclose that he intended to seek a transfer order: see *Greenwood v Martins Bank Ltd*² and *Spencer Bower on Estoppel*³. Secondly there is an estoppel by election: see *Macnaghten v Paterson*⁴ and *Spencer Bower*⁵. The wife has put herself in a worse position than she might otherwise

i 1 [1973] 2 All ER 395, [1973] 2 WLR 735

2 [1932] 1 KB 371; *aff'd* HL [1933] AC 51, [1932] All ER Rep 318

3 2nd Edn (1966), p 49, para 59

4 [1907] AC 483

5 2nd Edn (1966), p 285, para 291

have been in and has acted to her detriment in that she agreed to pay the £300 costs although there was no claim against her and she could not have been forced to do so. She agreed to pay her own costs in the custody proceedings which are said to be upwards of £1,000; she remarried thus losing her right to periodical payments and to any transfer of property order under s 4 of the 1970 Act; she agreed to hand over the aeroplane; she has debts which she was expecting to be able to discharge with the money from her share in the equity and finally she was looking to her share to finance additional accommodation for the children in Switzerland. I think her case is unanswerable, and the husband has no longer any ground, or indeed right, on which to make this application. He has made an agreement; he says he 'sticks by his bargain'. Indeed, he is bound to do so: see *Smallman v Smallman*¹. He cannot now introduce a new and vital term into the financial arrangements and the agreement about the children made on the dissolution of this marriage. He is too late. I think the registrar was right and I dismiss this appeal.

Appeal dismissed.

Solicitors: *Withers* (for the husband); *Theodore Goddard & Co* (for the wife).

R C T Habesch Esq Barrister.

Ashmore, Benson, Pease & Co Ltd v A V Dawson Ltd

COURT OF APPEAL, CIVIL DIVISION

LORD DENNING MR, PHILLIMORE AND SCARMAN LJJ

12th, 13th FEBRUARY 1973

Contract – Illegality – Performance – Illegal performance by one party – Claim for damages by other party – Participation in illegality by party claiming damages – Contract of carriage – Contract by defendants to carry plaintiffs' goods – Weight of defendants' vehicle when goods loaded in excess of statutory limit – Plaintiffs' transport manager present when goods loaded – Manager raising no objections – Goods damaged in course of journey – Claim by plaintiffs for negligence and/or breach of contract – Whether plaintiffs debarred from claim by reason of illegal performance of contract.

The plaintiffs had manufactured a large piece of engineering equipment, a 'tube bank', weighing 25 tons which was to be transported from their works to a port for shipment. B, the plaintiffs' transport manager, arranged for the load to be transported by the defendants, a small road haulage firm which had ten articulated vehicles. The defendants arranged to take the load on one of their vehicles and a price was agreed. B was present when the tube bank was loaded on to the defendants' vehicle. B was familiar with the statutory regulations governing the carrying of loads on motor vehicles. Under reg 73 (2) of the Motor Vehicles (Construction and Use) Regulations 1966^a the maximum laden weight of the defendants' vehicle was 30 tons. As the unladen weight of the vehicle was ten tons, the total weight exceeded the prescribed maximum by five tons. The carriage of the tube bank by that vehicle was therefore unlawful under s 64 (2)^b of the Road Traffic Act 1960. Nevertheless

¹ [1971] 3 All ER 717, [1972] Fam 25

^a SI 1966 No 1288

^b Section 64 (2), so far as material, is set out at p 858 e f, post

- a** B raised no objection to the use of the vehicle; nor did he point out that the appropriate vehicle to carry the load was a 'low-loader', which the defendants did not possess. The vehicle started on its journey and, half way to the port, the vehicle with its load toppled over; damage was done to the tube bank. The plaintiff brought an action for damages alleging negligence and/or breach of contract on the part of the defendants. The trial judge held that the contract between the plaintiffs and defendants was lawful when made, that the plaintiffs had relied on the defendants to carry out the contract lawfully and that the defendants could not, therefore, plead the illegality of the contract as performed as a defence to the plaintiffs' claim. On appeal,
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c **Held** – On the evidence B must have realised, when he saw the 25 ton tube being loaded on to the defendants' articulated vehicle, that the load was in breach of the regulations. Accordingly, even if the contract were lawful at its inception, its performance was unlawful and the plaintiffs, through B, had participated in the illegality since B had sanctioned the loading of the vehicle with a load in excess of the regulations. Having participated in the illegal performance of the contract the plaintiffs were debarred from claiming damages in respect of the accident and the appeal would be allowed (see p 859 h, p 860 f to h, p 862 f, g h and j and p 863 c d, post).

- d** Dicta of Atkin LJ in *Anderson Ltd v Daniel* [1924] 1 KB at 149, of Jenkins LJ in *B and B Viennese Fashions v Losane* [1952] 1 All ER at 913, and of Lord Denning MR in *J M Allan (Merchandising) Ltd v Cloke* [1963] 2 All ER at 261 applied.

Notes

- e** For actions on contracts involving illegality, see 8 Halsbury's Laws (3rd Edn) 148-150, para 257, and for cases on the subject, see 12 Digest (Reissue) 328-331, 2365-2390.

For the Road Traffic Act 1960, s 64, see 28 Halsbury's Statutes (3rd Edn) 241. As from 1st July 1972 s 64 of the 1960 Act has been replaced by s 40 of the Road Traffic Act 1972.

- f** For the Motor Vehicles (Construction and Use) Regulations 1966, reg 73, see 22 Halsbury's Statutory Instruments (2nd Re-issue) 242. The 1966 regulations were revoked and replaced as from 1st May 1969 by the Motor Vehicles (Construction and Use) Regulations 1969 (SI 1969 No 321) which were in turn revoked and replaced as from 13th February 1973 by the Motor Vehicles (Construction and Use) Regulations 1973 (SI 1973 No 24).

Cases referred to in judgments

- g** *Allan (J M) (Merchandising) Ltd v Cloke* [1963] 2 All ER 258, [1963] 2 QB 340, [1963] 2 WLR 899, 61 LGR 304, CA, 12 Digest (Reissue) 337, 2425.
Anderson Ltd v Daniel [1924] 1 KB 138, 93 LJKB 97, 130 LT 418, 88 JP 53, 22 LGR 49, CA, 2 Digest (Repl) 159, 1162.
B and B Viennese Fashions v Losane [1952] 1 All ER 909, [1952] 1 TLR 750, CA, 12 Digest (Reissue) 328, 2371.
- h** *St John Shipping Corp v Joseph Rank Ltd* [1956] 3 All ER 683, [1957] 1 QB 267, [1956] 3 WLR 870, [1956] 2 Lloyd's Rep 413, 12 Digest (Reissue) 329, 2372.
Waugh v Morris (1873) LR 8 QB 202, [1861-73] All ER Rep 941, 42 LJQB 57, 28 LT 265, 1 Asp MLC 573, 12 Digest (Reissue) 289, 2089.

i Appeal

By a writ issued on 12th August 1968 the plaintiffs, Ashmore, Benson, Pease & Co Ltd ('Ashmores'), brought an action against the defendants, A V Dawson Ltd ('Dawsons'). Ashmores alleged that, by an oral agreement made in February 1967 Dawsons agreed to transport two 25 ton tube banks for Ashmores from Stockton-on-Tees to Hull for shipment to Poland; that Dawsons received the goods on 7th February; that during the journey and whilst under the control and responsibility of Dawsons

one of the tube banks toppled over with the lorry on which it was being carried by Dawsons and was damaged; that it was an implied term of the agreement that Dawsons should take all reasonable care to transport the tube banks safely and to ensure that they were delivered undamaged; that the accident and the damage to the tube bank was caused or permitted by the negligence of Dawsons and further by breach of their duty under the agreement: that as a result of the accident and damage and of Dawsons' negligence and breach of contract Ashmores had been put to the expense of repairing the tube bank at the cost of £2,225, and Ashmores claimed damages for that sum. On 25th July 1972 at Newcastle-upon-Tyne Waller J awarded Ashmores £2,745 damages, i.e. £2,225 and £520 interest thereon at the rate of 6 per cent from 13th August 1968 to the date of judgment. Dawsons appealed.

C W G Ross-Munro QC and Mary Hogg for Dawsons.
Humphrey Potts QC and Bruce McIntyre for Ashmores.

LORD DENNING MR. In February 1967 a big piece of engineering equipment called a tube bank was being carried from Stockton-on-Tees to Hull where it was to be shipped to Poland. It was very heavy. It weighed 25 tons. It was loaded on an articulated lorry. Halfway to Hull that lorry with its load tipped over. Damage was done to the load. It cost £2,225 to repair. The manufacturers claim damages from the hauliers. In answer the hauliers plead that the load was too heavy for the vehicle, and that the contract of carriage, or the performance of it, was illegal.

The relevant regulations are the Motor Vehicles (Construction and Use) Regulations 1966¹. They were made by virtue of the Road Traffic Act 1960, s 64. Section 64 (2) says:

‘... it shall not be lawful to use on a road a motor vehicle or trailer which does not comply with any such regulations as aforesaid ...’

In the present case the vehicle was an articulated vehicle with a tractor and trailer. Under reg 73 (2) the maximum weight laden was specified as 30 tons. Now the unladen weight of the vehicle was ten tons. This load (consisting of the tube bank) was 25 tons. So the total weight laden was 35 tons. So it was five tons over the regulation weight. Furthermore, the tube bank was top heavy. It had fittings on the top which made its centre of gravity high. Not only was it in breach of the regulations, but it was a dangerous and unsafe load to be carried on this vehicle along the roads of England. The evidence showed clearly that the only vehicle suitable for this load was a ‘low loader’, which is underslung so that it can take heavier weights and bigger loads. So the expedition was certainly illegal.

I turn now to consider the contract of carriage. The makers of the tube bank were Ashmore, Benson, Pease & Co Ltd of Stockton-on-Tees, the plaintiffs. Their transport manager was a Mr Bulmer. His assistant was Mr Jones. Two of these tube banks were to be sent from the works at Stockton-on-Tees to the port of Hull. Mr Bulmer told Mr Jones to arrange for the carriage of the two tube banks and to give the work to A V Dawson Ltd, the defendants. That was a small firm in which the principals were Mr Arthur Vernon Dawson, the father, and Mr Maurice Dawson, the son. This firm had ten articulated vehicles. The biggest of them was only a 30 tonner. They had no low loaders. They had worked for Ashmores for several years. Mr Jones knew the whole of their fleet well; and Mr Bulmer had known it for some six months. On getting the instructions, Mr Jones telephoned Dawsons and spoke to Mr Maurice Dawson, the son. He suggested that Maurice Dawson should come up and see the nature of the load. Maurice Dawson did so. The weight of it was shown plainly on the plate and on each tube bank and on the case. It

a was '25 tons'. It was arranged that Dawsons should take the loads. The price was arranged; it was £55 for the trip for each of the two articulated vehicles. If it had been on low loaders (which Dawsons had not got), the price would have been £85 or more for each; but here it was £55.

b Later that day Dawsons sent two of their drivers with the articulated vehicles to get the two loads. The tube banks were loaded on to the trailers. Mr Bulmer was there for a short time. He saw them loaded, and so did Mr Jones. The tube banks were firmly secured by chains.

c Early next morning the two drivers came and set off on the journey for Hull. When they were about halfway there, the leading vehicle toppled over. It was driven by Mr Harvey, the best and most experienced driver that Dawsons had. Mr Harvey was asked the cause: 'What do you say caused your lorry to topple over?' He answered: 'The camber in the road to the left plus the weight of the load, plus the height of the load.' The judge found that Mr Harvey made an error of judgment. But that was not the real cause of the toppling over. The real cause was the overweight. The articulated lorry was a most unsuitable vehicle on which to carry it. The whole transaction was illegal, being in breach of the regulations. Assuming, however, that Mr Harvey was negligent, the question is whether the illegality prevents Ashmores from suing for that negligence. This depends on whether the contract itself was unlawful, or its performance was unlawful.

d The first question is whether the contract of carriage, when made, was lawful or not. The judge found that it was lawful, because it could have been lawfully performed. He cited *Waugh v Morris*¹ and said:

e 'I find that this contract was concluded between Jones on behalf of [Ashmores] and Maurice Dawson on behalf of [Dawsons]. I find that Jones was relying on Maurice Dawson and his company to carry out the contract, a contract which could perfectly easily be carried out lawfully, and that he relied on [Dawsons] to do so. It was not a term of the contract that it should be carried in any particular lorry. The contract was concluded at a time when Mr Jones was asking Mr Maurice Dawson to look at the load and say that he could carry it for the sum offered.'

f I am not altogether satisfied with that finding. Mr Jones admitted that he knew a little about motor vehicle construction and the regulations. He was asked by counsel for Dawsons: 'You knew, for example, that there were specific loads for articulated lorries, didn't you?' and he said: 'I would say yes.' I would have thought that Mr Jones, being in the business, would have known that the lorries which g Dawsons were going to provide could not lawfully carry these loads.

h Although I have these misgivings, I am prepared to accept the judge's finding that the contract was lawful when it was made. But then the question arises: was it lawful in its performance? The judge's attention does not seem to have been drawn to this point. Yet there are authorities which show that illegality in the performance of a contract may disable a person from suing on it, if he participated in the illegality. This was pointed out by Atkin LJ in *Anderson Ltd v Daniel*², in a passage which was quoted by Devlin J in *St John Shipping Corp'n v Joseph Rank Ltd*³:

i "The question of illegality in a contract generally arises in connection with its formation, but it may also arise, as it does here, in connection with its performance. In the former case, where the parties have agreed to do something which is prohibited by Act of Parliament, it is indisputable that the contract is unenforceable by either party. And I think that it is equally unenforceable by

1 (1873) LR 8 QB 202, [1861-73] All ER Rep 941

2 [1924] 1 KB 138 at 149

3 [1956] 2 All ER 683 at 686, 687, [1957] 1 QB 267 at 282

the offending party where the illegality arises from the fact that the mode of performance adopted by the party performing it is in violation of some statute, even though the contract as agreed upon between the parties was capable of being performed in a perfectly legal manner.' a

That passage was further approved by Jenkins LJ in *B and B Viennese Fashions v Losane*¹ where he said, 'that illegality in the performance of a contract may avoid it although the contract was not illegal ab initio'. b

In this case the parties entered into the performance of the contract when Dawson's driver took the articulated vehicle (the 30 tonner) up to Ashmores' works to pick up this load. Mr Bulmer, the transport manager, came along and saw it. Mr Jones, his assistant, was there. Both saw this 25 tons tube bank being loaded on to the articulated lorry. Mr Bulmer must have known that this was illegal; and Mr Bulmer's knowledge would affect Ashmores. Mr Jones was asked: 'Mr Bulmer would know the specific loads for articulated lorries, would he not? A Like the back of his hand, yes'. Then as to these particular lorries, Mr Jones was asked: c

'Q Mr Bulmer would have had all the knowledge in the world and would have known what weight these lorries were permitted to carry but you didn't know? A Well, I would say he would have a good idea what they would carry, yes.' d

Now Mr Bulmer was not called to give evidence. The reason was because he left the employment of Ashmores some years ago and had gone to Zambia. But he had given a statement in which he had said:

'Identical loads to the one in question have been carried on similar vehicles belonging to G Stiller (Haulage) Ltd, Middleton St George, Darlington, completely without incident.' e

On that evidence I think that Mr Bulmer must have known that these articulated lorries of Dawsons were only permitted to carry 20 tons. Nevertheless, realising that 25 tons was too heavy—much too heavy—for them, he was content to let them carry the loads because it had happened before without trouble. He was getting the transport done cheaper too by £30 saved on each trip by each load. Not only did Mr Bulmer know of the illegality; he participated in it by sanctioning the loading of the vehicle with a load in excess of the regulations. That participation in the illegal performance of the contract debars Ashmores from suing Dawsons on it or suing Dawsons for negligence. I know that Dawsons were parties to the illegality. They knew, as well as Mr Bulmer, that the load was overweight in breach of the regulations. But in such a situation as this, the defendants are in a better position. f
In pari delicto, potior est conditio defendentis. g

I would therefore allow the appeal and enter judgment for the Dawsons.

PHILLIMORE LJ. I agree; and indeed I would go further, in that in my judgment this contract was illegal from its inception. The learned judge accepted Mr Jones's evidence—to use his own word—'completely', although Mr Jones, on the very vital question of whether this type of articulated lorry would have specific loads permissible, contradicted himself. He preferred Mr Jones's evidence to that of either Mr Maurice Dawson or his father; and indeed he went so far as to say that he thought that he was not satisfied that a lengthy conversation which Mr Maurice Dawson had described had ever taken place. Now no doubt there was some material for criticising the evidence both of Mr Maurice Dawson and of his father. That is not altogether surprising since the events in question took place in February 1967 and the case was not brought to trial until the summer of 1972. In the course of Mr Maurice Dawson's h
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- a evidence he said that after he had seen these cases of machinery which they were to transport, he had a conversation with Mr Bulmer, and he said he told Mr Bulmer that he thought that these articles would be better carried on low loader types of transport; to which the answer that Mr Bulmer gave was that there was not time because they had to be at the docks at Hull on the following morning; and he then proceeded to suggest that in his reluctance to carry these articles on articulated vehicles Mr Maurice Dawson was actuated by fear of a gentleman called Peter Sunter, who apparently ran a low loader transport business and would report to the authorities anyone whom he was able to detect as carrying excessive loads in articulated lorries. He then described how Mr Bulmer had said that a firm called Stillers of Darlington had carried similar weights in their vehicles and had done so without difficulty. It was quite a lengthy conversation which was described, and I find it impossible to hold that this was entirely invented. Moreover, it is exactly in line with a conversation which the father spoke to as having taken place during the course of a telephone conversation which he had with Mr Jones. He said that Mr Jones had told him that these loads were 25 tons each; he had said that they should go by low loader vehicles; and the answer to that was that Mr Jones said he knew that they should, but that Mr Bulmer was trying to economise on transport costs and had given the job to Dawsons for that reason; that he then went on to describe how Stillers had carried similar loads on the articulated lorries without difficulty. It is to be observed that in a statement which Mr Bulmer made in the summer of 1968 he said that 'Identical loads to the one in question have been carried on similar vehicles belonging to G Stiller (Haulage) Ltd, Middleton St George, Darlington, completely without incident.' It seems to me that those conversations to which the father and the son deposed are consistent and consistent only with this contract having been deliberately given to Dawsons in the knowledge that it involved a breach of these regulations and in order to economise on the job.
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For those reasons also I would allow this appeal.

- f **SCARMAN LJ.** I also would allow this appeal; but, for myself, I think that this court ought not to disturb the learned judge's finding that the contract was lawful in its inception. The only way in which his finding on that issue can be attacked appears to me to be by placing some reliance on the evidence of one or other or both of the two Dawsons. This court has not had the benefit enjoyed (if that is the correct term) by the judge of having seen those gentlemen in the witness box. Commenting on their evidence generally, he said: 'I found their evidence completely unsatisfactory.' In the face of that sweeping condemnation of their credibility, I am not prepared to speculate as to how much of the Dawsons' evidence has some element of truth and how much has not. If, therefore, one puts on one side, as I think this court must, the evidence of the two Dawsons, one is left with the evidence of Mr Jones. The judge accepted Mr Jones as a reliable witness. When one turns to the evidence of Mr Jones, it is clear that, if his account of the two conversations with Maurice Dawson, which I think constituted the contract, is accurate, then this contract was capable of a lawful performance. Mr Jones describes first a telephone conversation, when he told Mr Maurice Dawson that he had two tube banks weighing 25 tons to go to Hull to be there at 8 a.m. on Wednesday morning. He then said that he told Mr Dawson that it would be advisable to come up and see the load to see what his vehicles would be carrying. At that moment, assuming that Mr Dawson had shown himself interested in this offer, Mr Jones has plainly suggested to Mr Dawson a job of carrying these two 25 tons loads to Hull, and had invited Mr Dawson to take a look at the loads and to decide what vehicles should carry it. On the Tuesday—I do not think it is clear whether it was Tuesday morning or Tuesday afternoon—Mr Maurice Dawson did come to Ashmores. He went to the site where the tube banks were standing. He saw them and decided to accept the offer. Mr Dawson made no demur as to the feasibility of carrying the loads; and that was the
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contract. Even if Mr Jones was aware at the time that none of the Dawson-owned articulated lorries could lawfully carry this load, it is not to be implied against him that he had put Dawson on terms that these loads were to be carried in Dawson articulated lorries. It was left to the Dawsons to carry the loads in vehicles that they thought appropriate. The contract was, therefore, capable of being performed lawfully. a

The next question is, was this contract lawfully performed? It was not. The loads were carried on two articulated lorries. The all-up weight of each lorry was well over the 30 tons which each was permitted by law to carry. There was therefore a breach of s 64 (2) of the Road Traffic Act 1960. The Dawsons, of course, knew that the performance of the contract was illegal. The question is, did Ashmores, the plaintiffs? The issue of illegal performance, as distinct from illegal formation, was neither discussed nor expressly decided by the judge. It was raised at the trial, though not mentioned in the pleadings. It is raised in this court and it is our duty to consider it. The critical factor is the knowledge of two men, Mr Bulmer and Mr Jones. Mr Bulmer, for the reasons given by Lord Denning MR, was unable to give evidence at the trial; but it is clear that Mr Bulmer did go down to the site where these tube banks were standing and for a time watched them being loaded on to the two Dawson lorries. Mr Jones was there too. Both Mr Bulmer and Mr Jones were very well aware of the nature of the Dawson fleet of lorries. Both of them now knew, if they did not know before, that loads were being placed on articulated lorries. It is said, however, that neither of them knew all the facts constituting the illegality of this performance, because there is no specific evidence that either knew that the unladen weight of these articulated lorries was ten tons each. The court in my view must apply its common sense to the evidence and the materials that it has on this—more especially because in express terms the judge did not deal with it. It is clear from the evidence that Mr Bulmer was well aware of the regulations; Mr Jones said that Mr Bulmer knew them like the back of his hand; further, in my opinion, Mr Bulmer must have known the carrying capacity of the two Dawson lorries he saw being loaded. It would be shutting one's eyes to the obvious were one to say that, as Mr Bulmer watched these loads being placed on these lorries, he was not aware that the lorries were ten tons or thereabouts unladen. He knew the weight of the two loads; he knew the regulations. He must have known that Dawsons were about to commit a breach of the law. My own view is that, had Mr Jones himself addressed his mind to the problem, he also would have been aware of the facts constituting this infringement of the law. But it is enough for the purposes of judgment if Mr Bulmer knew. The question now arises, and it is really a question of law, whether, Mr Bulmer being the transport manager of Ashmores, his knowledge would be sufficient to impose on Ashmores the consequences of being parties to an illegal performance of the contract. Mr Bulmer was their responsible official. But knowledge by itself is not, I think, enough. There must be knowledge plus participation. On this point I would respectfully adopt the language of Lord Denning MR in *J M Allan (Merchandising) Ltd v Cloke*¹ when he said: b

'I desire to say that where two people together have the common design to use a subject-matter for an unlawful purpose, so that each participates in the unlawful purpose, then that contract is illegal in its formation: and it is no answer for them to say that they did not know the law on the matter.' c

What is applicable to formation is equally applicable to performance. There must be some degree of assent to the illegal performance. In *B and B Viennese Fashions v Losane*² Jenkins LJ recognised, I think, the necessity to assent to the illegality; he said³: d

¹ [1963] 2 All ER 258 at 261, [1963] 2 QB 340 at 348

² [1952] 1 All ER 909

³ [1952] 1 All ER at 913 e

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'It is plain from *Anderson, Ltd. v. Daniel*¹ that illegality in the performance of a contract may avoid it although the contract was not illegal ab initio. That being so, one has to consider whether the mode in which the contract was performed, or purported to be performed, in this case sufficed to turn it into an illegal contract.'

A little further on he said²:

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'The plaintiff chose, in purported performance of the contract, to deliver utility garments without an invoice. As a performance of the contract, that was clearly an illegal performance in view of the provisions of art. 10 (1). The defendant firm accepted the goods so delivered and disposed of them.'

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In the present case Mr Bulmer could have stopped the loading when he went down to watch it being done. He did not do so, with all his knowledge and experience; and I am driven to the conclusion that he was a participator in the illegality. For these reasons I think this performance was illegal and that Ashmores, through Mr Bulmer, participated in that illegal performance. I would allow the appeal.

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I would add one word on a point which was discussed in the course of argument but which does not require to be considered for the purposes of our decision. Counsel for Dawsons at the trial was anxious to call an engineer to explain the circumstances and perhaps the cause of the accident. When he sought to call this witness he was confronted by the learned trial judge with RSC Ord 38, r 6 (1), which says:

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'In an action arising out of an accident on land due to a collision or apprehended collision, unless at or before the trial the Court otherwise orders, the oral expert evidence of an engineer sought to be called on account of his skill and knowledge as respects motor vehicles shall not be receivable [unless, in effect, a copy of a report from him containing the substance of his evidence has been made available to the other side before the hearing].'

f

The judge would not permit the engineer to be called, taking the view that the overturning of this lorry when it struck the grass verge of the highway was a collision. Whatever may be the meaning of the word 'collision' (and I accept that there can be a collision between a moving object and a stationary body), the overbalancing of a great lorry because of contact with a grass verge does not seem to me to amount to collision. But, be that as it may, it is unfortunate that the judge shut out the evidence of the expert on a point such as this; for the rule plainly confers on the court a discretion.

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In my judgment the discretion should have been exercised in favour of the Dawsons. Had the engineering evidence caused any surprise or difficulty to the other side, the surprise could have been adequately dealt with by adjournment.

Appeal allowed.

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Solicitors: *L Bingham & Co*, agents for *Doberman, Richardson, Broady & Horsman*, Middlesbrough (for Dawsons); *Jacksons, Monk & Rowe*, Middlesbrough (for Ashmores).

L J Kovats Esq Barrister.

¹ [1924] 1 KB 138

² [1952] 1 All ER at 913

R v Bogacki and others

COURT OF APPEAL, CRIMINAL DIVISION

ROSKILL LJ, TALBOT AND BOREHAM JJ

19th MARCH 1973

Road traffic – Vehicle – Taking without authority – Taking – Unauthorised assumption of possession coupled with some movement of vehicle – Theft Act 1968, s 12 (1).

The mere unauthorised assumption of possession of a vehicle is not sufficient to constitute the offence of 'taking' the vehicle without authority under s 12 (1)^a of the Theft Act 1968. For the offence to be established it must be shown that, following the unauthorised assumption of possession or control, some movement, however small, of the vehicle took place (see p 867 f g, post).

Notes

For taking a vehicle without authority, see Supplement to 10 Halsbury's Laws (3rd Edn) para 1475c.

For the Theft Act 1968, s 12, see 8 Halsbury's Statutes (3rd Edn) 790.

Case cited

R v Roberts [1964] 2 All ER 541, [1965] 1 QB 85, CCA.

Appeal

On 13th July 1972 at Middlesex Crown Court before Judge Solomon and a jury the appellants, Stephen Bogacki, Howard John Tillwach and Robert Charles Cox, were convicted of attempting to take a motor vehicle without the consent of the owner or other lawful authority. The appellant Bogacki was conditionally discharged for two years, and a similar order was made in respect of an offence of theft for which he had originally been placed on probation at a magistrates' court in April 1971. The appellants Tillwach and Cox were each conditionally discharged for 12 months. All three appellants appealed against their convictions pursuant to a certificate of the trial judge under s 1 (2) of the Criminal Appeal Act 1968. The facts are set out in the judgment of the court.

R J Lowry QC and *J S Wiggs* for the appellants.

H Green for the Crown.

ROSKILL LJ delivered the judgment of the court. These three appellants, Bogacki, Tillwach and Cox, were charged at Middlesex Crown Court on 13th July 1972 before Judge Solomon and a jury with attempting, and I venture to underline the word 'attempting', to take a motor vehicle without authority. The trial judge directed the jury in a manner of which complaint is now made on behalf of the appellants and to which I shall refer in a moment. Following that direction all three appellants were convicted. The appellant Bogacki was conditionally discharged, a similar concurrent order being made in respect of an offence of theft for which some time before he had been placed on probation at a magistrates' court. The appellants Tillwach and Cox were also each conditionally discharged.

Each appeals against conviction on a certificate granted by the trial judge for the purpose of obtaining the decision of this court whether the construction of s 12 (1) of the Theft Act 1968 which he adopted and in relation to which he gave the direction

^a Section 12, so far as material, is set out at p 866 b c, post

a to the jury now complained of was correct. In fact, this was not a case which required a certificate since there was a question of law involved. In these circumstances under s 1 (2) (a) of the Criminal Appeal Act 1968 there is an appeal as of right. But leaving that point on one side, these appeals raise for the first time in this court the construction of the critical words of s 12 (1) of the Theft Act 1968.

b The facts as they must be taken to have been found by the jury fall within a very narrow compass. The evidence for the Crown was to a large extent undisputed. At about 3.45 a.m. on New Year's Day 1972 these three appellants, who had been having a lot to drink at a New Year's Eve party, went to Ponders End bus garage. There they tried to change a 50p piece in order to purchase cigarettes from a machine. They were refused change and told to go away. As they went they boarded a single decker bus which was standing on the forecourt of the garage. One of them turned c the engine over with the starter as if to start it. It was common ground that after three or four minutes they left the garage quite openly. They walked to the police station where they were given change for the 50p piece which they had been refused at the bus station. Very shortly thereafter they were arrested. According to the police evidence, the appellant Cox first of all denied he had ever boarded the bus. The appellant Tillwach made a written statement in which he admitted that he had been on the bus and he alleged that the appellant Bogacki had sat in the driving seat and tried to d start the engine.

e There was no doubt, and counsel who has appeared in this court for the appellants has not sought to contend otherwise, that one of those three young men acting in concert with the others got on board that bus and attempted to start the engine. The bus never moved. Indeed the weight of the evidence was that the engine never started and this court deals with the appeal on that assumption.

f The point raised by the appeal arises out of the direction given by the learned judge. There had been a submission to the judge by counsel for the appellants that it would be unsafe to leave the case to the jury. The point now at issue was adumbrated in the course of the argument, but the judge did not find it necessary to call on counsel for the Crown for his help. Nor did he give any clear indication during the argument how he proposed ultimately to direct the jury. When he came to direct the jury he did so in these terms:

g 'Now, the offence is the offence of taking a bus, and a lot has been said to you by learned counsel as to what taking is, with none of which I agree, and I am asking you to disregard what has been said to you by learned counsel. It is not an element or ingredient of this offence that these accused people, or any of them, should have intended to drive it away or to move it even one inch. The offence is not, I repeat, the offence is not taking and driving away, it is merely taking and taking, members of the jury, means assuming possession of an object for your own unauthorised use, however temporary that assumption of possession might be. May I give you an example. Suppose that you left your motor car parked in the car park behind a cinema, and you forgot to lock the door but you shut the door, and suppose that a man and a woman, some time h later, when the motor was unattended came along, opened the door, got into the car and had sexual intercourse in the car. This particular offence would then have been committed by them, because they would not have had your permission to use the car for that purpose, and they would have had possession, in fact, for a purpose which was unauthorised. It is as simple as that, members of the i jury. And therefore, please put out of your minds the idea that it is necessary to show, in order to establish this offence, that anybody or any one of these men intended to drive the car [the judge said "the car" but he must have meant the bus] away, that is not so. The question is: did they, without the permission of the owners, acquire possession, for however short a time, for their own unauthorised purpose? That is the question.'

The trial judge's direction was certainly clear and categorical. The question is whether it was right. The trial judge equated the word 'take' in s 12 (1) with the word 'use'. He directed the jury in terms that if there were unauthorised user of a vehicle, that amounted to 'taking' within s 12 (1), even though there had been no jot or tittle of movement of the vehicle by those charged with the offence. a

It is well known that s 12 (1) altered the relevant law. The old law created the offence of taking and driving away. Section 12 (1) no longer includes the words 'driving away'. The relevant words are: b

'. . . if, without having the consent of the owner or other lawful authority, he takes any conveyance for his own or another's use [he is guilty of an offence].'

The question, therefore, is what is meant in that context by the word 'take'. I ventured to draw attention at the outset of this judgment to the fact that these young men were not charged with the complete offence, though the judge's summing-up suggested that they were. They were only charged with an attempt because the Crown took the view when the count was drafted they were only guilty (if at all) of an attempt since they never succeeded in moving the vehicle. Nonetheless counsel for the Crown has made a valiant effort to support the trial judge's direction by arguing that 'take' in this subsection is the equivalent of 'use' and that, therefore, they were liable to be convicted of the complete offence because they 'took' the vehicle in that they assumed possession of it adverse to the rights of the true owner. c

There has been some discussion of this section in the writings of academic lawyers whose views are entitled to the greatest respect. In Professor Smith's well-known book on the Theft Act¹ he deals with this section and draws attention to the fact that the element of driving away no longer appears in the section. He says: d

'The concept of "taking" which has been eliminated from stealing still survives here, but, fortunately, it seems to have given little trouble in connection with this offence. "Taking" suggests the acquisition of possession.'

The learned author goes on to deal with various cases which are not directly relevant here. Then in a subsequent passage he says²: e

'Under the Road Traffic Acts, the offence was not committed unless the vehicle was "driven away" as well as taken. This requirement led to some very subtle distinctions. It was held that, for example, a vehicle was not being driven where D released the handbrake so that it ran down a hill or where it was being towed or pushed by another vehicle. It would seem that there is a taking in each of these cases and convictions would now be possible, if the other constituents of the offence were present.'

In the following paragraph he goes on³: f

'This seems to be a very desirable change in the law. It was never clear what part *driving* played in the mischief of the offence. The offence appears to be designed to protect the owner of a conveyance from temporary deprivation of it. Yet, under the old law, the offence would clearly not have been committed by loading a vehicle on to a transporter by crane and taking it away for a month—otherwise, presumably, if it had been driven on to the transporter. It is not clear why the former case should not equally be an offence, and there is no doubt that it may be under the Theft Act. One of the constituents of the offence, however, is that the conveyance must be taken for "his own or another's use"—a new requirement, not found in the Road Traffic Acts. This would seem g

¹ The Law of Theft (2nd Edn, 1972), p 113, para 313

² Ibid, p 114, para 316

³ Ibid, p 114, para 317

a to exclude allowing the conveyance to run (or float) away out of malice. Probably driving, whatever the motive, would be held to be "use" as would, for example, the display of the vehicle in an exhibition of veteran cars.'

I have read the whole of those passages in order to draw attention to the fact that nowhere does the learned author suggest that the meaning of the word 'take' has been altered merely by the exclusion from this subsection of the words 'driving away'.

In Professor Griew's book on the Theft Act¹ the learned author says:

"The *primary offender* is he who "takes any conveyance for his own or another's use." In one respect this wording is wider than that of the replaced provision, which required a taking and driving away. The primary offence now requires no act of driving. The word "takes" will presumably be satisfied by any movement, however caused (e.g., by pushing, by lifting or by releasing a hand-brake) and over however short a distance.'

In other words Professor Griew is saying in terms that some element of movement is an essential prerequisite to a conviction for taking, even though the words 'driving away' no longer appear in the subsection. Learned counsel were unable to assist us with any other citation from works of authority on this point and one comes back to the construction of the language used in the subsection.

The word 'take' is an ordinary simple English word and it is undesirable that where Parliament has used an ordinary simple English word elaborate glosses should be put on it. What is sought to be said is that 'take' is the equivalent of 'use' and that mere unauthorised user of itself constitutes an offence against s 12.

e It is to be observed that if one treats 'takes' as a synonym for 'uses', the subsection has to be read in this way: 'if . . . he uses any conveyance for his own or another's use . . .' That involves the second employment of the word 'use' being tautologous, and this court can see no justification where Parliament has used the phrase 'if he takes any conveyance for his own or another's use' for construing this language as meaning if he 'uses any conveyance for his own or another's use', thus giving no proper effect to the words 'for his own or another's use'.

f For those reasons the court accepts counsel for the appellants' submission that there is still built in, if I may use the phrase, to the word 'takes' in the subsection the concept of movement and that before a man can be convicted of the completed offence under s 12 (1) it must be shown that he took the vehicle, that is to say that there was an unauthorised taking possession or control of the vehicle by him adverse to the rights of the true owner or person otherwise entitled to such possession or control, coupled with some movement, however small (as Professor Griew says) of that vehicle following such unauthorised taking.

g Here, had the trial judge given the jury a correct direction, there was abundant evidence to justify convictions for attempting to take the bus because what was done must on the verdict of the jury clearly be taken to have been an act to which all these men were joint parties, preparatory to putting the bus into motion after an unauthorised taking of possession or control. Therefore, they could all well have been convicted of the offence with which they were charged, but on the direction of the trial judge they were, in the view of this court, wrongly convicted because the trial judge did not correctly tell the jury what the law was which they had to apply. Accordingly the answer to the question in the certificate is that the trial judge's direction to the jury was wrong. The convictions must be quashed and the appeals allowed.

Appeals allowed. Convictions quashed.

Solicitors: *Weld & Beavan*, Enfield (for the appellants); Solicitor, *Metropolitan Police*.

N P Metcalfe Esq Barrister.

¹ The Theft Act 1968 (1968), p 71

M & W Grazebrook Ltd v Wallens

NATIONAL INDUSTRIAL RELATIONS COURT

SIR JOHN DONALDSON P, MR J H ARKELL AND MR J W KENRICK

23rd MARCH 1973

Industrial relations – Conciliation officers – Communications made to conciliation officers – Admissibility in evidence – Proceedings before Industrial Court and tribunals – Communications to conciliation officers in connection with performance of their functions – Circumstances in which communications admissible – Industrial Relations Act 1971, s 146 (6).

Discovery – Production of documents – Privilege – Communications with agents with a view to litigation – Proceedings before Industrial Court and tribunals – Communications with agents other than legal advisers – Communications with a view to litigation – Whether privileged.

On a complaint of unfair dismissal before an industrial tribunal, the employers contended that certain documents were privileged by virtue of s 146 (6)^a of the Industrial Relations Act 1971. The documents consisted of (i) minutes of a meeting held before the employee was dismissed and attended by representatives of the employers and by union shop stewards; (ii) internal memoranda prepared by the employers' works manager, production manager and personnel officer after the employee's complaint had been presented to the tribunal. Both sets of documents were given by the employers to a conciliation officer appointed under s 146 of the 1971 Act. On a preliminary point of law the tribunal held that s 146 (6) of the 1971 Act did not render the documents privileged. The employers appealed.

Held – (i) On its true construction, s 146 (6) of the 1971 Act was intended to exclude evidence that statements were made or documents communicated to a conciliation officer in connection with the performance of his functions under s 146 of that Act. However, it was not intended to render inadmissible evidence which could have been given if there had been no communication to a conciliation officer; the test was whether evidence existed in an admissible form apart from evidence based on such communication to the conciliation officer (see p 869 j to p 870 a, post).

(ii) In relation to proceedings before an industrial tribunal, communications not only with legal advisers, but with other agents with an actual view to the litigation in hand, and the mode of its conduct, were privileged. Such privilege was limited to the litigation in hand and its conduct and did not exist in relation to the situation at the time when the matters complained of were arising (see p 871 b to d, post).

(iii) Accordingly, the case would be remitted to the tribunal with a direction that the tribunal should (a) make an order for discovery of the minutes of the meeting held before the employee's dismissal and consider any claim for privilege advanced other than under s 146 (6) of the 1971 Act, and (b) investigate the circumstances under which the internal memoranda came into existence in order to ascertain if those documents attracted privilege, either as documents brought into existence with a view to achieving a settlement or with an actual view to the litigation in hand, or the mode of its conduct (see p 871 f g and h j, post).

Notes

For privilege of documents prepared with a view to litigation, see 12 Halsbury's Laws (3rd Edn) 44-46, paras 62, 63, and for cases on the subject, see 18 Digest (Repl) 103-105, 879-896.

^a Section 146 (6) is set out at p 869 h j, post

- a** For conciliation officers appointed under the Industrial Relations Act 1971, see Supplement to 38 Halsbury's Laws (3rd Edn) para 677J, 1.
For the Industrial Relations Act 1971, s 146, see 41 Halsbury's Statutes (3rd Edn) 2166.

Cases referred to in judgment

- b** *Crompton (Alfred) Amusement Machines Ltd v Comrs of Customs and Excise (No 2)* [1972] 2 All ER 353, [1972] 2 QB 102, [1972] 2 WLR 835, CA, *aff'd* 4th July 1973, HL.
Pearce v Foster (1885) 15 QBD 114, 54 LJQB 432, 52 LT 886, 50 JP 4, CA, 18 Digest (Repl) 93, 760.

Case also cited

- c** *Duncan (decd), Re, Garfield v Fay* [1968] 2 All ER 395, [1968] P 306.

Interlocutory appeal

- This was an appeal by M & W Grazebrook Ltd against the determination on a preliminary point of law by an industrial tribunal (chairman R E Chapman Esq), sitting at Birmingham, dated 4th January 1973, that on a complaint of unfair dismissal made by the respondent, George Edward Wallens, certain documents were not privileged under s 146 (6) of the Industrial Relations Act 1971. The facts are set out in the judgment of the court.

Bruce Reynolds for the appellants.

Caroline Alton for the respondent.

- e** **SIR JOHN DONALDSON P** delivered the following judgment of the court. This is an interlocutory appeal from a decision of an industrial tribunal sitting in Birmingham. It concerns the admissibility of documentary evidence and calls for the first time for a consideration of the true construction of s 146 (6) of the Industrial Relations Act 1971. This is a matter of considerable general importance and we propose to deal with it in general terms before considering the facts of this particular case.

On 1st December 1971, in an opening statement¹, I said:

- g** 'Fears have been expressed that this court will require conciliation officers of the Department of Employment or of the Commission on Industrial Relations or others to reveal the content of confidential discussions into which the parties have entered bona fide with a view to settlement. Such fears are completely without foundation. The confidentiality of communications to statutory conciliation officers is protected by section 146 (6) of the Act. Furthermore, the courts have for many years recognised that the public interest requires respect for the confidentiality of such discussions, whether directly between the parties or with independent third parties. This court will pursue the same policy.'

- h** Section 146 (6) of the 1971 Act provides:

'Anything communicated to a conciliation officer in connection with the performance of his functions under this section shall not be admissible in evidence in any proceedings before the Industrial Court or an industrial tribunal, except with the consent of the person who communicated it to that officer.'

- j** In our judgment, this subsection is intended to exclude evidence that statements were made or documents communicated to a conciliation officer in connection with the performance of his functions under s 146. It is not intended to render inadmissible evidence which could have been given if there had been no communication to

¹ See *Presidential Statement: Opening of Court* [1972] ICR 1 at 5, 6

the conciliation officer. As the tribunal pointed out, were it otherwise either party could conceal any inconvenient evidence by simply communicating it to a conciliation officer. The test is whether evidence exists in an admissible form apart from evidence based on such communication to the conciliation officer. a

Thus, in the absence of consent, no evidence can be given of the content of oral statements made to a conciliation officer in connection with the performance of his functions under the section or, indeed, that such statements were made. If it is relevant, evidence can, of course, be given of the fact that during certain periods a conciliation officer was concerned in the matter. b

Documents are, however, in a special position. Section 146 (6) excludes evidence that the content of the document was communicated to the conciliation officer and also secondary evidence of that content based on the communication. Nevertheless, the document exists. Its admissibility as a document does not depend on the terms of the subsection but on the general law in relation to 'privilege' from disclosure. 'Privilege' is a somewhat misleading term used by lawyers to denote that the document is protected from disclosure in the interests of the administration of justice. This privilege would extend to any document which was prepared solely for the purpose of communication to a conciliation officer whether in connection with his functions under s 146 or, more generally, with a view to achieving a settlement of the subject-matter of the proceedings before the tribunal. The basis of this privilege (which extends to 'without prejudice' communications between parties or, in the field of family law, to communications to marriage guidance counsellors, probation officers and others) is the public interest in achieving an agreed settlement of disputes. c

Rule 6 (1) (b) of the Schedule to the Industrial Tribunals (Industrial Relations, etc) Regulations 1972¹ empowers a tribunal to make the like orders for discovery as could be made by a county court, and no order can be made for the production of any document which would be privileged from disclosure in such a court. General guidance on this topic is contained in the note in the County Court Practice or Ord 14 of the County Court Rules 1936. d

Counsel for the respondent has drawn the attention of this court to a particular paragraph in the note to CCR Ord 14, r 5². It appears under the main heading, 'Communications with Agents with a view to litigation' and continues: e

'Communications not only with legal advisers, but with other agents, with an actual view to litigation in hand, and the mode of conduct of it, also are privileged: Pearce v. Foster³.' f

Counsel for the respondent rightly submits that that particular decision does not support the proposition for which it is cited. She goes on to submit that there is no authority binding on the traditional courts of this country which does support this proposition. g

On the other hand, counsel for the appellants, whilst agreeing that there is no authority which can be relied on as expressly supporting that proposition, submits that if one looks at a whole range of cases, and in particular at the judgment of Lord Denning MR in *Alfred Crompton Amusement Machines Ltd v Comrs of Customs and Excise* (No 2)⁴, a case which is currently under appeal to the House of Lords⁵—this note to Ord 14 of the County Court Rules accurately summarises the general effect of the authorities. h

We do not think it necessary to follow counsel for the appellants in the full extent i

¹ SI 1972 No 38

² See County Court Practice (1973), Part 1, p 422

³ (1885) 15 QBD 114

⁴ [1972] 2 All ER 353, [1972] 2 QB 102

⁵ The appeal was dismissed on 4th July 1973

a of his researches, because in our judgment, if counsel for the respondent is right and this is not the law in relation to the traditional courts, it must be held to be the law in relation to industrial tribunals and this court. We say that for this reason. Before industrial tribunals it is the rule, rather than the exception, for parties to be represented by persons other than lawyers. Indeed, it is the policy of Parliament to encourage such representation. If the law to be applied to industrial tribunals were not as stated in the note¹ in the County Court Rules, the position would arise that, b for example, a personnel officer, when examining as a witness a works foreman, could, at the end of the works foreman's evidence, be called on to hand over the proof of evidence from which he had been examining the witness. Obviously, that would be a wholly untenable situation. Accordingly, we rule that if and insofar as the general law applicable to all courts does not give the privilege set out in the note in the County Court Practice, then, in the interests of the administration of justice, we c hold that that privilege exists in relation to proceedings before an industrial tribunal. We would, however, draw attention to the fact that it is a limited privilege. It exists only in relation to communications with an actual view to the litigation in hand and the mode of conduct of it. It does not exist in relation to the situation at the time when the matters complained of were arising.

d In the present case, the respondent complains that he was unfairly dismissed on 29th September 1972 and he claims compensation under s 22 of the 1971 Act. There is an issue whether he was dismissed unfairly within the meaning of that section. There is also an issue whether the respondent had been employed for the minimum qualifying period set out in s 28 (a) of the 1971 Act and, if not, whether he is nevertheless entitled to claim on the basis that his dismissal resulted from the exercise of his rights under s 5 (1) of the Act or from an indication by him that he intended to e exercise those rights.

The issue before this court concerns the admissibility of two groups of documents. The first consists of minutes of a meeting held on 20th September 1972 which was attended by various representatives of management and by shop stewards from the Amalgamated Union of Engineering Workers and the Transport and General f Workers Union. The minutes were drawn up on 21st September 1972, eight days before the respondent was dismissed. Their admissibility falls to be considered as if they had never been handed to the conciliation officer. Whilst we doubt whether there are any grounds for holding that they are inadmissible in evidence, the tribunal should make an order for their discovery and then consider any claim for privilege which may be advanced other than under s 146 (6).

g The second consists of three internal memoranda prepared by the works manager, the production manager and the personnel officer between 17th and 26th October 1972, after the respondent's complaint had been presented to the tribunal. These documents were also handed to the conciliation officer. The employers complained to the tribunal that if they had known that they might have to disclose these documents, they would never have shown them to the conciliation officer. This complaint discloses a complete misunderstanding of the situation. If these documents h are disclosable at all, it is not because they were communicated to the conciliation officer, but because they were in existence. There is a dispute as to why they came into existence. This must be investigated by the tribunal. If the circumstances are such as to attract privilege, either as documents brought into existence with a view to achieving a settlement or with an actual view to the litigation in hand, or the mode of the conduct of it, they will be privileged from disclosure.

i In conclusion, we would only say that the facts of this appeal, and the protest by the employers, suggest that workers claiming compensation for unfair dismissal and their advisers are insufficiently aware of their right to ask a tribunal to order the production by the employers of all documents in their possession or power relating to the matters in issue, subject always to the employers' right to resist having to produce such documents on well-established grounds of 'privilege'.

The matter will be remitted to the tribunal with a direction to consider the matter further in the light of, and consistently with, this judgment. a

Order accordingly.

Solicitors: Barlow, Lyde & Gilbert (for the appellants); Gregory, Rowcliffe & Co, agents for Chrimes, Spragg & Co, Dudley (for the respondent). b

Gordon H Scott Esq Barrister.

R v Durkin c

COURT OF APPEAL, CRIMINAL DIVISION
EDMUND DAVIES LJ, WILLIS AND BEAN JJ
19th, 22nd MARCH 1973

Criminal law – Removal of articles from places open to the public – Public having access to building to view collection housed in it – Removal of article forming part of collection – Removal on day on which public not having access to building – No offence when article not forming part of collection intended for permanent exhibition to public – Collection intended for permanent exhibition – Meaning – Municipal art gallery – Collection of pictures owned by local authority – Only part of collection on exhibition in gallery at any one time – All pictures exhibited at least once a year – Whether collection intended for permanent exhibition – Theft Act 1968, s 11 (1), (2). d e

A local authority owned an art gallery which was open to the public on weekdays but closed on Sundays. Only part of the collection of pictures owned by the authority was on view at any one time but the pictures were all shown at least once a year, sections of the collection being exhibited at various times of the year for short periods. Early one Sunday morning the appellant removed a valuable painting from the collection then on view at the gallery. He was convicted of removing a picture without lawful authority, contrary to s 11^a of the Theft Act 1968. He appealed contending that the picture did not form part of 'a collection intended for permanent exhibition to the public' within s 11 (2), since each picture in the collection was only seldom exhibited, and therefore, by virtue of s 11 (2), no offence had been committed since he had removed the picture on a day when the public did not have access to the gallery. f g

Held – The words 'a collection intended for permanent exhibition to the public' meant simply a collection intended to be permanently available for exhibition to the public. That intention was sufficiently manifested by the local authority's settled practice of periodically displaying to the public at the gallery the pictures in their permanent collection. Accordingly, the appellant had been properly convicted and the appeal would be dismissed (see p 876 g h, post). h

Notes i

For removing articles from places open to the public, see Supplement to 10 Halsbury's Laws (3rd Edn) para 1475B.

For the Theft Act 1968, s 11, see 8 Halsbury's Statutes (3rd Edn) 789.

a Section 11, so far as material, is set out at p 874 b to d and f g, post

a Appeal

On 4th July 1972 at Teesside Crown Court before Judge Forrester-Paton QC and a jury, the appellant, John Durkin, was convicted of removing an article from a place open to the public, contrary to s 11 (1) of the Theft Act 1968 (count 2). The particulars of the offence charged were that the appellant, on 19th March 1972, at Middlesbrough in the county borough of Teesside, without lawful authority removed from the municipal art gallery, a building to which the public then had access in order to view a collection of public paintings housed therein, a painting displayed to the public therein entitled 'St Hilda's Church, Middlesbrough and the Market Square' by L S Lowry. The appellant pleaded guilty to a charge of damaging property (count 3). He was sentenced to fines of £145 and £5 respectively on the two counts, with three months' imprisonment in default, and was also ordered to pay the costs of his defence up to a maximum of £75. He appealed against his conviction on count 2, pursuant to a certificate of the trial judge under s 1 (2) of the Criminal Appeal Act 1968, on the ground that the evidence showed that the painting taken by the appellant formed part of a collection which was only displayed to the public intermittently, and therefore no offence could be committed by taking it on a day when the public did not have access to the art gallery. The facts are set out in the judgment of the court.

M Caswell for the appellant.

Nigel McLusky for the Crown.

Cur adv vult

e 22nd March. **EDMUND DAVIES LJ** read the following judgment of the court. On 4th July 1972 at Teesside Crown Court before Judge Forrester-Paton, the appellant was convicted of removing a painting by L S Lowry without lawful authority from the Middlesbrough Municipal Art Gallery, contrary to s 11 (1) of the Theft Act 1968. He pleaded guilty to breaking a window, and he was sentenced to fines of £145 and £5 respectively on the two counts, with three months' imprisonment in default. **f** On a certificate granted by the trial judge, he now appeals against his conviction on the count of unlawfully taking away.

The undisputed facts of this unusual case may be shortly stated. At about 1.30 a.m. on Sunday, 19th March 1972, the 31 year old appellant went to the art gallery at Middlesbrough, got in by breaking a window, rushed upstairs and very quickly removed an L S Lowry painting of a Middlesbrough scene insured for £5,000 which was on exhibition in the first floor gallery and then made his exit. He did not **g** know that there was a burglar alarm installed. But even so, he got away before the police, summoned by the sound of the alarm, arrived on the scene.

The appellant made his intentions quite clear, both in a written statement and in his conversation with a member of the staff of the local newspaper and also in a ransom note which he had written beforehand and which was in his pocket when the police interviewed him. His learned counsel, who has admirably submitted everything that could be advanced before us, described in the court below the appellant's actions as in the nature of a protest. As the trial judge said, other people would use less polite terms to describe it; some people would say he was being a confounded nuisance, other people would perhaps use the words blackmail or extortion. Although the appellant first insisted that works of art should be properly protected, he himself **j** certainly put at risk this valuable painting, because there he was blundering along with it in the street in the middle of a foggy night and falling over a flower bed. On his own admission he then left it in a warehouse where it was certainly not safe, for it might well have been stolen or damaged by vandals. It is quite clear from what he said that his intentions were to use his unlawful possession of this painting as a means of extorting from the Teesside Council Arts Committee compliance with four demands which he put forward: first, that they should install an efficient alarm

system in the Teesside museums and art galleries; secondly, that all museums and art galleries in Teesside should be open on Sundays for a trial run, using unemployed men as attendants; thirdly, that the local authority should give a donation of £100 to each of two charities which he named, although there was not the slightest evidence that he had any connection with either of them; and fourthly, and most ridiculously, he demanded that the local authority should raffle a pair of the mayor's underpants and give the proceeds to another charity.

Section 11 (1) of the Theft Act 1968 provides as follows:

'Subject to subsections (2) and (3) below, where the public have access to a building in order to view the building or part of it, or a collection or part of a collection housed in it, any person who without lawful authority removes from the building or its grounds the whole or part of any article displayed or kept for display to the public in the building or that part of it or in its grounds shall be guilty of an offence. For this purpose "collection" includes a collection got together for a temporary purpose, but references in this section to a collection do not apply to a collection made or exhibited for the purpose of effecting sales or other commercial dealings.'

As to that, the trial judge said:

'Now there is no doubt that he removed it [meaning the Lowry picture]; there is no doubt that he removed it without lawful authority, he didn't even believe he had lawful authority to remove it, and there is no doubt equally that that was the article displayed or kept for display to the public in the Municipal Art Gallery. So about these ingredients of the offence there is no doubt at all. But where the dispute does arise is as to whether, at the time when the removal was carried out, the building was really one to which this section applies.'

It is conceded for the appellant that if his abstraction of the picture had occurred on a weekday, he would have no defence to the charge. But the gallery is not open to the public on Sundays, and, as we have said, the appellant took the picture early on a Sunday morning. This involved consideration of sub-s (2) of s 11, which provides:

'It is immaterial for purposes of subsection (1) above, that the public's access to a building is limited to a particular period or particular occasion; but where anything removed from a building or its grounds is there otherwise than as forming part of, or being on loan for exhibition with, a collection intended for permanent exhibition to the public, the person removing it does not thereby commit an offence under this section unless he removes it on a day when the public have access to the building as mentioned in subsection (1) above.'

Having regard to the wording of this subsection, the trial judge granted his certificate in the following terms:

'I certify that the case is a fit case for appeal on the grounds that the evidence showed that the painting taken by the [appellant] formed part of a collection which was only displayed to the public intermittently, and therefore a question arose as to whether any offence could be committed by taking it on a day when the public did not have access to the art gallery. The court is invited to consider whether I directed the jury correctly as to s 11 (2) of the Theft Act 1968.'

The facts relevant to the question raised by this appeal, which emerged from the evidence of Mr Cozens, assistant curator at Middlesbrough art gallery, may be thus summarised. The Teesside local authority have two art galleries, one at Billingham, the other at Middlesbrough. Each is closed to the public on Sundays. The permanent collection of pictures owned by the local authority is sometimes on view in the one gallery, at other times in the other. The entire collection is very seldom on view at

a one time in either gallery, only a part being exhibited at a given time. But all the pictures in the permanent collection are shown at least once a year and sections of it are exhibited at various times throughout the 12 months, depending on the space left free in the gallery by temporary exhibitions of pictures lent for limited periods of about a month. The Lowry picture was part of a permanent collection of contemporary works formed as the result of purchases by the local authority over a period of years. Like the other pictures in the collection, it is not on permanent display in the Middlesbrough art gallery, but it had been exhibited there since 26th February 1972. When pictures are not displayed they are kept in the storeroom of that building.

b On these facts, counsel for the appellant submits that the appellant committed no offence contrary to s 11. This being apparently the first prosecution under it, it may not be unprofitable to say something about the genesis of the section. c As Professor Smith has pointed out¹, its object is to protect things which are put at hazard by being displayed to the public, and it undoubtedly owes its existence to the removal a few years ago of Goya's portrait of the Duke of Wellington from the National Gallery. The portrait having been returned four years later, the taker was acquitted of its larceny but convicted of larceny of the frame which he had destroyed. d In its Eighth Report² in 1966 the Criminal Law Revision Committee also referred to two other cases of temporary deprivation, the first being when an art student took a statuette by Rodin from an exhibition, intending, as he said, to live with it for a while, and returning it later; the second being the removal of the coronation stone from Westminster Abbey. The committee considered that the situation was serious enough to justify the creation of a special offence, but did not include a provision in their draft Theft Bill because it was felt at that time that the matter e called for further consideration.

The legislature proceeded to deal with the matter by s 11, which Smith and Hogan³ describe as 'of some complexity'. Counsel for the appellant says that it gives rise to questions of difficulty hitherto left untouched by the textbook writers. He made two or three submissions regarding it, but we hope he will acquit this court of discourtesy when we say that, in the light of the facts we have summarised, for the f purposes of the present appeal they are in essence one and the same.

The basic question arises from the phrase 'a collection intended for permanent exhibition to the public' which appears in s 11 (2). Mr Cozens described the pictures belonging to the Teesside local authority as 'a permanent collection rather than a permanent exhibition'. Counsel for the appellant stresses that it is with the latter that s 11 (2) deals. What, then, is meant by 'permanent exhibition'? Professor Griew⁴ g has expressed the view that, 'In this context the antithesis of "permanent" seems to be "occasional"'. But counsel for the appellant accepts that the exhibition need not be continuous, and that the closing of an art gallery at weekends, during holidays, or for like periods would not prevent the works of art still inside from remaining throughout part of 'a collection intended for permanent exhibition to the public'. h He likewise concedes that 'permanent' is a matter of degree, but submits that on the facts of this case none of the pictures in the Teesside authority's permanent collection is 'intended for permanent exhibition', since each picture is only occasionally exhibited. And, while recognising that s 11 (2) adverts to what was 'intended' in relation to the Teesside collection, he submits that this is best inferred from what happens in practice, and that the intention manifested by the practice of the Teesside local authority was j that none of these pictures should be on 'permanent exhibition'.

If all this is right, s 11 has largely failed in its aim, insofar as it seeks to provide a remedy where articles are taken on 'closed' days, for it is common knowledge that

1 Law of Theft (2nd Edn, 1972), p 109, para 299

2 Cmnd 2977, para 57

3 Criminal Law (2nd Edn, 1969), p 398

4 The Theft Act 1968 (1968), p 69, footnote 4

many of our great galleries have more pictures than they can exhibit at any one time, and a number of them adopt the agreeable practice of periodically changing their displays, some pictures being removed into store and being replaced by others taken out of store. Acceptance of counsel for the appellant's submission means that the unauthorised abstraction of any of these pictures would not be an offence unless it occurs 'on a day when the public have access to the building.'

The direction of the trial judge was in the following terms:

'Members of the jury, the direction I give you is this, and in doing so I accept broadly the argument that has been presented by [counsel for the Crown], my direction is this, that permanent means something that is intended to last for an indefinite period, it refers to a course of conduct intended to be carried on over an indefinite period, not necessarily continuous during that period. And applying that to the words of this section what I say is—if I am wrong about this, I can, if necessary be corrected in a higher court—what I say is that it is sufficient, if the evidence satisfies you that the Teesside Council, through its Arts Committee, intended that its permanent collection of paintings should be put on view to the public from time to time and that that course of conduct should continue for the foreseeable future and continue indefinitely into the future. If they had the sort of intention, then . . . this collection was intended for permanent exhibition to the public. It is not necessary they should intend to have the collection, or part of it, on view every day when the art gallery is open, nor is it necessary they should intend that the whole collection should be on view at the same time. It is sufficient if they intend that the collection as a whole should be available for public viewing in sections, one section at one time, another section at another time, provided of course, they intend to carry on that course of conduct indefinitely into the future.'

Was that direction right? If we may say so, it has the great merit of enabling the section to be applied in a sensible manner without necessitating detailed enquiries regarding how long the article abstracted had been on display and how long in store, and with what frequency and for how long pictures in a collection which is admittedly a permanent one are actually on display, these being matters as to which no records may be available. That the prosecution should fail in an otherwise clear case of the unauthorised abstraction on a closed day of part of a permanent collection through inability to furnish such details would be unfortunate. Nevertheless, if that is what the section requires, so be it. But we think otherwise. With the learned judge, we hold that 'a collection intended for permanent exhibition to the public' is simply one intended to be permanently available for exhibition to the public, and that such intention was sufficiently manifested in the present case by the local authority's settled practice of periodically displaying to the public in the Middlesbrough art gallery the Lowry picture and the others in their Teesside permanent collection.

Our conclusion, therefore, on the point raised in the learned trial judge's certificate is that he correctly directed the jury. From this it follows that we dismiss the appeal.

Appeal dismissed.

Solicitors: *Freer & Humphreys*, Middlesbrough (for the appellant); *Peter Ross*, Middlesbrough (for the Crown).

N P Metcalfe Esq Barrister.

Carlton v Theodore Goddard & Co

CHANCERY DIVISION

MEGARRY J

7th MARCH 1973

Costs – Taxation – Solicitor – Bill of costs for contentious business – Gross sum bill – Power of party chargeable to require solicitor to deliver to him in lieu thereof bill containing detailed items – Three month time limit – Solicitor delivering to client gross sum bill – Client seeking taxation of costs – Client asking for bill to be prepared and lodged for taxation four months after delivery of original bill – Solicitor delivering detailed bill of costs – Detailed bill for larger amount than original bill – Whether client ‘required’ solicitor to deliver bill containing detailed items – Whether three month time limit can be waived by solicitor – Solicitors Act 1957, s 64, proviso (a).

The defendants, a firm of solicitors, acted for the plaintiff in wardship proceedings. In January 1972 they delivered to the plaintiff a gross sum bill of costs. In February the plaintiff wrote to the defendants saying he wanted the costs taxed. The plaintiff resided in Malta, and having succeeded in the wardship proceedings had taken the ward to Malta. He made a claim against the Passport Office and they would only recognise a taxed bill of costs in respect of it. On 18th May the plaintiff’s solicitors wrote informing the defendants of the attitude of the Passport Office and concluded the letter by saying ‘it would seem that there is no alternative but for your Bill to be prepared and lodged for Taxation’. On 22nd June the defendants delivered to the plaintiff’s solicitors a detailed note of their charges. The total of the June bill was for a larger amount than the January bill. The plaintiff contended that it was the January bill which should be taxed whereas the defendants claimed that the June bill should be taxed as it replaced the January bill under the Solicitors Act 1957, s 64, proviso (a)^a.

Held – The January bill was the bill to be taxed for the following reasons—

(i) the obligatory machinery of proviso (a) of s 64 could not be brought into play until there had been something which could fairly be described as a request or requirement, within three months of the delivery of the gross sum bill, that the solicitors should deliver to the client a detailed bill to replace the gross sum bill already delivered, and on the evidence the plaintiff had not made a request or requirement of that kind; to require a bill to be taxed was not per se a requirement that ‘a bill containing detailed items’ should be delivered in lieu of a gross sum bill (see p 879 g h and j, post); and in any event solicitors could not, as against a client who relied on it, waive the three month time limit imposed by proviso (a) (see p 880 b c, post);

(ii) even if the court had a discretionary power to allow a bill to be withdrawn and replaced by another, there were no grounds for exercising such a discretion; furthermore the defendants could not as of right replace the January bill by the June bill (see p 880 d e, post).

Notes

For the form and contents of a bill of costs for contentious business, see 36 Halsbury’s Law (3rd Edn) 132-134, para 180, and for cases on the subject, see 43 Digest (Repl) 164-174, 1521-1612.

For the Solicitors Act 1957, s 64, see 32 Halsbury’s Statutes (3rd Edn) 68.

^a Section 64, so far as material, is set out at p 879 c to e, post

Adjourned summons

By an originating summons dated 20th July 1972 the plaintiff, William Charles Carlton, sought an order for taxation of a gross sum bill of costs delivered to him by the defendants, Theodore Goddard & Co, his solicitors in a wardship action, in preference to a later detailed bill of costs. The facts are set out in the judgment.

John Monckton for the plaintiff.

Joseph Dean for the defendants.

MEGARRY J. This summons raises a short point about solicitors' costs. The summons, issued by the plaintiff, seeks taxation of a bill of costs delivered in January 1972 to him by the defendants, who were his solicitors in wardship proceedings in this Division. I shall refer to this as 'the January bill'. The defendants accept that the plaintiff is entitled to an order for taxation, but say that that order should be for taxation not of the January bill but of a later bill which the defendants delivered in June 1972; and that I shall call 'the June bill'. The main point in the case turns on the Solicitors Act 1957, s 64, proviso (a), a provision which, I was told, appears to be devoid of authority.

The January bill is plainly a gross sum bill. It shows disbursements of £3,224·11, and the item for profit costs consists of the words 'A fully detailed Bill would amount to £3,750, but say £2,687·50'. That last sum is the amount carried out to the charging column, and the rest of the entry appears in the text of the bill, preceded by about a page of description of the work done. The total shown at the foot of the charging column is £5,911·61, consisting of the £3,224·11 for disbursements, and the 'say £2,687·50' for profit costs. Left to myself, I would have said that this is a bill for £5,911·61, including £2,687·50 for profit costs; but counsel for the plaintiff expressly conceded that it was a bill for £6,974·11 (including £3,750 for profit costs), coupled with an offer to accept £5,911·61, including the £2,687·50 for profit costs. He told me that before the master this was accepted on both sides, and that before me he conceded it. I did not find this very easy to follow, for as I put it to him, the words 'A fully detailed Bill would amount to £3,750, but say £2,687·50' seem to be saying that if a different and fully detailed bill had been delivered, the profit costs would have been £3,750, but that in the bill actually delivered the profit costs were only £2,687·50. It is not as if the bill carried the £3,750 out to the charging column and then reduced it. Indeed, the fact, if it be a fact, that it is a bill for £6,974·11 can be ascertained only by executing some mathematical process such as taking the total actually shown on the bill, namely, £5,911·61, and then adding to it the difference between the £2,687·50 shown as the charge for profit costs and the £3,750 shown in the body of the bill as what the profit costs would have been if a detailed bill had been delivered. It is not much of a bill if the total is not what is shown as the total but some larger sum which has to be calculated. However, there is nothing before me for decision on the point, though I can well understand how there seems to have been some misunderstanding about what really had been in issue before the master.

After the January bill had been delivered, the plaintiff wrote to the defendants in February, saying that he wanted the costs taxed and making some comments. There were then some discussions, and the plaintiff made a claim against the Passport Office; he resides in Malta, and after succeeding in the wardship proceedings he had, I think, taken the ward to Malta. It then appeared that the Passport Office would only recognise a taxed bill of costs in respect of his claim. On 18th May his solicitors wrote to the defendants stating this, and referring to a cheque that the plaintiff had sent to the defendants in respect of a proposed reduction of their costs, saying that they assumed that this cheque would now be returned. The letter concludes with this sentence: 'Accordingly, it would seem that there is no alternative but for your Bill to be prepared and lodged for Taxation'. On 22nd June the defendants delivered to the plaintiff's solicitors a detailed note of their charges in the case; this is the June

a bill. It gives some details of a number of items, amounting to a little less than £850, but the main item is for £2,970 profit costs for 'Instructions for hearing and generally', with a descriptive text that is rather longer than that in the January bill. This amount, of course, is by itself more than the total for profit costs that the defendants were willing to accept in the January bill; but that no doubt will be considered on the taxation. The total of the June bill is £3,295·61 for disbursements, and £3,818·10 for profit costs, amounting to £7,113·71 in all. This is less than £140 more than the total of the January bill on the basis that counsel for the plaintiff accepts, though of course it is over £1,200 more than what on the face of it appears to be the total of the January bill.

b In those circumstances, it is the January bill that the plaintiffs say should be taxed and the June bill that the defendants say should be taxed: the defendants say that the January bill has been replaced by the June bill under s 64, proviso (a), of the Solicitors Act 1957. That section and the proviso read as follows:

c 'Where the remuneration of a solicitor in respect of contentious business done by him is not the subject of such an agreement as is mentioned in section fifty-nine of this Act, the solicitor's bill of costs may at the option of the solicitor either contain detailed items or be for a gross sum: Provided that—(a) at any time before service upon him of a writ or other originating process for the recovery of costs included in a gross sum bill and before the expiration of three months from the date of the delivery to him of the bill, the party chargeable therewith may require the solicitor to deliver to him in lieu thereof a bill containing detailed items, and the gross sum bill shall thereupon be of no effect; . . .

d There are then two other provisos which I need not read. Counsel for the defendants relies on the last sentence of the letter of 18th May which I have read, coupled with a statement by the plaintiff in his affidavit that the defendants were 'asked to provide details of their bill of costs', as having rendered the January bill 'of no effect' under the proviso.

e Counsel for the plaintiff's reply is that the proviso is not satisfied. First, he says that the plaintiff never exercised the power to 'require' the delivery of a detailed bill in lieu of the gross sum bill, and second, even if he did, that this was not done within the three months laid down by the proviso; for the January bill was delivered to him under cover of a letter dated 19th January 1972, and the letter of 18th May 1972 was nearly four months later.

f First, then, there is the question whether the plaintiff ever required the defendants to deliver to him in lieu of the gross sum bill 'a bill containing detailed items'. I cannot see that he has. To require a bill to be taxed is plainly not per se a requirement that a detailed bill should be delivered; for as provisos (b) and (c) to s 64 itself make plain, a lump sum bill may be taxed. The letter seems to me to contain not a word about 'a bill containing detailed items'. At most, there is the somewhat indefinite expression employed by the plaintiff in his affidavit. Nor does the letter require any bill to be delivered to the plaintiff; all that it does is to say that a bill should be 'lodged for Taxation'. There is some ground for saying that one bill was to be replaced by another, in the reference to there being 'no alternative but for your Bill to be prepared', so that it can be said that the letter was not asking for the existing bill to be lodged for taxation but for some other bill to be prepared: but that by itself is not enough. Furthermore, the language of the letter is not so much the language of requiring something to be done as the language of a somewhat reluctant acceptance of the inescapable. It seems to me that before proviso (a) of s 64 is brought into play there must be something which can fairly be described as a request or requirement that the solicitors should deliver to the client a detailed bill to replace the gross sum bill already delivered; and although I do not think that any particular form of words need be employed, the substance of what is relied on must amount to a request or requirement of this kind. If in doubt, of course, the solicitors, before

embarking on the work, can always enquire whether some equivocal communication that they have received is or is not intended to be a requirement under the proviso. On this ground alone the defendants' contentions must fail. a

As for the time limit, I very much doubt whether the solicitors can 'waive' the three months. By agreement, of course, anything proper can be done. There is nothing that I can see to prevent solicitors and their client from agreeing to operate the machinery of the proviso despite the expiration of the three months. Nor do I say anything about the ability of solicitors to waive some provision against their own interests. But I do not see how solicitors who wish to ignore the three months can, as against a client who relies on it, simply say 'we waive the three months, and so you are caught by the proviso'. The obligatory machinery of the proviso does not seem to me to operate unless the requirements of the proviso have first been satisfied. b

Counsel for the defendants did put forward a further contention, namely, that there was a discretionary power in the court to allow a bill to be withdrawn and replaced by another; and he also contended that in some circumstances a solicitor could do this as of right. This point came as something of a surprise to counsel for the plaintiff who said that it has not been raised before the master, and that in any case there was no material before the court to support the exercise of any such discretion. The full circumstances of any case in which this was sought to be done ought, he said, to be before the court; and I agree. On the facts as they stand before me, I can see no ground for exercising any such discretion (assuming it to exist), and I can see no basis on which the defendants could as of right replace the January bill by the June bill, especially after the plaintiff had sought taxation. c

Accordingly, in my judgment the plaintiff succeeds on this summons, and I direct taxation of the January bill as prayed by the summons. In saying that, I wish to make it plain that I decide nothing as to the amount of the January bill, but merely draw attention to what I have said about it, and to what counsel for the plaintiff has conceded. d

Order accordingly. e

Solicitors: *Hunt & Hunt*, Ilford (for the plaintiff); *Theodore Goddard & Co* (for the defendants) f

R W Farrin Esq Barrister. g

Practice Direction

FAMILY DIVISION

Nullity – Petition – Title of suit – Inclusion of surname of wife prior to marriage ceremony no longer necessary. h

In proceedings for nullity of marriage the names of the parties should be stated in the documents and in the title of the suit in the same manner as in the case of proceedings for divorce. i

It is considered unnecessary to continue the practice of including as an alias name the surname of the wife prior to the ceremony of marriage.

Issued with the concurrence of the Lord Chancellor.

McCann v Sheppard and another

COURT OF APPEAL, CIVIL DIVISION

LORD DENNING MR, STAMP AND JAMES LJ

28th FEBRUARY, 1ST, 15th MARCH 1973

b Court of Appeal – Evidence – Further evidence – Damages for personal injuries – Basis of assessment falsified by events occurring after trial – Death of plaintiff – Death occurring after notice of appeal lodged – Pain-killing drug prescribed for plaintiff after accident – Plaintiff becoming addicted to drug – Plaintiff dying from overdose of drug – Whether evidence of death admissible in Court of Appeal – Effect on general damages and damages for lost future earnings.

c Court of Appeal – Evidence – Further evidence – Character of witness – Witness having died since date of trial – Fresh evidence of witness's criminal record – No opportunity for challenge or explanation – Whether evidence admissible.

d In August 1968 M, a single man aged 24, was severely injured in a motor accident. His injuries were to the lower part of his body and legs. He had a broken pelvis and much damage was done to his bladder and other internal organs. His urinary and sexual functions were greatly impaired. He had to walk with a stick. In consequence of his injuries he was in great pain; his doctors prescribed a pain-killing drug (palfium) on which he became more and more dependent. He was unable to work after the accident. In January 1970 he issued a writ against the defendant claiming damages for negligence. In June 1970 he married and in September 1971 his wife gave birth to a child. M's action was tried in June 1972 and on 6th June he was awarded £37,548 damages made up as follows: (i) special damages (lost earnings to the date of trial), £2,548; (ii) loss of future earnings (15 years at £1,000 per year), £15,000; (iii) general damages for pain and suffering, loss of amenities and risk of loss of expectation of life, £20,000. In July 1972 the defendant appealed seeking a reduction of the award.

e In October 1972 M was convicted of four offences of procuring for himself a dangerous drug (palfium) and asked for 14 other similar offences to be taken into consideration. He was placed on probation on condition that he received hospital treatment as an in-patient. Three days later, on 22nd October, M took an overdose of drugs and died. At the hearing of the defendant's appeal in February 1973 the defendant sought to introduce as fresh evidence the fact that M had died. The defendant also sought to introduce evidence of M's criminal record before the date of trial but later disclaimed any reliance on it. M's administrators, who had been substituted as plaintiffs, contended that the evidence of M's death should not be admitted since the trial judge, in making his award, had taken into account all contingencies, including the contingency of early death.

h **Held** – (i) Although the general rule in accident cases was that the sum of damages fell to be assessed once and for all at the date of the hearing, where notice of appeal had been entered in due time the Court of Appeal would be prepared to admit evidence of an event which had occurred while the appeal was pending and which had falsified the basis on which the assessment had been made. Accordingly the evidence that M had died on 22nd October should be admitted and the damages assessed accordingly (see p 885 g to p 886 a and f, p 888 b, p 889 c d and j to p 890 a, post); dictum of Lord Wilberforce in *Mulholland v Mitchell* [1971] 1 All ER at 313 applied.

i (ii) It followed that, in the light of that evidence, the following adjustments should be made to the award of damages—

(a) the 15 year period for the calculation of loss of future earnings should be reduced to 20 weeks, i.e. from the date of trial to the date of death, giving a figure of £400 (see p 886 b and f g and p 890 b and c, post);

(b) damages of £750 for loss of expectation of life should be added to the award (see p 886 b and g and p 890 d e, post);

(c) in view of the severe bodily injuries and the intolerable and intractable pain which M had suffered, and of which he was aware, during the last 4½ years of his life, as well as the enforced recourse to drugs with consequent addiction, the general damages for pain and suffering and loss of amenities should be assessed at £15,000 (see p 886 e and g h and p 891 g h, post).

Per James LJ. It may be that there could be cases in which the court would consider it right to admit, after a trial on the merits, evidence of the criminal record of a witness who had died since the trial, in order to attack that witness's credibility. But such a case must be a very rare one indeed for it necessarily involves the admission of evidence of what may be of a highly prejudicial nature without there being any opportunity for challenge or explanation (see p 888 g h, post); dictum of Tucker LJ in *Braddock v Tillotsons Newspapers Ltd* [1949] 2 All ER at 311 considered.

Notes

For the rule that damages are assessed once and for all, see 11 Halsbury's Laws (3rd Edn) 227, 228, para 395, and for cases on the subject, see 17 Digest (Repl) 84-88, 57-89.

For the power of the Court of Appeal to receive further evidence, see 30 Halsbury's Laws (3rd Edn) 468-470, para 884, and for cases on the subject, see 51 Digest (Repl) 823-828, 3789-3829.

Cases referred to in judgments

Attorney-General v Birmingham, Tame and Rea District Drainage Board [1912] AC 788, [1911-13] All ER Rep 926, 82 LJCh 45, 107 LT 353, 76 JP 481, 11 LGR 194, HL, 51 Digest (Repl) 693, 2981.

Braddock v Tillotsons Newspapers Ltd [1949] 2 All ER 306, [1950] 1 KB 47, CA, 51 Digest (Repl) 827, 3823.

Curwen v James [1963] 2 All ER 619, [1963] 1 WLR 748, CA, Digest (Cont Vol A) 1210, 1208b.

Jenkins v Richard Thomas & Baldwins Ltd [1966] 2 All ER 15, [1966] 1 WLR 476, [1966] 1 Lloyd's Rep 473, CA, Digest (Cont Vol B) 219, 890a.

Ladd v Marshall [1954] 3 All ER 745, [1954] 1 WLR 1489, CA, 51 Digest (Repl) 827, 3826.

Mulholland v Mitchell [1971] 1 All ER 307, [1971] AC 666, [1971] 2 WLR 93, HL.

Murphy v Stone Wallwork (Charlton) Ltd [1969] 2 All ER 949, [1969] 1 WLR 1023, CA, Digest (Cont Vol C) 1361, 3808b.

Murray v Shuter [1972] 1 Lloyd's Rep 6, CA.

Oliver v Ashman [1961] 3 All ER 323, [1962] 2 QB 210, [1961] 3 WLR 669, CA, Digest (Cont Vol A) 1190, 1053a.

Read v The Great Eastern Railway Co (1868) LR 3 QB 555, 9 B & S 714, 37 LJQB 278, 18 LT 822, 33 JP 199, 36 Digest (Repl) 216, 1142.

West (H) & Son Ltd v Shephard [1963] 2 All ER 625, [1964] AC 326, [1963] 2 WLR 1359, HL, Digest (Cont Vol A) 1191, 1053c.

Wise v Kaye [1962] 1 All ER 257, [1962] 1 QB 638, [1962] 2 WLR 96, CA, Digest (Cont Vol A) 1191, 1053b.

Yorkshire Electricity Board v Naylor [1967] 2 All ER 1, [1968] AC 529, [1967] 2 WLR 1114, HL, Digest (Cont Vol C) 755, 1235.

Appeal

By a writ issued on 5th January 1970 and subsequently amended David Alastair McCann brought an action against the defendants (1) John Sheppard and (2) John Whethan Cart claiming damages for personal injuries and consequential loss caused by the negligence of the first defendant in the driving of a motor car near Bristol on 15th August 1968 or alternatively by the negligence of the second defendant in the

- a driving of a motor van or alternatively by reason of the negligence of both defendants. On 6th June 1972, terms of settlement having been agreed by the parties as to liability and the action having been tried by Park J without a jury at Bristol, it was ordered (1) that by consent judgment should be entered for the second defendant against the plaintiff, (2) that the first defendant pay the plaintiff the sum of £41,252, being as to £2,548 agreed special damages, and £399 interest thereon at 3½ per cent from 15th August 1968 to the date of judgment, as to £20,000 for general damages and £3,365 interest thereon at 7 per cent from 8th January 1970 to the date of judgment and as to £15,000 damages for loss of future earnings. By notice of appeal dated 18th July 1972 the first defendant appealed against that order seeking a reduction of the awards for loss of future earnings and general damages. On 21st December 1972 a supplemental notice of appeal was lodged asserting that the plaintiff had died on 22nd October 1972 and contending that the judge had erred in regarding the plaintiff as a genuine and credible witness. On 12th February 1973 the administrators of the plaintiff's estate obtained an order making them plaintiffs in the action. The facts are set out in the judgment of Lord Denning MR.

Peter Fallon QC and John Royce for the first defendant.

C J S French QC and Betty Knightly for the plaintiffs.

- d The second defendant did not appear and was not represented.

Cur adv vult

15th March. The following judgments were read.

- LORD DENNING MR.** In this case we heard some fresh evidence *de bene esse*. I will bring it in so as to complete the story, but I will exclude it from consideration hereafter, if need be.

- David Alastair McCann was born on 25th November 1943 in Northern Ireland. As a young man of 18 he came over to England. He worked in a circus as an elephant groom. He used the name Raddy Green and got into trouble with the police on a few occasions. Usually it resulted in a fine, but on one occasion he was sent to prison for four months for breaking into a store and stealing. Afterwards he went back to his own name—David McCann—and had various jobs in Bristol. Latterly he was engaged in demolition work. Then, on 15th August 1968, when he was 24, he was in a motor accident. He was going to Weston-super-Mare on holiday with two friends. He was a passenger in the back seat. He was very severely injured. His injuries were all to the lower part of his body and his legs. He had a broken pelvis and much damage done to the bladder and other internal organs. His urinary and sexual functions were greatly impaired. His foot flapped up and down. He had to walk with a stick. Worst of all, he was in great pain and had to take drugs to relieve it. He never worked after the accident. He lived on national insurance benefits. On 5th January 1970 he issued a writ against the driver of the car claiming damages for negligence.

- Nearly two years after the accident, whilst his action was pending, on 12th June 1970, he got married. He said that, owing to his injuries, his sex life was practically nil, but they did have a baby born on 3rd September 1971. He said that it was a 'miracle' and that he was the 'proudest man in the city'.

- Now I come to the part of the case which concerns us most: drugs. In order to relieve the pain, the doctors prescribed a pain-killing drug called palfium. He became more and more dependent on it. In June 1972 the action came for trial at Bristol before Park J. He described the pain and the drugs:

'When the pain strikes me, it starts towards the back and shoots down the full length of the leg, almost like an electric shock, and it really hurts; and I have to take drugs; and the drugs I take are dangerous drugs, and I am frightened of becoming addicted, but there is no alternative.'

The judge said that while Mr McCann was giving evidence, he was obviously under drugs. On 6th June 1972 the judge awarded him these sums: a

	£
Special damages for loss of earnings up to the date of trial	2,548
Loss of future earnings (15 years at £1,000 a year)	15,000
General damages for pain and suffering, loss of amenities and risk of loss of expectation of life	20,000
	b
Total:	37,548

When interest was added, the total judgment entered for him was £41,252 and costs.

On 18th July 1972 the first defendant gave notice of appeal to this court contending that the award was excessive, and asked that it should be reduced to such sum as this court thought just and equitable. c

Meanwhile, however, in March 1972, two or three months before the hearing, Mr McCann had gone to live in Birmingham with his wife's people. Whilst there, he obtained drugs in this way: he used to go to a doctor and say that he was a temporary resident and was in need of palfium. He produced the certificates from his doctor at Bristol. He went from one doctor to another getting drugs, sometimes using a false name. The police found out about it. On 18th October 1972 he was prosecuted at the Oldbury Magistrates' Court. He pleaded guilty to four cases of procuring for himself a dangerous drug (palfium) and asked for 14 other similar cases to be taken into consideration. These dated back to April 1972. The justices put him on probation, and made a condition that he should receive treatment as an in-patient at All Saints Hospital for one year. That was Wednesday, 18th October 1972. On Saturday, 21st October 1972, he left the hospital for the weekend. On the Sunday afternoon he took an overdose of drugs and died. d

Now, here is the point. The appeal of the first defendant was still pending to this court. It came on for hearing on Wednesday, 28th February 1973. The first defendant sought to introduce a good deal of fresh evidence, which we heard *de bene esse*; but, as the case developed, counsel for the first defendant disclaimed any reliance on it. He acknowledged that the award of damages made by the judge could not be upset on the evidence as it stood before him. Eventually, the only fresh evidence that he sought to introduce was the fact that Mr McCann died on 22nd October 1972. This, he said, was such an overwhelming event—which had occurred since the trial—that this court should admit evidence of it and reduce the award to take account of it. e

During the argument, it was suggested that, if the award of £37,548 and interest was reduced on account of his death, the widow might recover the difference by bringing an action under the Fatal Accidents Acts 1846-1959. But I doubt this. There are two authorities which suggest that she cannot do so. The first is *Read v The Great Eastern Railway Co*¹. In that case the injured plaintiff, in his lifetime, received a sum in full satisfaction of his claim. He afterwards died from his injuries. His widow then sought to sue under the Fatal Accidents Acts. The court held that she could not do so. In argument, Lush J put this very question²: 'Suppose that the deceased had brought an action and recovered and then died, could his widow bring another action?' In his judgment, Blackburn J gave the answer³: '... to hold this would be to strain the words of the section'. The second is *Murray v Shuter*⁴. Mr Murray was so severely injured that he could only be expected to survive for a few months. His advisors thought that the damages would be £15,000 or £16,000, if the case was tried whilst he was alive. So they applied to adjourn the case until after he was dead, because his f
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¹ (1868) LR 3 QB 555

² (1868) LR 3 QB at 557

³ (1868) LR 3 QB at 558

⁴ [1972] 1 Lloyd's Rep 6

a widow and child might receive £60,000. We granted an adjournment for nine months so as to let him die. I said¹:

‘Once his claim was disposed of during his lifetime, his dependants could recover nothing more. They would have no separate action for their own benefit.’

b In these circumstances, it is open to doubt whether the widow here would have any claim under the Fatal Accidents Acts. Her husband has sued the first defendant to judgment. Under that Act, the matter must be looked at as at the time of his death. Applying the words of s 1 of the Fatal Accidents Act 1846, ‘if death had not ensued’, would he himself have been entitled to maintain an action and recover damages for negligence? I do not think so for the simple reason that he had already recovered judgment; and, having done that, he could not maintain another action for the same cause.

c It would appear, therefore, that the present action is the only one which lies in respect of the injuries to David McCann in the motor accident. He died intestate. His widow and child will benefit from any award of damages in this action, but they will not have any additional action on their own account.

d What then are the damages proper to be awarded in this action? If they were to be assessed as at the trial before Park J, his award was right at that time, and we would not interfere. But it is open to this court, if we think right, to receive evidence as to matters which have occurred after the date of the trial: see RSC Ord 59, r 10 (2). In this case, therefore, we are at liberty to receive evidence of the death of David McCann. If we do receive it, then it is our duty to rehear the case in the light of that evidence and to assess the damages as at the time of rehearing, that is, at the time when we hear the appeal. That was decided by the House of Lords in *Attorney-General v Birmingham, Tame and Rea District Drainage Board*², and *Murphy v Stone Wallwork (Charlton) Ltd*³.

e Should we receive evidence that David McCann died on 22nd October 1972, pending the appeal to this court? Counsel for the first defendant submits that we should not do so, because at the trial the learned judge took into account all contingencies, including the contingency of early death. He recalls the wise words of Lord Pearson in the three leading cases of *Curwen v James*⁴; *Murphy v Stone Wallwork (Charlton) Ltd*⁵ and *Mulholland v Mitchell*⁶. The general rule in accident cases is that the sum of damages falls to be assessed once and for all at the time of the hearing; and this court will be slow to admit evidence of subsequent events to vary it. It will not normally do so after the time for appeal has expired without an appeal being entered—because the proceedings are then at an end. They have reached finality. But if notice of appeal has been entered in time—and pending the appeal, a supervening event occurs such as to falsify the previous assessment—then the court will be more ready to admit fresh evidence—because, until the appeal is heard and determined, the proceedings are still pending. Finality has not been reached. It is in every case a matter for the discretion of the court. In *Mulholland v Mitchell*⁷ Lord Wilberforce gave helpful guidance as to the way in which the discretion should be exercised. This case seems to me to come within his words that ‘it would affront common sense’ if we shut our eyes to the fact of death. The damages which the judge awarded were intended as compensation for the injured man himself—during the long years of life which the

j 1 [1972] 1 Lloyd’s Rep at 7

2 [1912] AC 788 at 801, [1911-13] All ER Rep 926 at 938, 939

3 [1969] 2 All ER 949, [1969] 1 WLR 1023

4 [1963] 2 All ER 619 at 624, [1963] 1 WLR 748 at 755

5 [1969] 2 All ER at 959, [1969] 1 WLR at 1035

6 [1971] 1 All ER 307 at 314, [1971] AC 666 at 681

7 [1971] 1 All ER at 313, [1971] AC at 679, 680

judge thought he would suffer pain and lose earnings. They were not intended to provide for the widow or child in case of his death. I would, therefore, admit the evidence that David McCann died on 22nd October 1972, and assess his damages accordingly. a

Some items are clear:

	£	
Special damages for loss of earnings up to the date of trial—June 1972	2,548	b
Loss of future earnings from date of trial—June 1972—to date of death—22nd October 1972	400	
Loss of expectation of life (see <i>Yorkshire Electricity Board v Naylor</i> ¹)	750	
Loss of earnings during 'lost years' (see <i>Oliver v Ashman</i> ²)	nil	

The difficult item is general damages for pain and suffering and loss of amenities of life—to cover the period from the accident in August 1968 to the death in October 1972, that is, 4½ years. The pain and suffering was far greater than in most of the cases that come before the court. A tragic consequence is that the drugs prescribed for relieving the pain turned him into a drug addict—so that he used deception to get drugs—and was brought before the courts. The loss of amenities of life was far greater than in most cases. There was grave sexual incapacity and difficulty in passing water, much constipation and unpleasantness attendant on it, and there was inability to do any kind of work or recreational activity. His life was so hopeless that it may be that he took an overdose of drugs so as to put an end to it, or, of course, it may have been an accident. We do not know. But, I must say that such grievous consequences for 4½ years do merit a considerable sum of general damages. He suffered much more than the 'unconscious' cases where the injured person is turned into a vegetable without feeling. When I consider the damages in those cases, I would put the general damages here at £15,000. This gives a total of £18,698, plus interest, of course. The sum will be for the benefit of the widow and child. c

I would allow the appeal, accordingly. d

STAMP LJ. I prefer to express no opinion as to the prospects of success in an action brought by the widow or child under the Fatal Accidents Acts. But agreeing, as I do, that evidence of the death of Mr McCann ought to be admitted, it must, I think, follow that damages for loss of future earnings should be reduced to the extent indicated by Lord Denning MR, that the new factual situation calls for an award of £750 for loss of expectation of life and for a new appraisal under the head of general damage for pain, suffering and loss of amenities. e

The extent and nature of the appalling injuries and pain and physical and mental suffering which Mr McCann suffered and endured have been sufficiently described by Lord Denning MR. I agree with him that the figure for general damages should be assessed at £15,000. There was no prospect which can fairly be taken into account of Mr McCann, had there been no accident, making any savings out of earnings; and, irrespective of *Oliver v Ashman*² nothing could be assessed under that head. f

I would allow the appeal to the extent indicated by Lord Denning MR. g

JAMES LJ. On 15th August 1968 Mr David Alastair McCann, a single man aged 24 years, suffered serious injuries when the car in which he was a passenger collided with another car. McCann brought an action for damages against both drivers. It was agreed at the trial that the first defendant alone was liable to pay, and the second defendant is no longer involved in the action. Quantum was the only contested issue. h

¹ [1967] 2 All ER 1, [1968] AC 529

² [1961] 3 All ER 323, [1962] 2 QB 210

a On 6th June 1972 Park J ordered judgment to be entered for McCann in the total sum of £41,252 made up as follows: 1. General damages for pain and suffering, loss of amenities and loss of expectation of life, £20,000. 2. For loss of future earnings £15,000—calculated at £1,000 per annum for 15 years. 3. Special damages, the agreed sum of £2,548. 4. Interest agreed on the basis of the sums awarded for general damages and special damages, £3,704. On 18th July 1972, within the time limited for serving notice, the first defendant gave notice of appeal against the amount of damages awarded.

b On 22nd October 1972 McCann was found dead at his home. The first defendant became aware of this and enquiries were made on his behalf into the circumstances of death. On 21st December 1972 a supplemental notice of appeal was given asserting the fact of death and also contending that the judge had erred in regarding McCann as a genuine and credible witness. The first defendant seeks leave to call

c further evidence on these matters.

On 12th February 1973 the administrators of the estate of McCann obtained an order making them plaintiffs in the action. They are now the respondents to the appeal, and on 13th February 1973 they served notice of appeal seeking (i) an increase in the sum awarded for loss of future earnings and, contingent on the court admitting evidence of the death of McCann after the trial, (ii) an increase in the award for loss of expectation of life and an increase in the general award of damages to reflect the loss of prospects of making provision for his dependants.

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As will be apparent from what I have said the case raises a number of important issues. The first arises out of the death of McCann. The court is aware of the fact of death because his administrators are now on the record and there is a cross-appeal. The court being aware of the death, the first defendant asks the court to admit

e evidence of it and, having admitted that evidence, to vary the amount of damages to the sum which would have been the proper award had it been known at the trial that McCann's expectation of life extended only to 22nd October 1972.

The first defendant also asked the court to admit other evidence not available to him at the time of the trial. First, the evidence of Detective Inspector Smith of New Scotland Yard to prove that McCann had suffered in the years 1960 to 1967 a number of convictions for comparatively minor criminal offences; that after the accident in August 1968 he was placed on probation for an offence of causing wilful damage, and, on 18th October 1972, four days before his death, he was convicted of offences of procuring dangerous drugs for his own use by deception. Secondly, the evidence of Detective Inspector Neilson, who is a member of the dangerous drugs squad of the West Midlands police force, to prove McCann's involvement in obtaining prescriptions for drugs from doctors, by giving false names and addresses, and pretending that he was a temporary resident in the area. There were apparently 14 instances of his doing so in the period 19th March to 2nd June 1972, just before the trial, and four more instances in the period 10th to 14th June 1972, a week after the trial. In relation to this evidence it is of interest to observe that the judge said of McCann:

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h 'I want to say at this stage that it seems to me that while [McCann] was giving evidence he was obviously under drugs, he found it very difficult to follow many of the questions he was asked and he found it difficult to frame his answers to them.'

i The evidence of the witness, Detective Inspector Neilson, is also directed to his assessment of McCann as an 'evasive, difficult man' and 'a compulsive liar'.

The court heard the evidence *de bene esse* in order to understand the nature of the evidence when deciding the question whether to admit all or any part of it. At the conclusion of his argument counsel for the first defendant informed the court that he desired to rely only on the evidence of death.

RSC Ord 59, r 10 (2), provides:

'The Court of Appeal shall have power to receive further evidence on questions of fact . . . but, in the case of an appeal from a judgment after trial or hearing of any cause or matter on the merits, no such further evidence (other than evidence as to matters which have occurred after the date of the trial or hearing) shall be admitted except on special grounds.'

The evidence of the involvement of McCann in obtaining drugs unlawfully, his conviction of such offences, and his death in October 1972, relates to matters which have occurred after the date of the trial, and no special grounds are needed to justify the receiving of that evidence. Whether the remainder of the further evidence should be admitted falls to be decided on the well-known principles expressed in *Ladd v Marshall*¹ by Denning LJ:

' . . . first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial: second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive: third, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, although it need not be incontrovertible.'

The first and third prerequisites are without doubt satisfied. Whether the second condition is satisfied is more questionable, but in view of counsel for the first defendant's statement that he does not wish to rely on the evidence it is unnecessary to consider that matter in detail.

In *Braddock v Tillotsons Newspapers Ltd*² the question arose whether evidence directed solely to the issue of the credibility of a witness should be allowed to be given as further evidence. The same question arises in this case in relation to the evidence of McCann's convictions previous to the trial. Tucker LJ³ in that case expressed the opinion that such evidence should only be admitted when—

'the evidence is of such a nature and the circumstances . . . are such that no reasonable jury could be expected to act on the evidence of the witness whose character has been called in question.'

Applying that test to the present case, the evidence of the convictions and of the police officer's opinion of McCann's credibility ought not in my judgment to be received. It may be that there could be a case in which the court would consider it right to admit, after a trial on the merits, evidence of the criminal record of a witness who has died since the trial, in order to attack that witness's credibility. But such a case must be a very rare one indeed, for it necessarily involves the admission of evidence of what may be of a highly prejudicial nature without there being any opportunity for challenge or explanation.

Counsel for the plaintiffs has argued strongly that although the court knows that McCann died shortly after the trial, nevertheless, in the exercise of the court's discretion, the court should refuse to admit evidence of that fact. He argues that to admit the evidence, with the result that the damages awarded by the judge may be reduced, would introduce a considerable element of chance into the litigation. He points out that, had the position been that the first defendant had not entered his appeal within the time prescribed by the rules, the opportunity for calling further evidence would not have existed unless the court extended time for that purpose. Further, it was by chance that McCann died 20 weeks and not a year or more after the hearing. If he had lived for a year or more the appeal would probably have

¹ [1954] 3 All ER 745 at 748, [1954] 1 WLR 1489 at 1491

² [1949] 2 All ER 306, [1950] 1 KB 47

³ [1949] 2 All ER at 311, [1950] 1 KB at 53

a been heard; or if it had not been heard, the court would not be likely to admit evidence of the event which occurred so long after the judgment. It is only the double chance of the first defendant appealing within time and death occurring so soon after the hearing that enables the first defendant to present an arguable case for the admission of the evidence. Counsel also argues that the evidence of McCann's death relates to a sphere in which, as is usual in this sort of case, the judge had to make an estimate; that having entrusted that function to the judge, it would be wrong to interfere by introducing fresh material, and, counsel argues, that, in exercising its discretion, the court should have regard to the fact that, so long as the decision in *Oliver v Ashman*¹ stands, there is no way of recovering loss of earnings for 'the lost years', and if the sum awarded to McCann is to be drastically reduced by reason of his death, the consequences for his widow and child are grave indeed.

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c RSC Ord 59, r 3 (1) provides: 'An appeal to the Court of Appeal shall be by way of rehearing . . .' Where notice of appeal has been served within the time prescribed by the rules and an event has taken place at a time reasonably proximate to the date of the trial, which event falsifies the facts on which judgment proceeded, the court should not rehear the matter on the basis of the fiction that the event has not taken place. In *Curwen v James*², Harman LJ expressed this principle thus: 'There is an important principle here involved and it is this that the court should never speculate where it knows'. In that case a widow who obtained an award of damages under the Fatal Accidents Acts remarried very shortly after the trial. Evidence of remarriage was admitted on the hearing of the appeal. Pearson LJ³ pointed out the dangers of the admission of further evidence and the caution which the court should exercise in considering whether to admit it:

e ' . . . I think it right to emphasise what has already been pointed out—that, in this case, the event in question occurred quite soon after the trial or hearing, and in fact within the time limited for serving the notice of appeal. This case, as it stands, is limited to a case on those facts, and I do not propose to say what the position would be if the event had occurred at some later stage. I do feel anxiety on this subject, because the normal rule in accident cases is that the sum of damages falls to be assessed once for all at the time of the hearing. When the assessment is made, the court has to make the best estimate it can as to events that may happen in the future. If further evidence as to new events were too easily admitted, there would be no finality in such litigation.'

f The relevant principles were considered in *Jenkins v Richard Thomas & Baldwins Ltd*⁴, *Murphy v Stone Wallwork (Charlton Ltd)*⁵, and in *Mulholland v Mitchell*⁶.

g In the present case the judge accepted the evidence that McCann's expectation of life had been shortened by reason of his injuries and their consequences, but the evidence of the shortening was that it reduced the normal expectation by at most 20 years. Thus it did not encroach on the period of years immediately following the trial to which the court would be looking when assessing future loss of earnings and future pain and suffering and loss of amenities. In fact, the judge took a multiplier of 15 years for the purpose of calculating loss of future earnings, which multiplier is quite usual in cases where there is no loss of expectation of life. The fact of death brought a dramatic change in the situation. It occurred after only four months from trial. The facts of the present case, in relation to McCann's death and the circumstances of his death, are well within the established general principles on which the

i 1 [1961] 3 All ER 323, [1962] 2 QB 210

2 [1963] 2 All ER 619 at 623, [1963] 1 WLR 748 at 753

3 [1963] 2 All ER at 624, [1963] 1 WLR at 755

4 [1966] 2 All ER 15, [1966] 1 WLR 476

5 [1969] 2 All ER 949, [1969] 1 WLR 1023

6 [1971] 1 All ER 307, [1971] AC 666

court admits further evidence and, in my judgment, to refuse to do so would be inequitable. For these reasons the evidence of McCann's involvement with drugs leading to his death and the evidence of his death should be admitted. What is the effect of the further evidence when admitted?

1. The damages for future loss of earnings assessed on the basis of a 15 year purchase of earnings of £1,000 per annum cannot stand. The period must be reduced from 15 years to the period from 6th June to 22nd October 1972, 20 weeks. For the plaintiffs it is argued that the figure of £1,000 per annum is in any event too low. Counsel for the plaintiffs contends that it is wrongly based on the figure agreed arbitrarily for calculating special damages and it does not reflect future increases or tax savings by reason of dependants. The judge did not accept the evidence of McCann as to his employment and prospective earnings. He had to make the best estimate he could. He arrived at the estimate of £1,000 per annum and I see no reason to interfere with that estimate. £20 per week for 20 weeks is £400.

2. Damages for loss of expectation of life were included in the award of general damages of £20,000. On the facts the judge cannot have appropriated more than a nominal figure to this head. The certificate of death states the cause of death—overdose of pain-killing drugs and sleeping drugs. For the purpose of this action it is conceded that the probabilities are that it was as a result of the injuries and consequent pain that death occurred in that way. On this footing the expectation of life of McCann was reduced to a little over four years from the date of the accident. The new factual position, in my judgment, calls for an award of the conventional figure of £750 under this head.

3. The figure for general damages, £20,000, was awarded on a basis which has been falsified, for it reflects the pain and suffering and loss of amenities up to the date of trial and for a considerable number of years ahead. It has been suggested that as the judge took a 15 year purchase for one purpose, he probably had regard to a similar period, and added it to the period of four years up to the trial, when assessing the £20,000. That would be an award based on a figure of about £1,000 per annum. Counsel for the first defendant contends that the figure should be reduced to £5,000 or perhaps a little more, on the basis that death occurred within five years of the injury. Counsel for the plaintiffs was unable to argue, once evidence of death is received, that the new factual situation does not affect this head of damages. He contended however that the figure awarded was far too low and that on a rehearing the figure should not be reduced, or substantially reduced, even taking into account the fact of McCann's death in October 1972. I have no doubt that a rehearing requires a new appraisal under the heading of general damages, for pain, suffering and loss of amenities. I do not consider that a correct approach is to take a proportion of the sum assessed by the judge according to the reduced number of years to be considered. It is necessary to set out the salient features of the injuries suffered by McCann and the consequences on his daily life.

At the trial evidence was given by surgeons eminent in the disciplines of neurosurgery and urology. Their evidence was supported by their written reports made after examining McCann on a number of occasions. The agreed reports of an orthopaedic surgeon were also adduced in evidence. Stated briefly, the injuries suffered by McCann were severe injuries involving the fracture of the pelvic ring and damage to the right sacral plexus, the roots being torn from the spinal cord. There was a tear of the bladder and damage to the urethra.

From the orthopaedic aspect he made a reasonable recovery, but there remained considerable deformity and disorganisation of the right sacro-iliac joint. The neurological injury and the genito-urinary complication were the main causes of disability. The overall disability, according to McCann, manifested itself in a number of ways. His complaints were supported by clinical and radiological findings and were regarded by the doctors and surgeons, apart from Mr Roberts, as genuine. Mr Roberts, however, concluded his report dated 3rd June 1971 with these words:

- a 'My general impression of Mr. McCann was of a patient who had suffered very severe and substantial injuries and had become much obsessed with them. At no time did I feel that there was any likelihood that he would understate any of his problems and I suspect that he may in fact tend to exaggerate them, possibly even deliberately. Nevertheless, it cannot be doubted that he has suffered very severely as the result of his original accident.'
- b I list the principal features: 1. permanent weakness and wasting of the right leg; loss of dorsiflexion of the right foot requiring him to wear a spring appliance; difficulty in locomotion; 2. trophic ulceration under the right toe; 3. incontinence of urine; difficulty and pain in micturition; 4. constipation requiring relief by manual defaecation; 5. impotence and lack of sexual urge but, be it noted, his wife whom he married in June 1970 gave birth to his child in September 1971, a fact which he,
- c McCann, described as 'a miracle'; 6. diminished sensation in the genitalia; 7. acute pain from the right sacral region passing down the length of the right leg. In March 1969 pain was so acute that a cordotomy was carried out. Subsequently he developed a mirror image pain in the left leg, and, after five months, the right-sided pain returned and attained its previous level. Pain-killing drugs were required for relief with associated risk of addiction.
- d The bare recital of those features cannot adequately portray the gravity of the injuries or the experience of one who is aware of the severe and unpleasant disabilities and knows that his only escape from intolerable pain is through the euphoria of drug addiction.
- e It is the practice of judges when assessing damages in this sort of case to itemise damages under the different heads for future loss of earnings, special damages calculated up to the date of trial, general damages and so forth. This is not to say that in arriving at the sums itemised judges should not, or do not, look at the total sum 'in the round'. In assessing the figure for general damages there is opportunity for 'scaling' in order to achieve a fair total figure and one which is in proper perspective to other cases.
- f In the present case an important feature is the injured person's awareness of his condition. In *Wise v Kaye*¹ a 20 year old girl—paralysed and in a permanent coma—was awarded £15,000 for the bodily injuries she sustained. In *H West & Son Ltd v Shephard*², a 41 year old married woman who sustained brain atrophy and paralysis of all limbs and loss of speech, and who had limited periods of consciousness, was awarded £15,000 for the bodily injuries and £2,500 in addition for her degree of awareness of her condition.
- g Those cases reveal that substantial awards of damages are appropriate for the bodily injury itself, quite apart from pain and irrespective of whether the injured person is aware of his condition. In the present case there are: (a) severe physical injuries; (b) intolerable and intractable pain; (c) enforced recourse to drugs with resultant drug addiction; (d) full awareness of (a), (b) and (c). Looking at this case
- h in the round in my judgment the figure for general damages should be assessed at £15,000.
4. Interest. The sum awarded for interest which was, of course, based in part on the sum of £20,000 will require recalculation and a lower figure substituted.
5. The last matter arising from the fact of death is embodied in the contention of the plaintiffs that a sum should be awarded in this action in respect of the loss of prospects of making a provision for dependants, and in the possibility of the widow successfully claiming damages pursuant to the Fatal Accidents Acts 1846-1959 in subsequent proceedings.
- j

1 [1962] 1 All ER 257, [1962] 1 QB 638

2 [1963] 2 All ER 625, [1964] AC 326

I can deal with these matters shortly. The claim for loss of prospects has its genesis in a dictum of Sellers LJ in *Wise v Kaye*¹ in which he reserved the question whether a sum representing the balance of savings out of earnings during 'the lost years' can be recovered in a case in which life expectancy has been reduced. The decision of this court in *Oliver v Ashman*² still stands and prevents recovery of loss of earnings in respect of 'the lost years'. The present case is not one in which the claim put forward, even if soundly based in law, could succeed, for on its facts the probabilities are against Mr McCann, had he survived, making any savings out of earnings. a

A claim pursuant to the Fatal Accidents Act 1846-1959 would, in this case, bristle with interesting points. Whether it is open to the widow to pursue such a claim is not for us to decide. The possibility and possible results in relation to the present action have been canvassed in argument. I content myself with saying that the words in s 1 of the 1846 Act—'such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages' would appear to put an insuperable obstacle in the path of such proceedings in a case in which the injured person has brought proceedings and obtained judgment for his injuries in his lifetime. b

The question is not bare of authority. *Read v The Great Eastern Railway Co*³ and the more recent case of *Murray v Shuter*⁴, to which Lord Denning MR referred, decided in this court, are against such a claim being sustainable. In the latter case Lord Denning MR⁵ said of the situation: c

'His advisers suggest that the damages would be some £15,000 or £16,000 if the case is tried while he is alive. That would be the end of the matter. Once his claim was disposed of during his lifetime, his dependants could recover nothing more. They would have no separate action for their own benefit.' d

I would allow the appeal to the extent that the sum of £20,000 be reduced to £15,750 and the sum of £15,000 to £400. A consequential reduction in the amount of interest awarded will have to be calculated and substituted for the figure in the order. e

Appeal allowed. Damages £18,698 with interest until date of trial; no interest after date of trial. Leave to appeal to the House of Lords refused. f

Solicitors: *Cartwrights*, Bristol (for the first defendant); *Lee, Bolton & Lee*, agents for *Bush & Bush*, Bristol (for the plaintiffs).

L. J Kovats Esq Barrister. g

1 [1962] 1 All ER at 265, [1962] 1 QB at 654

2 [1961] 3 All ER 323, [1962] 2 QB 210

3 (1868) LR 3 QB 555

4 [1972] 1 Lloyd's Rep 6

5 [1972] 1 Lloyd's Rep at 7

a

Ellis v Jones

QUEEN'S BENCH DIVISION

LORD WIDGERY CJ, ASHWORTH AND BRIDGE JJ

8th MARCH 1973

b

Criminal law – Evidence – Written statement – Identity – Proof of identity – Written statement admissible as evidence to the like extent as oral evidence – Accused charged with making false declaration for purpose of obtaining sickness benefit – Declaration that he had not been working during relevant period – Evidence by company director that accused had worked for him – Evidence in form of written statement including reference to 'Clive Jones' – Name of accused Clive Jones – Whether positive evidence required that accused was the person referred to in statement – Criminal Justice Act 1967, s 9.

c

The respondent, Clive Jones, was charged with making a false declaration that he had not been working in order to obtain sickness benefit under the National Insurance Act 1965. A statement from an employer was put in at the hearing under s 9^a of the Criminal Justice Act 1967 saying 'I know Clive Jones' and listing dates on which he had worked for him. At the conclusion of the prosecution case, it was submitted for the respondent that there had been no positive evidence to identify him with the Clive Jones in the statement. An application for an adjournment to call the employer was refused, and the case was dismissed. On appeal,

d

e

Held – The effect of a statement properly put into court under s 9 of the 1967 Act was the same as if the witness had given it orally from the witness box. Accordingly, in the absence of any suggestion that the Clive Jones in the dock and the Clive Jones referred to in the statement were different people the matter could only be approached on the footing that it was the same person who was referred to. It followed that there was a case to answer; the appeal would be allowed and the case remitted to the justices to continue the hearing (see p 896 a to c and d, post).

f

Notes

For the effect of a statement put in evidence under s 9 of the Criminal Justice Act 1967, see Supplement to 10 Halsbury's Laws (3rd Edn) 834A.

For the Criminal Justice Act 1967, s 9, see 8 Halsbury's Statutes (3rd Edn) 585.

g

Case stated

This was an appeal by way of case stated by the justices for the county of Glamorgan, acting in and for the petty sessional division of Miskin Lower, in respect of their adjudication as a magistrates' court sitting at the Court House, Porth, on 14th June 1972.

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An information was preferred by the appellant, Beryl Ellis, an officer of the Department of Health and Social Security, against the respondent, Clive Jones, charging that he on 21st April 1971 at Ferndale in the division of Miskin Lower for the purpose of obtaining for himself sickness benefit under the National Insurance Act 1965 knowingly made a certain false representation, namely, that because of incapacity he had not worked since the date of the last medical (supplementary) certificate furnished by him, i.e. on or about 22nd January 1971, whereas on divers days between those dates he had worked, contrary to s 93 (1) of the National Insurance Act 1965.

j

The solicitor for the appellant outlined the facts of the case and then read aloud a written statement made and signed by a Mr Hayden Davies pursuant to s 9 of the

^a Section 9, so far as material, provides: '(1) In any criminal proceedings . . . a written statement by any person shall [if certain conditions are satisfied] be admissible as evidence to the like extent as oral evidence to the like effect by that person . . .'

Criminal Justice Act 1967, a copy of which had been served on the respondent on behalf of the appellant on or about 19th April 1972. No objection to the statement being tendered in evidence pursuant to s 9 was made, either prior to or at the hearing of the information, and the justices were told that the respondent's solicitor had agreed to the statement being tendered in evidence. The statement was as follows:

'I am a director of Hayden Davies, Civil Engineering Contractor Ltd, Sully Road, Penarth. I know Clive Jones. He was employed full time as a sub contract labourer by the firm of which I am a director. He worked for Hayden Davies, Civil Engineering Contractor Ltd. throughout the period from 2 2 71 to 26 3 71. He was paid the following amounts:—

£20.00 on 5 2 71	£14.00 on 5 3 71
£20.00 on 12 2 71	£30.00 on 12 3 71
£21.00 on 19 2 71	£15.00 on 19 3 71
£7.50 on 26 2 71	£12.50 on 26 3 71

These payments were in respect of weeks of work ending on payday Friday. This statement is true to the best of my knowledge and belief and I make it knowing that, if it is tendered in evidence, I shall be liable to prosecution if I have wilfully stated in it anything which I know to be false or do not believe to be true.'

The only other witness was Mr John McKinnon, an officer of the Department of Health and Social Security, who gave evidence on oath that he had an interview with the respondent on 28th January 1972 at his home, the respondent's wife being present throughout the interview. At the interview the respondent was shown a form MED 5, dated 22nd January 1971, form BF 27 dated 26th January 1971 and another medical certificate dated 20th April 1971. The respondent agreed that the signatures were his and that he had received benefit and also admitted receiving and understanding form BF 11D which laid down conditions for the receipt of benefit. When the respondent enquired why those questions were being asked he was told by Mr McKinnon that he had information that he had been working while in receipt of benefit. The officer then charged him with the offence. The respondent declined to make a statement, saying: 'I am innocent. I was attending hospital for treatment. I'll see a solicitor about this.' No questions were put to Mr McKinnon on behalf of the respondent and the case for the prosecution was closed.

It was contended for the respondent at the close of the prosecution case that there was no case to answer on the basis that the words in the statement of Mr Hayden Davies, 'I know Clive Jones', did not enable the court to say that the man referred to in the statement was the respondent and they could in fact refer to any man named Clive Jones and that on the basis of uncertainty of identity the case should be dismissed.

It was contended on behalf of the appellant that there was a case to answer but that as the respondent's solicitor had agreed to the statement being tendered as evidence, if the court had any doubt as to identity (i) that the court should exercise its discretion and of its own motion call Mr Hayden Davies to identify the respondent as Clive Jones the person named in his written statement; (ii) that the court should allow the appellant to call the witness, Mr Hayden Davies, personally, to identify the respondent Clive Jones, notwithstanding that the case for the prosecution had closed, on the basis that the submission of 'No case to answer' on the grounds given was a completely unforeseeable contingency, no objection having been made to the statement being tendered in evidence.

The justices came to the following conclusion: (a) that a written statement under s 9 of the Criminal Justice Act 1967 could not alone under any circumstances identify a person; they thought that evidence of identification could possibly be furnished by tendering a s 9 statement to which there was annexed as an exhibit a photograph being

- a a good likeness of the accused, and (b) that even a cursory examination of the provisions relating to s 9 statements would inevitably lead an advocate to the same conclusion, and (c) that they could not in the circumstances hear the appellant's solicitor say that the respondent's submission of no case to answer was in the circumstances a completely unforeseeable contingency, and (d) that having regard to all the circumstances the due administration of justice did not require them to exercise their discretion to call Mr Hayden Davies. The justices dismissed the information.

b The question for the opinion of the court was whether the words in the statement of Mr Hayden Davies 'I know Clive Jones' were sufficient for the justices to say that the respondent was the man referred to in that statement and whether in the exercise of their discretion they should have allowed or required Mr Hayden Davies to be called as the respondent's solicitor had agreed to the statement being tendered in evidence.

- c *Raymond Jack* for the appellant.
Geoffrey Brice for the respondent.

- LORD WIDGERY CJ.** This is an appeal by case stated by justices for the county of Glamorgan in respect of their adjudication as a magistrates' court on 14th June 1972. On that occasion they had before them an information preferred by the present appellant against the respondent, Clive Jones, alleging that in April 1971 for the purpose of obtaining for himself sickness benefit under the National Insurance Act 1965, Jones knowingly made a false representation, namely, that because of incapacity he had not worked since the date of the last medical supplementary certificate furnished by him, that is to say, on or about 22nd January 1971, whereas on divers days between these dates he did work, contrary to s 93 (1) of the National Insurance Act 1965. All that really comes to is that the allegation was that the respondent, Clive Jones, had claimed benefit on the basis he was not working, whereas the prosecution said he had worked on a number of days during the relevant period.

- e We are not told of the manner in which the proceedings began, but we can use our imagination and experience to appreciate that the respondent, Clive Jones, would have been called forward into the dock and asked if he was Clive Jones, and it seems reasonable to assume that he answered in the affirmative, as was the case. The evidence for the prosecution, apart from the evidence that he had claimed the benefit, was the evidence of one Hayden Davies, who was a director of a civil engineering contracting firm in Penarth. He was called by the prosecution for the purpose of proving that Jones had worked during the relevant period. For reasons which are not disclosed in the case, although counsel for the respondent has mentioned them, in the end the prosecution decided to rely on Mr Hayden Davies's written statement under s 9 of the Criminal Justice Act 1967. The defence did not seek to cross-examine Mr Hayden Davies and did not give any effective notice requiring his attendance at court. So the statement of Mr Hayden Davies was read out without challenge, and having given his name, address, age and occupation he said: 'I know Clive Jones. He was employed full time as a sub-contract labourer by the firm of which I am a director', and he then went on to set out the details of the days on which Clive Jones had worked, being the days relied on by the prosecution.

- h When that witness had been called, the prosecution closed its case; the advocate for the respondent then got up and submitted that there was no case to answer and the basis of his submission was that there was no evidence to associate the Clive Jones referred to in the statement of Mr Hayden Davies with the Clive Jones in the dock. Accordingly he said the prosecution had not made out its case.

j On that submission being made the prosecution sought an adjournment with a view to calling Mr Hayden Davies and proving that the right Clive Jones was referred to. The justices thought that would be an inappropriate course to take, and to cut a long story short they decided they would not grant an adjournment, they supported the

respondent's submission of no case to answer and dismissed the charge; hence the appeal to this court. a

For my part it is really too obvious to be mentioned that where a statement is properly put in under s 9, as it was in the present case, then the effect of the evidence in the statement is the same as though the witness had stood in the witness box and given it orally. So I approach this case on the basis that the evidential basis is exactly the same as it would have been if Mr Hayden Davies had gone into the witness box, been asked 'Do you know Clive Jones?' and answered 'Yes'. In the absence of any sort of suggestion that the Clive Jones who answered to his name and stood in the dock was different from the Clive Jones referred to by Mr Hayden Davies, I should have thought it was perfectly clear that the justices could approach the matter only on the footing that the same person was referred to. b

Certainly beyond any doubt at all there was at the end of the prosecution case a case for the defence to answer, and this is yet another example of submissions made by advocates for the defence in circumstances which are wholly inappropriate and which give rise to a great deal of waste of time and money. I would allow the appeal and send the case back to the justices with a direction to continue the hearing. c

ASHWORTH J. I agree. d

BRIDGE J. I agree.

Appeal allowed.

Solicitors: *Solicitor, Department of Health and Social Security; Spickett & Sons, Pontypridd* e
(for the respondent).

Jacqueline Charles Barrister.

R v Smith (Roger Daniel) f

COURT OF APPEAL, CRIMINAL DIVISION
LORD WIDGERY CJ, JAMES LJ AND NIELD J
29th MARCH 1973 g

Criminal law – Attempt – Belief of accused that his acts constitute an offence – Acts not in fact an offence – Handling stolen goods – Goods having ceased to be stolen goods – Accused handling goods in belief that they were stolen goods – Whether accused guilty of an attempt to handle stolen goods. h

A quantity of goods was stolen from a warehouse. Ten days later police discovered part of the proceeds of the theft in a lorry which was on its way to London. They decided to let the lorry continue on its journey so that they could catch the persons concerned with the ultimate disposal of the goods. The lorry set off for London with police officers on board and a police car trailing it. The lorry eventually stopped at a service station on the motorway where it was met by the accused and others who were responsible for the transfer of the goods to other vehicles and for their ultimate distribution. The accused took a leading part in making arrangements for the disposal of the goods. After a time the police officers revealed their identity and arrested the accused. Although the accused was ignorant of the fact, the goods had, by virtue i

a of s 24 (3)^a of the Theft Act 1968, ceased to be stolen goods by the time they reached the service station as they had already come into the custody of the police. In consequence the accused was charged with attempted handling of stolen goods instead of the substantive offence of handling.

b **Held** – A person who had planned and carried out a course of action in the belief that what he was doing was a criminal offence could not be convicted of an attempt to commit the offence if it turned out that what he had done was not in law an offence at all. Accordingly the accused could not be convicted of attempting to handle stolen goods since, at the time when he handled the goods, they had in fact ceased to be stolen goods (see p 899 g to j, p 900 e and p 902 f g, post).

R v Percy Dalton (London) Ltd [1949] LJLR 1626 and *R v Donnelly* [1970] NZLR 980 applied.

c *R v Miller*, *R v Page* (1965) 49 Cr App Rep 241 not followed.

Notes

For an attempt to commit a crime, see 10 Halsbury's Laws (3rd Edn) 306-309, para 567, and for cases on the subject, see 14 Digest (Repl) 112-118, 776-818.

d For the Theft Act 1968, s 24, see 8 Halsbury's Statutes (3rd Edn) 797.

Cases referred to in judgment

People of the State of California v Rojas (1961) 10 Cal Rptr 465.

R v Curbishley, *R v Crispin* (1970) 55 Cr App Rep 310, CA.

R v Donnelly [1970] NZLR 980, CA.

e *R v McDonough* (1962) 47 Cr App Rep 37, CCA, Digest (Cont Vol A) 444, 11523b

R v Miller, *R v Page* (1965) 49 Cr App Rep 241, CCA, Digest (Cont Vol B) 201, 10,403a.

R v Percy Dalton (London) Ltd [1949] LJLR 1626, 33 Cr App Rep 102, CCA, 17 Digest (Repl) 472, 251.

Cases and authorities also cited

f *Director of Public Prosecutions v Head* [1958] 1 All ER 679, [1959] AC 83, HL.

R v Cooper, *R v Compton* [1947] 2 All ER 701, CCA.

R v Osborn (1919) 84 JP 63.

R v Williams [1893] 1 QB 320, CCR.

Smith and Hogan, Criminal Law (2nd Edn, 1969), p 173.

Williams, Criminal Law, The General Part (2nd Edn, 1961), p 633, para 205.

g Appeal

On 28th September 1972 in the Crown Court at Liverpool before his Honour Judge Jalland and a jury the appellant, Roger Daniel Smith, was convicted of attempting to handle stolen goods by dishonestly attempting to assist in their disposal for the benefit of others. He was sentenced to 12 months' imprisonment and a suspended sentence of 12 months' imprisonment, imposed for a period of three years at Birkenhead Quarter Sessions on 21st July 1969 for theft, was ordered to take effect with the original term unaltered. He appealed against his conviction on the grounds (1) that a man could not be convicted of the attempt to commit an offence when the circumstances were such that he could not in law be capable of committing the full offence; (2) that he should not have been convicted of attempting to handle stolen goods because the goods in question had previously been restored to lawful custody. The facts are set out in the judgment of the court.

j *B A Hytner QC* and *J Briggs* for the appellant.

W G O Morgan QC and *J A Morgan* for the Crown.

a Section 24 (3) is set out at p 899 a b, post.

LORD WIDGERY CJ delivered the following judgment of the court. On 28th September 1972 at Liverpool Crown Court the appellant was convicted of attempted handling of stolen goods. It is perhaps as well to read the terms of the count in the indictment. The particulars of the offence were—

‘... on or about the 28th day of September 1971, in the County of Hertford, dishonestly attempted to assist in the disposal by or for the benefit of Alan Christopher Dixon, George James Mooney, Paul John Maeder and other persons unknown of 890 cartons of corned beef, the property of Arbuckle Smith and Company Limited, knowing or believing the same to have been stolen.’

The essence of it was dishonestly attempting to assist in the disposal of those goods. He was convicted on that count and sentenced to 12 months’ imprisonment. There was another count in the indictment charging conspiracy, arising out of the same circumstances, but the jury were directed to return a verdict of not guilty on that count.

What had happened was this. On 18th September 1971 there was a burglary at a warehouse in Liverpool, and a very large quantity of corned beef in cartons was stolen. Ten days later, on 28th September, two police officers on duty at night saw a large van proceeding down a main road near Sutton Coldfield, and their attention was directed to it because it was obviously overloaded, or had a load which had shifted, in other words it was all down on one side. They stopped the vehicle; the driver was a man called Dixon; he had a man named Nicholson with him. The van was loaded with cartons of corned beef, and for the purposes of this judgment I shall state the facts as the jury must have found them to be, and the jury clearly accepted that the cartons of corned beef in this van were part of the proceeds of the theft in Liverpool ten days before. The van and the two men in it was taken along by the police officers to Sutton Coldfield police station. There was a brief conference between the police officers and members of the regional crime squad. The upshot of it was that it was decided to let this van go on its way to London with the police keeping an eye on it with a view to catching some of the other people who were concerned in the theft and disposal of these goods. So after what was really quite a brief interval, the van set off for London; it had two police officers on board and was trailed by other police officers in a car. They got to the London end of the M1 motorway at about 7 a.m. at the Scratchwood service area, as it is called, because this was the place where Dixon, the driver of the vehicle, told the police that he was to rendezvous with those who were to take the corned beef on. At the Scratchwood service area there were a number of people, including the appellant, who were obviously there to receive this vehicle, and who were responsible for the transfer of the goods to other vehicles and the ultimate distribution of the goods to the ultimate receivers. I take the matter quite briefly, and I do not consider further the fact that many of these facts were disputed in the trial. It suffices for present purposes to say that in view of the jury’s verdict, one can regard the appellant as being one, if not the leader, of a party waiting at the Scratchwood service area for this van with a view to disposing of the contents.

It is clear that not only were they there for that purpose, but that when the van arrived the appellant took a leading part in making arrangements for the future disposal of the goods. There were such troubles as a burst tyre and things of that kind, and he evidently was taking a leading part in seeing that the goods were made mobile again and went on to their ultimate destination. In the end the police officers made their identity known, and the appellant was eventually arrested.

The reason why he was not charged with handling stolen goods was a perfectly simple one, namely that by the time the vehicle got to Scratchwood service area and the appellant began to take an active part in the affair, the corned beef was, as a matter of law, no longer stolen goods. The reason is that by s 24 (3) of the Theft

a Act 1968, which deals with certain offences relating to stolen goods, there is this provision:

b 'But no goods shall be regarded as having continued to be stolen goods after they have been restored to the person from whom they were stolen or to other lawful possession or custody, or after that person and any other person claiming through him have otherwise ceased as regards these goods to have any right to restitution in respect of the theft.'

c So in brief, as a matter of law, although the goods were undoubtedly stolen goods when they left the Liverpool warehouse, they ceased to be stolen goods as soon as the police got hold of them at Sutton Coldfield, and they were then restored to lawful custody. Consequently when the appellant began to perform his functions at the Scratchwood service area, the goods with which he was dealing, totally unknown to him, were not stolen goods at all. Accordingly there could be no question of charging him with handling stolen goods. Instead he was charged with attempting to handle stolen goods, and this is another case in which the court has to consider whether a person can be said to commit the offence of attempting to commit a criminal offence, if the offence itself is not capable of being committed by reason of circumstances unknown to the accused. The fact that an attempt is charged means, of course, that d the prosecution are not able or minded to try and prove the full offence. It goes without saying that a man is not to be charged with or convicted of an attempt except on the basis that he has not gone the whole distance and actually committed the full offence itself.

e Attempts arising out of a failure on the part of the accused to complete the full offence usually fall into two main classes. The first class is the type of case where the accused has embarked on a course of conduct which, if completed, will result in an offence but for some reason breaks off that course of conduct and never completes the action required to amount to the offence. There are dozens of examples of which one can think of attempts which come into that class: the pickpocket who puts his hand in a man's pocket only to find it empty; the burglar who is disturbed by the f police when he is in the process of trying to break open the window; the safebreaker who finds when he gets to the safe, it is too difficult for him and he cannot open it. These are all people who have set out on a course of conduct which if completed in accordance with their intention would have amounted to a criminal offence, but who have desisted for one reason or another before the full course of criminality has been pursued. In general, and I emphasise that this court is only concerned to deal with those cases in generality, a charge of attempt can properly be laid in that type g of case. It matters not that the accused might never have completed the major offence in any event.

h But the second class of case is the one into which the present facts fall. The second class of case where attempt is sought to be charged is where the accused has meticulously and in detail followed every step of his intended course believing throughout that he was committing a criminal offence and when in the end it is found he has not committed a criminal offence because in law that which he planned and carried out does not amount to a criminal offence at all. That is this case and the question whether in such circumstances the accused can properly be charged with an attempt is on the authorities a very much more difficult one, and indeed the questions raised are questions which have been canvassed in New Zealand and the United States of America j as well as in the courts of this country.

I think one can conveniently start with the modern cases and not take too long going through the earlier authorities of which counsel's industry has reminded us this morning. I approach this question first of all by looking at *R v Percy Dalton (London) Ltd*¹. This is an immediate post-war case when there were still controlled

prices or maximum permitted prices for the sale of various commodities. The accused in the *Percy Dalton* case¹ were charged with having sold pears at a price in excess of the current permitted price for pears. It seems fairly clear that the accused thought they were breaking the law, in other words that they knew the maximum price and thought that they were charging a price in excess; but when the case was heard out to its end and the details were examined, it was found that in fact they had not exceeded the maximum price and that therefore an offence of breach of the appropriate regulation had not been made out. The question then arose whether it was possible to charge them with attempting to commit the offence of selling in excess of the maximum price. The court held that it was not, and there is a passage which this court finds of particular value, and which indeed has been approved on other occasions in this court also. It appears in the judgment of the court given by Birkett J, and it is in these terms²:

'All the acts of the company [the accused in that case] have been considered by the jury in coming to that conclusion; and we feel it impossible to say on the same facts that the company can be convicted of the attempt to sell above the maximum price when the completed transaction was no offence. Steps on the way to the commission of what would be a crime, if the acts were completed, may amount to attempts to commit that crime, to which, unless interrupted, they would have led; but steps on the way to the doing of something which is thereafter done, and which is no crime, cannot be regarded as attempts to commit a crime.'

That principle, as I say, has been adopted with approval in *R v McDonough*³; it is a principle which this court regards as being laid down by *R v Percy Dalton (London) Ltd*¹ and one which prima facie we ought to follow, and of course if we follow that principle it means that the appellant in this case must succeed, because in the end when he had carried out the full course of conduct which he had in mind, he had not committed the offence of handling stolen goods because the goods were no longer stolen.

Ought we to adopt that principle in the present case? It is of course urged on us by counsel for the Crown that we ought not. We have been referred by counsel for the Crown to a case in the United States, *People v Rojas*⁴, a case which, if one may say so, is as near to the present one as one could hope to find. It was another case in which goods had been stolen, had been recovered by the police, and had gone back into lawful custody, and therefore were not stolen at the time when the accused sought to deal with them. There the full Supreme Court of California took the conclusion contrary to the appellant's argument that an attempt could properly be charged, the basis of it being that the accused had done everything which he intended to do, and had done it with a guilty mind; and no doubt there are social arguments which suggest that such a person should be liable to be punished as guilty of an attempt notwithstanding the principle laid down in *R v Percy Dalton (London) Ltd*¹.

In New Zealand, where again almost exactly the same point has arisen, we have *R v Donnelly*⁵. This again was a case similar to the present, and here, by a majority of two to one, the Court of Appeal in Wellington held in favour of our present appellant, in other words took the view that an attempt could not be charged in the circumstances. Haslam J, however, gave a carefully reasoned judgment in dissent in which he would have held that an attempt could be charged.

So far as more recent authorities in this country are concerned, there are two which counsel for the appellant mentioned with some hesitation, though of course in clear recognition of his duty as counsel, because he said they might be thought to be against

1 [1949] LJLR 1626

2 [1949] LJLR at 1630

3 (1962) 47 Cr App Rep 37

4 (1961) 10 Cal Rptr 465

5 [1970] NZLR 980

a him. The first is *R v Miller*, *R v Page*¹, a case which came before a division of the Court of Criminal Appeal on which I was sitting. The facts according to the headnote were:

b 'The driver of a lorry transporting bales of woollen rags was approached by the appellants, who suggested that for a monetary reward he should permit them to steal a lorry load of these bales. The driver reported the matter to his employer and thereafter, acting on his employer's instructions, took the lorry to an appointed place and there helped the appellants to unload it. The appellants were convicted of larceny of the bales.'

In the Court of Criminal Appeal, however, it was held—

c 'that the conviction of larceny could not stand, as the property had not been taken *invito domino*; but that as the evidence disclosed the offence of attempted larceny, the court would . . . substitute convictions of attempted larceny.'

d So the reasoning of this court in *R v Miller*, *R v Page*¹ is that since the owners of the goods consented to the stratagem and permitted the goods to be taken by the would-be thieves, the goods were no longer taken without the consent of the owner and as a matter of technicality the offence of larceny was not committed. However, this court held notwithstanding that the offence of attempted larceny had been committed. The report does not indicate any extensive argument on the issue with which we are today concerned. It appears to have arisen in the course of the argument for the Crown, other matters of another nature having occupied counsel for the appellants. In particular *R v Percy Dalton (London) Ltd*² was not referred to, which perhaps in the circumstances which I have already recounted was rather unsatisfactory. The reasons of the court given by Howard J do not really go into this matter in any detail. Howard J said³:

f 'We have listened to the submissions made by Mr. Bolland and Mr. Leggatt with regard to the question of an attempt to commit larceny. Mr. Bolland says that there could not be a conviction of attempt to commit larceny if in the circumstances of this case there was no larceny because the owner had, through his servant, in substance and in reality, handed over the goods to the appellants. He says the only way in which the matter could be regarded would be as a conspiracy and then subsequent acts would be acts done in pursuance of the conspiracy, but in our view it seems plain on the evidence here that the fact that it was in the circumstances impossible to commit larceny is no bar to a conviction of an attempt to commit larceny.'

g And so it was held. I have no personal recollection of the case and cannot assist from that direction, and I can only really repeat on *R v Miller*, *R v Page*¹ the observation which has been made elsewhere, that it is a somewhat unsatisfactory authority because it lacks any further reasoning in support of its conclusion than the reasons which h I have read.

i One comes therefore finally to the most recent case on this topic, *R v Curbishley*, *R v Crispin*⁴, decided in this court. That was a case in which the appellants as parties to a plan concerned with the movement of stolen goods had been assigned as their part in the plan to take a vehicle to a certain place, there to pick up the stolen goods or part of them, a role not unlike that of the appellant in the case which is now before us. They knew that the goods were going to be stolen goods; they knew that

1 (1965) 49 Cr App Rep 241

2 [1949] LJR 1626

3 (1965) 49 Cr App Rep at 245

4 (1970) 55 Cr App Rep 310

they were going to handle stolen goods in the technical sense. They went there in accordance with the plan, but when they got there the goods were not there and they therefore had to turn round and come home again. The convictions which had been recorded at the Buckinghamshire Quarter Sessions of dishonestly attempting to assist in the removal or disposal of stolen goods were upheld. We do not think that *R v Curbishley*, *R v Crispin*¹ is really in any way inconsistent with Birkett J's dictum in *R v Percy Dalton (London) Ltd*², nor do we think that it really carries weight against the appellant in the present appeal, because on the brief facts which I have outlined you have on the face of it a clear example of a man who sets out to commit a criminal offence, and who is unable to complete the full course of action which would amount to the commission of that offence by reason of some intervention on the part of others. The only reason why they did not commit the full offence was because the goods were not there when they went to pick them up. That seems to me to fall into the first of the two classes of attempt cases to which I earlier referred, and not to be in any way inconsistent with the argument put forward by counsel for the appellant today.

Counsel for the Crown picks up a sentence in *R v Curbishley*, *R v Crispin*¹ and seeks to put a somewhat different complexion on the case, because it is to be observed there that the goods had not only been removed when the appellant arrived to collect them, but had been removed by the police. Of course if they had been removed by the police they might well have got back into lawful custody as a result of that, and *R v Curbishley*, *R v Crispin*¹ might then become on all fours with the case we are deciding.

We are not impressed by that argument because there is not a word in the report to suggest that anyone regarded removal by the police as significant or that the point we have to decide was argued at all. On its face it seems to be a straightforward example of class one attempts where the only reason why the full offence was not committed was that the accused broke off the course of events at some stage before the full details of the crime had been worked out. We do not therefore regard *R v Curbishley*, *R v Crispin*¹ as being any significant obstacle in the path of the appellant in this case.

In the end we have come to the conclusion that we ought to follow the principle in *R v Percy Dalton (London) Ltd*³ enunciated by Birkett J, supported by *R v Donnelly*⁴ and against which, as far as English authority is concerned, we only have to set the authority of *R v Miller*, *R v Page*⁵, which for the reasons I have already given, does not seem to us to be a compelling one. Accordingly we think the conviction was wrong in this case, that the appeal should be allowed and the conviction should be quashed.

Appeal allowed. Conviction quashed.

30th March. The court certified under s 33 of the Criminal Appeal Act 1968 that the following point of law of general public importance was involved, i.e. 'If stolen goods are returned to lawful custody and thus cease to be stolen by virtue of s 24 of the Theft Act 1968 can a person who subsequently dishonestly handles goods believing them to be stolen to be guilty of the offence of attempting to handle stolen goods.' Leave to appeal was given.

Solicitors: Registrar of Criminal Appeals (for the appellant); S Holmes, Town Clerk, Liverpool (for the Crown).

N P Metcalfe Esq Barrister.

¹ (1970) 55 Cr App Rep 310

² [1949] LJR 1626

³ [1949] LJR at 1630

⁴ [1970] NZLR 980

⁵ (1965) 49 Cr App Rep 241

Rouse v Squires and others

COURT OF APPEAL, CIVIL DIVISION

BUCKLEY, CAIRNS LJ AND MACKENNA J

21ST, 22ND MARCH 1973

- b** *Negligence – Contributory negligence – Causation – Collision – Road accident – Obstruction of highway – Danger to road users – Danger to road users failing to keep proper look-out – Collision caused by negligent driving of following vehicle – Obstruction contributing to collision – Driver negligently causing lorry to jack-knife and obstruct two lanes of motorway at night – Lorry behind stopping and illuminating scene with headlights – Third party driving lorry too fast and failing to observe obstruction until too late – Collision following belated attempt of third party to avoid obstruction – Collision caused by negligent driving of third party – Whether negligence of driver of jack-knifed lorry contributing to collision.*

At about 10.30 p m on a frosty night A was driving an articulated lorry along a motorway when, because of his negligence, it skidded, 'jack-knifed' and ended up blocking the slow and centre lanes of the carriageway. A car travelling behind collided with the lorry. Its rear lights remained on. R saw the accident and drove his lorry safely past. **d** He then parked and returned to render help. Another lorry, driven by F, pulled up some 15 feet short of A's lorry. F left his headlights on purposely to illuminate the broken down lorry. Finally, some five to ten minutes after the original accident, S arrived on the scene driving his employers' lorry at a fast speed. He did not realise, when he first saw the vehicles some 400 yards away, that they were stationary and that two lanes of the carriageway were obstructed. Eventually at a distance of some **e** 150 yards he applied his brakes but, because of the frosty surface, he skidded. His lorry collided with the rear of F's lorry and pushed it forward with the result that it knocked R down and caused him fatal injuries. R's widow obtained damages against S in respect of his negligent driving and, in third party proceedings, S claimed contribution from A and his employers in respect of A's negligence. The trial judge dismissed the claim holding that S was wholly to blame for the accident since the broken down **f** lorry was adequately lighted and, if S had kept a proper look-out, he would have seen it some 400 yards away thereby giving himself sufficient time to take avoiding action. S appealed.

Held – If a driver so negligently managed his vehicle as to cause it to obstruct the highway and constitute a danger to other road users (including those who were **g** driving too fast or not keeping a proper look-out, but not those who deliberately or recklessly drove into the obstruction) then the first driver's negligence might be held to have contributed to the causation of an accident of which the immediate cause was the negligent driving of the vehicle which, because of the presence of the obstruction, collided with it or with some other vehicle or some other person. A's negligent driving had created a grave danger on the highway. That danger, **h** although reduced by the illumination provided by F's headlights, had continued up to the moment of the collision and had been a factor in causing the collision. A had thereby contributed to the death of R. The appeal would therefore be allowed. In the circumstances 25 per cent of the blame should be attributed to A and 75 per cent to S (see p 906 h to p 907 a and c, p 908 c to e and f, p 910 a, c d and h, p 911 d e, g and h j, p 912 d and f to j and p 913 d to f, post).

j *Corstar (Owners) v Eurymedon (Owners), The Eurymedon* [1938] 1 All ER 122 and *Harvey v Road Haulage Executive* [1952] 1 KB 120 applied.

Diamond v Pearce [1972] 1 All ER 1142 distinguished.

Notes

For contributory negligence, see 28 Halsbury's Laws (3rd Edn) 87-93, paras 92-97, and for cases on the subject, see 36 Digest (Repl) 170-182, 912-982.

Cases referred to in judgments

- Admiralty Comrs v North of Scotland and Orkney and Shetland Steam Navigation Co Ltd* a
[1947] 2 All ER 350, sub nom *The Boy Andrew (Owners) v St Rognvald (Owners)* [1948] AC 140, [1948] LJR 768, sub nom *The St Rognvald* 80 Lloyd LR 559, HL, 42 Digest (Repl) 916, 7105.
- Admiralty Comrs v Owners of SS Volute* [1922] 1 AC 129, [1921] All ER Rep 193, 91 LJP 38, 126 LT 425, 15 Asp MLC 530, HL, 42 Digest (Repl) 908, 7041.
- Barber v British Road Services* (1964) *The Times*, 18th November, [1964] Bar Library transcript 289, CA. b
- Boy Andrew, The*. See *Admiralty Comrs v North of Scotland and Orkney and Shetland Steam Navigation Co Ltd*.
- British Fame (Owners) v Macgregor (Owners)* [1943] 1 All ER 33, [1943] AC 197, 112 LJP 6, 168 LT 193, 74 Lloyd LR 82, 42 Digest (Repl) 913, 7085.
- Brown v Thompson* [1968] 2 All ER 708, [1968] 1 WLR 1003, CA, Digest (Cont Vol C) 292, 916a. c
- Bywell Castle, The* (1879) 4 PD 219, [1874-80] All ER Rep 819, 41 LT 747, 4 Asp MLC 207, CA, 41 Digest (Repl) 771, 6267.
- Corstar (Owners) v Eurymedon (Owners), The Eurymedon* [1938] 1 All ER 122, sub nom *The Eurymedon* [1938] P 41, 107 LJP 81, 158 LT 445, 19 Asp MLC 170, 59 Lloyd LR 214, CA; affg [1937] P 167, 42 Digest (Repl) 914, 7092. d
- Davies v Mann* (1842) 10 M & W 546, 12 LJEx 10, 7 JP 53, 6 Jur 954, 152 ER 588, 36 Digest (Repl) 177, 945.
- Davies v Swan Motor Co (Swansea) Ltd* [1949] 1 All ER 620, [1949] 2 KB 291, CA, 36 Digest (Repl) 171, 921.
- Dymond v Pearce* [1972] 1 All ER 1142, [1972] 1 QB 496, [1972] 2 WLR 633, [1972] RTR 169, CA. e
- Eurymedon, The*. See *Corstar (Owners) v Eurymedon (Owners)*.
- Harvey v Road Haulage Executive* [1952] 1 KB 120, 96 Sol Jo 759, CA, 36 Digest (Repl) 180, 970.
- London Passenger Transport Board v Upson* [1949] 1 All ER 60, [1949] AC 155, [1949] LJR 238, 47 LGR 333, HL; affg sub nom *Upson v London Passenger Transport Board* [1947] 2 All ER 509, [1947] KB 930, [1947] LJR 1382, 177 LT 475, CA, 45 Digest (Repl) 21, 58. f
- Sigurdson v British Columbia Electric Railway Co Ltd* [1953] AC 291, PC, Digest (Cont Vol A) 1184, 980a.
- Stapley v Gypsum Mines Ltd* [1953] 2 All ER 478, [1953] AC 663, [1953] 3 WLR 279, HL, Digest (Cont Vol A) 1147, 157.
- Volute, The*. See *Admiralty Comrs v Owners of SS Volute*.
- Walker v Bletchley Flettons Ltd* [1937] 1 All ER 170, 24 Digest (Repl) 1054, 212. g

Appeal

This was an appeal by Kevin John Squires, the defendant in an action by the plaintiff, Mary Joy Rouse, suing as administratrix of the estate of Tobias Raymond Rouse (deceased). The plaintiff's claim against the defendant for damages under the Fatal Accidents Acts 1846-1959 and the Law Reform (Miscellaneous Provisions) Act 1934 in respect of the deceased's death in a road accident had been settled by the payment to the plaintiff of agreed damages of £16,000. The defendant appealed against the judgment of Deputy Judge Norman Richards QC, sitting as a deputy judge of the Queen's Bench Division, dated 20th October 1972, whereby he dismissed third party proceedings by the defendant against F V Carroll & Sons Ltd and Edward Alfred Allen. The facts are set out in the judgment of Cairns LJ. h

Stephen Brown QC and *R P Croxon* for the defendant, j
M Stuart-Smith QC and *Michael Turner* for the third parties.

CAIRNS LJ delivered the first judgment at the request of Buckley LJ. On the night of 23rd December 1968, on the M1 motorway, a multiple accident or series of accidents occurred as a result of which Mr Rouse was killed. His widow brought an

a action under the Fatal Accidents Acts 1846-1959 against the defendant, Mr Squires, the
driver of one of the vehicles involved. The action was compromised by the payment
of £16,000 and it is accepted that that was a proper settlement. Mr Squires, however,
had taken third party proceedings against F V Carroll & Sons Ltd and Mr Allen,
the owners and driver of another vehicle concerned, and he claimed against them
indemnity or contribution. That issue was contested, and at the trial before his
Honour Judge Norman Richards QC, sitting as deputy High Court judge, it was
b decided in favour of the third parties, Mr Squires being held solely to blame for the
fatal injury.

The incident occurred at about 10.30 p.m. on a frosty night, when Mr Allen,
driving his employers' articulated lorry up the north-bound carriageway of the M1,
for reasons which were not fully explained but which admittedly involved negligence
c on Mr Allen's part, lost control of the vehicle; it skidded and got into what is called
a jack-knife position obstructing the slow and centre lanes of the carriageway. An
'1100' motor car travelling on the centre lane of the same carriageway collided with
the part of Mr Allen's vehicle which was in that lane. This car is not relevant to the
proceedings except that its rear lights stayed on. After that two lorries, or more,
arrived on the scene. It is not clear what the order of their arrival was, and it really
d does not matter; it can be taken that the next to arrive was the lorry driven by Mr
Rouse. His lorry was not involved in any collision. He saw that there was trouble,
got past it, parked his lorry safely on the hard shoulder beyond the scene of the col-
lision and went back to render help. Unfortunately for him, he went and stood in
the carriageway somewhere near the jack-knifed lorry. Travelling some distance
behind Mr Allen's lorry was another lorry belonging to the same owners driven by a
Mr Franklin. He was sufficiently close to Mr Allen's lorry to see what happened to
e that lorry. He pulled up in the nearside lane of the carriageway 15 feet short of the
jack-knifed lorry, and he stayed there, leaving his headlights on purposely in order
to illuminate the broken-down lorry: his rear lights, of course, also remained on.
Finally, along came Mr Squires driving his employers' lorry. He did not realise when
he first came within view of the scene at not less than 400 yards away (he said 500
f yards) that there were vehicles ahead which were stationary and did not realise that
two lanes of the carriageway were obstructed. He said that it was within 150 yards of
the scene that he first realised that a stationary vehicle was present in the nearside
lane, and he said that he then braked and moved over to the centre lane. It was not
until after that that he realised that that lane also was blocked. He applied his brakes
harder, but because of the frosty surface of the road, possibly combined with the nature
of the load he was carrying, his lorry skidded. He was not aware that he had collided
g with any other vehicle, but in fact some part of his lorry—probably towards the
rear of the nearside of it—struck against the rear part of Mr Franklin's lorry and
pushed it forward so that it knocked down Mr Rouse and caused his fatal injuries.
After that Mr Squires's lorry careered across the central reservation and for some dis-
tance along the south-bound carriageway until the driver brought it to rest on the
central reservation.

h Mr Squires was admittedly negligent. The learned judge held that he was extremely
negligent: in driving too fast in frosty conditions—he admitted a speed of 50 m.p.h.;
in failing to observe that the vehicles ahead were stationary until he was within
150 yards of them, when he ought to have realised it from at least 400 yards away;
in failing to realise when he first saw the lights that there might be a breakdown and
that he ought to reduce his speed; and in failing to switch on full headlights when he
j saw that there was some obstruction ahead.

The learned judge, while finding that Mr Allen was negligent, reached the con-
clusion that his negligence was not a cause of Mr Rouse's injuries. It is convenient
to read a part of his judgment in which he set out his reasons for so deciding. He said:

'Now that what was called the doctrine of last opportunity is no longer a deci-
sive factor in making liability, where a dangerous act of two or more bodies had,

if I may so describe it, set the scene wherein the accident occurred, that does not mean that one who has contributed to the situation, without which the accident would not have occurred, must necessarily bear some blame. As was said by Edmund Davies LJ in *Dymond v Pearce*¹, a case where the circumstances of the accident were very similar to those in this case, a sine qua non is not an all-sufficient basis for establishing liability. As has been said in many cases to which my attention has been called, in arriving at a decision on causation, the proximity of various acts in time and space must be taken into account, and in this the fact that the negligent driver, the third party, caused an obstruction and nuisance on the carriageway, without which the accident would not have occurred, is not in itself an all-sufficient basis for establishing some degree of liability for this accident. The fact that some accident occurred five or ten minutes before, in my judgment, is no more material here than if it had happened some hours before. What I have to consider is whether the situation which resulted was really causative of the present accident. If the first accident had occurred so that the obstruction which resulted was unlit or lit only to such an extent, due to atmospheric conditions, that a driver keeping a proper look-out could not take avoiding action in time, as was the case in *Harvey v Road Haulage Executive*², other considerations might apply, but here I am satisfied that the scene of the obstruction was adequately lighted to warn any driver coming along and keeping a proper look-out that there was or might be trouble ahead and I repeat that the driver, on his own evidence, was able to see a situation which should have put him on his guard when he was 400 or 500 yards away, a distance which, at 50 m p h, would take him some 15 to 20 seconds to cover, even if he did not reduce speed. The question is whether, in the light of the matters which I have set out, the third party driver's negligence was a factor which really contributed to this fatal accident. In my judgment, it was not. The liability is solely attributable to the negligence of the defendant.'

I do not find myself in accord with this reasoning. *Dymond v Pearce*³ was a very different case. In that case a lorry 7½ feet wide was parked on a carriageway 24 feet wide in a well-lighted road. A motor-cyclist who had a clear view of it for 200 yards and had 16 feet of unobstructed roadway available to him but was keeping no look-out ahead because he was watching some girls on the pavement ran into the lorry and his pillion passenger was injured. Bridge J held the motor-cyclist solely to blame, and this court affirmed that decision. There the case against the lorry driver was founded on nuisance to the highway. This court held that, while there was a nuisance to the highway as being an obstruction, it did not constitute a danger, and, moreover, that the lorry driver was not negligent in parking in that way. The headnote⁴ to the report is not quite accurate in attributing to Edmund Davies LJ the observation that it 'did not present a danger to those using the highway in a reasonable manner'. What he said was⁵: '... it did not present a danger to those using the highway in the manner in which they could reasonably have been expected to use it.' It is not reasonable to expect that every user of the highway will use it in a reasonable manner. It is reasonable to expect that nobody will drive into a lorry parked so as to occupy only a third of a well-lighted carriageway. It would, however, be wholly unreasonable to expect that if you so mismanage a lorry that it obstructs two lanes of the carriageway on an unlighted motorway it is not going to constitute a danger to other road users.

I cannot see that there is any breach in the chain of causation between the negligent driving of Mr Allen and the injury to Mr Rouse. It is true that the arrival on

1 [1972] 1 All ER 1142 at 1151, [1972] 1 QB 496 at 507

2 [1952] 1 KB 120

3 [1972] 1 All ER 1142, [1972] 1 QB 496

4 [1972] 1 QB at 496

5 [1972] 1 All ER at 1150, [1972] 1 QB at 507

a the scene of Mr Franklin's lorry and of the car provided some warning by lights which would have been observed by a careful driver, but the fact remains that Mr Allen's negligence created a grave danger to users of the highway which the arrival of the car and Mr Franklin's lorry did something to lessen but by no means to remove.

b A much closer case to the present one than *Dymond v Pearce*¹ is *Harvey v Road Haulage Executive*², which the learned judge cited, but distinguished. There on a foggy day the defendants' lorry was negligently placed so as to obstruct nearly half a carriageway which was 30 feet wide. The plaintiff motor-cyclist ran into it because he was driving too fast in fog. This court, allowing an appeal from Slade J who had held the plaintiff solely responsible for his own injuries, held the drivers equally to blame.

c There is, of course, the difference in this case that Mr Squires collided not with Mr Allen's lorry, but with Mr Franklin's. However, this does not mean that the continuing presence of Mr Allen's lorry blocking two lanes was not a factor in causing the collision between Mr Squires's lorry and Mr Franklin's. Mr Squires's evidence includes these questions and answers:

d '... A As I got over the incline to drop down the other side I saw what looked like vehicles moving in front of me about 300 yards further down the road. Keeping at the same speed of about 50 miles an hour I continued on the road towards Leeds. As I got nearer I saw that there had been an accident—what looked like an accident.

'Q Can you give my Lord any indication as to how far ahead of you that was? A Roughly, I should think about 250 yards, sir.

e 'Q Can you be at all certain as to distance, in fact? A Well, I am sorry, it would be less than that, because I think it was only about 200 yards to the incline. I am sorry, it was about 150 yards, not 250, sir.'

I interpolate that the learned judge in his judgment accepted 150 yards as the right figure.

f 'Q What did you do? A I braked and came over to the centre lane.

'Q Pause there. Why did you decide to move over to the centre lane? A Because the first lane, with the accident involved, was blocked.

'Q Could you see at that time whether or not the centre lane was blocked? A It was not until I started to go into the centre lane that I saw what looked like a car blocking the centre lane.

'Q What did you do then, Mr Squires? A I braked harder and the next thing that happened was I went into a skid.

g 'Q And what happened then? A Something seemed to go wrong with the wagon and I shot across the centre reservation.

'Q Before that did your vehicle come into contact with anything? A I didn't know at the time it had. I was told after that it had done.

'Q You accept that your lorry did in fact come into contact with the rear of another vehicle, which we have called the second lorry? A I do, sir.'

h The learned judge did not find in terms that this evidence was true, but he gave no indication that he disbelieved any of it and it was unchallenged. I think this court ought to accept that it was because the centre lane was blocked that Mr Squires had to apply his brakes harder, so producing the fatal skid.

j Another case which supports Mr Squires's claim is that of *Barber v British Road Services*³. There a large lorry was backed out into the road so as to obstruct it and the driver of another vehicle went into it. It was said in terms by Pearson LJ and was

1 [1972] 1 All ER 1142, [1972] 1 QB 496

2 [1952] 1 KB 120

3 (1964) The Times, 18th November

implicit in the other judgments, that a driver must not assume that other drivers will be driving at moderate speed or keeping a proper look-out. That was in accordance with what had been said by Lord Uthwatt in *London Passenger Transport Board v Upson*¹:

'In the view that I have formed it is not necessary for me to deal with the question of negligence. I desire only to register my dissent from the view expressed by LORD GREENE, M.R.² that drivers: "... are entitled to drive on the assumption that other users of the road, whether drivers or pedestrians, would behave with reasonable care..." It is common experience that many do not. A driver is not, of course, bound to anticipate folly in all its forms, but he is not, in my opinion, entitled to put out of consideration the teachings of experience as to the form those follies commonly take.'

Observations to similar effect were made by Lord du Parc³.

Counsel for the third parties contends that the jack-knifed lorry ceased to constitute a danger once the other two vehicles, the motor car and Mr Franklin's lorry, took up their positions. The learned judge, in my view, applied the wrong test when he found that the scene of the obstruction was adequately lighted to warn any driver coming along and keeping a proper look-out. If one takes account, as I consider one must, of the driver who, while not deliberately driving against an obstruction, nor driving recklessly without regard to possible dangers, is driving at an excessive speed and not observing or not interpreting correctly lights ahead, I find it impossible to say that Mr Allen's lorry did not continue to be a danger. Its danger was due to its being in a position where it caused an extensive obstruction, lighted in a way which would not make it clear to approaching traffic what the nature or extent of the obstruction was: and it must be taken into account that the road was frosty, so that it would be necessary for a driver coming along the carriageway to appreciate at an earlier stage than would ordinarily be necessary that there was something ahead which required him to apply his brakes. I do not think it can be said that the negligence of which Mr Squires was undoubtedly guilty was of such a character or degree as to take it out of the conduct which another driver ought to expect may occur on the highway.

Counsel for the third parties then relies on the doctrine of the well-known case of *Davies v Mann*⁴ and contends that, despite the view expressed by Denning LJ in *Davies v Swan Motor Co (Swansea) Ltd*⁵ that that doctrine may have disappeared as a result of the Law Reform (Contributory Negligence) Act 1945, it is still part of our law, so that the driver who negligently drives into an obstruction negligently created by another cannot recover. In this connection he cited a number of cases, beginning with *The Volute*⁶. A well-known passage in the speech of Viscount Birkenhead LC in that case is in these terms⁷:

'Upon the whole I think that the question of contributory negligence must be dealt with somewhat broadly and upon common-sense principles as a jury would probably deal with it. And while no doubt, where a clear line can be drawn, the subsequent negligence is the only one to look to, there are cases in which the two acts come so closely together, and the second act of negligence is so much mixed up with the state of things brought about by the first act, that

1 [1949] 1 All ER 60 at 70, [1949] AC 155 at 173

2 [1947] 2 All ER 509 at 512, [1947] KB 930 at 938

3 [1949] 1 All ER at 72, [1949] AC at 176

4 (1842) 10 M & W 546

5 [1949] 1 All ER 620 at 630, [1949] 2 KB 291 at 322, 323

6 [1922] 1 AC 129, [1921] All ER Rep 193

7 [1922] 1 AC at 144, [1921] All ER Rep at 201

a the party secondly negligent, while not held free from blame under the *Bywell Castle*¹ rule, might, on the other hand, invoke the prior negligence as being part of the cause of the collision so as to make it a case of contribution. And the Maritime Conventions Act with its provisions for nice qualifications as to the quantum of blame and the proportions in which contribution is to be made may be taken to some extent declaratory of the Admiralty rule in this respect.'

b In relation to road accidents the Law Reform (Contributory Negligence) Act 1945 may be taken to play the same part as the Maritime Conventions Act did and does in relation to collisions at sea. Counsel for the third parties fastens on the words, 'where a clear line can be drawn, the subsequent negligence is the only one to look to'. I would emphasise the words 'and the second act of negligence is so mixed up with the state of things brought about by the first act'.

c Counsel then referred to *Stapley v Gypsum Mines Ltd*², a case frequently quoted in other connections, but not often in relation to road accidents, relying on a citation in that case of the passage from *The Volute*³ which I have just read. It was in fact referred to by four of their Lordships, but the few words on which counsel relies were of no relevance whatever in relation to the *Stapley* case².

d Next comes *Sigurdson v British Columbia Electric Railway Co Ltd*⁴. That was a case where the Judicial Committee in reversing a decision of the Court of Appeal in British Columbia restored the verdict of a jury, holding the motorman of a street car solely to blame for colliding with a vehicle which had been negligently driven on to the street car track. But there the defendants had contended that as a matter of law the jury's verdict could not stand. The question of causation being ultimately one of fact, it is not surprising that that legal submission was rejected. In the present case we are dealing not with the verdict of a jury, but with the decision of the learned judge, and since, as I have indicated, I think that he applied the wrong test, I consider that we should feel free to review his finding as to causation.

e Then there was cited *The Boy Andrew*⁵. *Davies v Mann*⁶ was discussed in that case, not to apply but to distinguish it, and the situation in that case was in fact miles away from being a *Davies v Mann* case⁶.

f The last case referred to was *The Eurymedon*⁷, a decision of this court in an Admiralty case where there had been a collision between the ships, the *Eurymedon* and the *Corstar* in the River Thames; the *Corstar* being drawn up at anchor athwart the river in a position where she ought not to have been, but with her anchor lights exhibited. The *Eurymedon*, proceeding up the Thames, collided with the *Corstar*. It was held by Bucknill J⁸ that both vessels were equally at fault, and his decision was upheld by this court. So far as the facts of that case go, they are not dissimilar from those in the present case. There are passages in the judgments which are of assistance to counsel for the third parties' argument. But I observe that Bucknill J, in a sentence from his judgment which is quoted by Greer LJ⁹, said this¹⁰:

h 'The knowledge or lack of knowledge of the *Eurymedon* as to the improper position of the *Corstar* appears to me to be a cardinal fact on this issue as to the liability of the *Corstar*.'

The judge said in that case that it could not be said that those navigating the *Eurymedon* had knowledge of the position of the *Corstar* until too late. So in this case Mr

1 (1879) 4 PD 219, [1874-80] All ER Rep 819

2 [1953] 2 All ER 478, [1953] AC 663

3 [1922] 1 AC at 144, [1921] All ER Rep at 201

4 [1953] AC 291

5 *Admiralty Comrs v North of Scotland and Orkney and Shetland Steam Navigation Co Ltd* [1947] 2 All ER 350, [1948] AC 140

6 (1842) 10 M & W 546

7 [1938] 1 All ER 122, [1938] P 41

8 [1937] P 167

9 [1938] 1 All ER at 125, [1938] P at 48

10 [1937] P at 177

Squires did not have knowledge of the position of the jack-knifed lorry until too late. In both cases it was because of negligence on the part of the approaching vessel or vehicle that that knowledge was not obtained, but the cardinal fact, as Bucknill J put it, was that it was not in fact obtained. Slessor LJ affirmed the decision on grounds different from those that had been stated by Bucknill J, but neither of the other two members of the court dissented from those grounds, and Scott LJ said expressly that he agreed with the conclusion of Bucknill J. He said¹: 'I see no ground for thinking that in holding both vessels to blame he acted on any wrong view of the law ...'

After consideration of these various cases, the conclusion I have reached is that *Harvey v Road Haulage Executive*² and *Barber v British Road Services*³ are authorities binding on us to this effect. If a driver so negligently manages his vehicle as to cause it to obstruct the highway and constitute a danger to other road users, including those who are driving too fast or not keeping a proper look-out, but not those who deliberately or recklessly drive into the obstruction, then the first driver's negligence may be held to have contributed to the causation of an accident of which the immediate cause was the negligent driving of the vehicle which because of the presence of the obstruction collides with it or with some other vehicle or some other person. Accordingly, I would hold in this case that Mr Allen's negligence did contribute to the death of Mr Rouse.

The learned judge said that if he had found that Mr Allen's negligence was causally connected with the death he would have assessed his share of the blame as one-tenth. I can see no proper basis for so low a proportion. I recognise that the House of Lords decided in the shipping case of *The Macgregor*⁴ that an appeal court should be slow to interfere with an apportionment arrived at by the trial judge unless the appeal court concludes that he has gone wrong on his assessment of the facts or on the principles to be applied. That authority has been recently applied by this court to a road accident in *Brown v Thompson*⁵. But there is this feature in the present case which did not exist in either of those two cases: that the primary decision of the learned judge was that the third parties here were not to blame at all. Having formed the view that the negligence of Mr Allen was not a contributory cause of the accident at all, it is easy to see that he was likely to conclude that, if it was a contributory cause to any extent, that extent was likely to be a very low one. But I look at the situation in this way. Of course we do not know exactly what happened to Mr Allen's lorry; but there was nothing to suggest that he had any emergency situation to face. For some reason he had simply lost control of his vehicle, presumably by driving too fast on a frosty road or by unwisely applying his brakes. Mr Squires has been held by the learned judge (and I do not query this part of his finding) to have been extremely negligent in that, in addition to driving too fast, he failed to keep a proper look-out. But it can be said of him that he did not initiate the dangerous situation but failed to take adequate steps to cope with a situation that already existed. Through that failure he must be held to be the person mainly responsible for this calamity. In my view the right proportion of blame which should be put on his shoulders is 75 per cent as against 25 per cent on Mr Allen. I would allow the appeal and give judgment against the third parties accordingly.

MACKENNA J. I base my judgment on five findings of fact which are amply supported by the evidence. 1. Mr Allen was negligent. He drove his lorry in

1 [1938] 1 All ER at 129, [1938] P at 54

2 [1952] 1 KB 120

3 (1964) *The Times*, 18th November

4 [1943] 1 All ER 33, [1943] AC 197

5 [1968] 2 All ER 708, [1968] 1 WLR 1003

a such a way that it ended up across the slow and centre lanes of his half of the road and could give no explanation of how this happened. 2. Mr Scattergood, whose car collided with Mr Allen's lorry and ended up behind it in the centre lane, was not negligent: he had no chance of avoiding this collision. 3. Mr Franklin was not negligent in pulling up behind Mr Allen's lorry: he did so in order that his headlights might illuminate the side of Mr Allen's trailer and so make the road safe for other traffic using this part of the roadway. 4. Mr Squires, who collided with Mr Franklin's lorry five or ten minutes after the collision between Mr Scattergood and Mr Allen, was negligent. If he had been keeping an intelligent look-out he would have seen the vehicles ahead of him at a distance of 400 yards and would have realised that they were stationary. He did not realise that they were stationary until he was 150 yards away. He did not at any time observe either the rear lights of Mr Scattergood's car or the side of Mr Allen's trailer, although Mr Franklin's headlights were focused on it. He was driving at an excessive speed. 5. If Mr Allen's lorry had not been athwart the centre lane, Mr Squires would probably not have collided with Mr Franklin's lorry. The position of Mr Allen's lorry in the centre lane, observed by Mr Squires just before his collision with Mr Franklin's lorry, caused him to brake harder than he would otherwise have done. Because he braked harder his lorry went into a skid. Because it skidded it collided with Mr Franklin's lorry and so killed Mr Rouse.

On these facts I would hold that Mr Allen's negligence contributed to cause the fatal collision between Mr Squires and Mr Franklin. His driving in such a way that his lorry ended up across two lanes of the roadway was negligent because of the risk it created for other vehicles travelling in the same direction. The risk was that these other vehicles might collide with the lorry or might cause or suffer damage in seeking to avoid such a collision. Though this risk was diminished when the headlights of Mr Franklin's lorry were focused on the trailer, it still existed to a substantial degree, and because of it Mr Squires collided with Mr Franklin's lorry. The case might have been different if there had been no connection between Mr Allen's negligent driving and the fatal collision except that it had caused Mr Franklin to stop where he did.

f We have been referred to a number of cases where two parties were guilty of negligence and it was argued that the negligence which was subsequent was the sole cause of the accident. I would deduce this rule from the cases. Where the party guilty of the prior negligence has created a dangerous situation, and the danger is still continuing to a substantial degree at the time of the accident, and the accident would not have happened but for this continuing danger, he is responsible for the accident as well as the party who was subsequently negligent.

g A passage was read to us from Lord Birkenhead LC's speech in *The Volute*¹. He said that where a clear line can be drawn between the prior and the subsequent negligence will be the sole cause of the accident. There are few reported cases in which this line has been drawn. I do not think it can be drawn in any case where the danger created by the prior negligence is still continuing. It is otherwise, of course, if that danger has been eliminated.

h It was argued for Mr Allen that while his lorry was illuminated by Mr Franklin's headlights it had ceased to be dangerous for motorists keeping a proper look-out and driving at a reasonable speed. This may be so, but it is not enough to exonerate Mr Allen completely. An obstacle may still be dangerous even though the danger has been reduced by lighting so that it no longer imperils those who use reasonable care for their own safety: see the judgment of du Parc J in *Walker v Bletchley Flettons Ltd*² and the speech of Lord Uthwatt in *London Passenger Transport Board v Upson*³.

1 [1922] 1 AC 129 at 144, [1921] All ER Rep 193 at 201

2 [1937] 1 All ER 170 at 175

3 [1949] 1 All ER 60 at 70, [1949] AC 155 at 173

*Dymond v Pearce*¹, referred to by the trial judge, is distinguishable. There the defendant, who had parked his lorry with its lights on underneath a street lamp close to the kerb, had not created any danger for other traffic. His lorry was not an unforeseeable obstruction, as Mr Allen's was in its position across two lanes of the road. a

*The Eurymedon*² is nearer to the present case. There the plaintiffs' ship lay at anchor in a dangerous position athwart the fairway of the Thames. Her position was indicated by lights which those in charge of the defendants' ship should have identified as anchor lights in time to avoid a collision. They did not do so because they were not expecting to find a ship in this unusual position. Both ships were held responsible for the collision. The position of Mr Allen's lorry in the present case was at least as unusual as that of the plaintiffs' ship in *The Eurymedon*². b

The judgments of Denning LJ in *Davies v Swan Motor Co (Swansea) Ltd*³ and in *Harvey v Road Haulage Executive*⁴ are also in point and support my conclusion. I doubt if I would have given the same verdict as the jury in *Sigurdson v British Columbia Electric Railway Co Ltd*⁵, who found the unobservant street car driver solely to blame for his collision with the plaintiff's car which was stationary across the track. The judgment of the Privy Council restoring that jury's verdict does not compel us to decide the present case in Mr Allen's favour. c

I would hold Mr Allen as well as Mr Squires responsible for the collision which caused Mr Rouse's death, and would fix his share at 25 per cent and Mr Squires's at 75 per cent. This assessment takes full account of Mr Squires's opportunity of seeing Mr Allen's lorry and of avoiding the collision. The trial judge's suggested figure of 10 per cent for Mr Allen was, I think, wide of the mark and ought to be corrected. It may have been affected by the mistaken view on which he decided the case, that Mr Squires was wholly to blame. I would allow the appeal. d

BUCKLEY LJ. I agree. I have not at all times during the argument found it easy to see what the right solution to this problem is, but in the end I have arrived at a firm conclusion. I am prepared to accept for the purposes of this judgment the following propositions which I cull from the argument of counsel for the third parties. Anyone who by a negligent act creates a danger on a highway to other users of the highway can be liable to another user if damage results from the danger so caused. The question whether there is a danger is to be determined by the ordinary test of foreseeability. But for that purpose, when considering how other road users can reasonably be expected to use the road, you are not entitled to assume that they will all exercise the proper degree of care. For instance, one should not proceed on the assumption that every driver will be able to stop within the limit of his own vision, because common experience shows that people do not always drive in that way. But when there is ample visibility and ample opportunity for the driver of an oncoming vehicle to see and appreciate the nature and extent of an obstruction and to take evasive action, then the obstruction does not constitute a danger, and in such a case there is a break in the chain of causation between the prior negligent act which caused the obstruction and the immediate consequences of the latter negligent act of a driver on the highway who causes an accident. In such a case there is what Lord Birkenhead LC in *The Volute*⁶ described as 'a clear line'. e

¹ [1972] 1 All ER 1142, [1972] 1 QB 496

² [1938] 1 All ER 122, [1938] P 41

³ [1949] 1 All ER 620, [1949] 2 KB 291

⁴ [1952] 1 KB 120

⁵ [1953] AC 291

⁶ [1922] 1 AC 129 at 144, [1921] All ER Rep 193 at 201

a I ask myself, therefore, whether in the circumstances of the present case there was a reasonable likelihood that a driver using the north-bound carriageway at the time of this accident with which we are concerned would fail to appreciate the dangerous situation which resulted from Mr Allen's negligence, or its extent, in time to avoid an accident. In considering that question, I think one must approach it, as Lord Birkenhead LC said in *The Volute*¹, 'somewhat broadly and upon common-sense principles as a jury would probably deal with it', and one must bear in mind that not all users of the highway will be exercising that degree of care and circumspection which constitutes a proper look-out.

b It is certain that Mr Squires did not appreciate the dangerous situation, or its extent, in time. He did not appreciate, in the first instance, that the vehicles were in fact stationary; he thought for some time that they were moving. The learned judge considered that he was not justified in having so thought; but he did in fact think so. And when he did appreciate that Mr Franklin's lorry was stationary and pulled out into the middle lane, he still apparently did not appreciate that that lane also was obstructed. It was only when he got into the middle lane that, because he realised that that lane was obstructed, he put on his brakes even harder than earlier he had done, and that caused him to skid, which caused the accident which resulted in the death of Mr Rouse.

c Taking these circumstances into consideration, it seems to me that the right inference from the facts is that the circumstances were not such as to be reasonably likely to bring to the notice of other users of the highway the existence and the extent of the hazard which was presented by Mr Allen's lorry being across two lanes of the highway in sufficient time to avoid an accident. In those circumstances, this seems to me to be a case in which there is no break in the chain of causation between Mr Allen's negligence and the accident: there is no 'clear line', to use the expression of Lord Birkenhead LC. Accordingly, I have reached the conclusion that Mr Allen's negligence did contribute to the accident which resulted in the death of Mr Rouse.

d I agree with what has been said by Cairns LJ, in regard to *Harvey v Road Haulage Executive*² and *Barber v British Road Services*³. I also agree with what has been said in regard to the apportionment of liability. Accordingly, the appeal will be allowed and judgment will be entered against the third parties for £4,000.

e
f
Appeal allowed.

Solicitors: *White & Co* (for the defendant); *L Bingham & Co* (for the third parties).

g Ilyas Khan Esq Barrister.

1 [1922] 1 AC at 144, [1921] All ER Rep at 201

2 [1952] 1 KB 120

3 (1964) *The Times*, 18th November

Hardy v Elphick

COURT OF APPEAL, CIVIL DIVISION

RUSSELL, BUCKLEY AND ORR LJJ

22nd, 23rd, 26th FEBRUARY, 23rd MARCH 1973

Action – Dismissal – Abuse of process of court – Second action relating to same subject-matter and parties as earlier action – Purpose of second action to make use of pleadings in first action to defeat defence available in first action – Action for specific performance of agreement for sale of land – Defence that no sufficient memorandum in writing of agreement – Particulars of defence setting forth further terms of agreement – Second action brought by plaintiff in order to rely on particulars in first action as constituting or contributing to a sufficient memorandum – Second action having different cause of action – Whether second action an abuse of process of court – RSC Ord 18, r 19.

The defendant and plaintiff entered into negotiations for the sale by the defendant to the plaintiff of certain land. On 15th March 1971 the defendant wrote a letter to the plaintiff stating that he had agreed to sell to the plaintiff the land, which the letter described, for £30,000. Later the defendant informed the plaintiff that he would not proceed with the sale. In December 1971 the plaintiff commenced an action for specific performance of the agreement. By his defence the defendant denied the agreement; he further stated that he would rely on s 40^a of the Law of Property Act 1925 and that, if the letter of 15th March constituted a memorandum of the terms of any contract or agreement between them, he would plead that it did not contain the whole of such terms and in consequence was not a sufficient memorandum to satisfy s 40. The plaintiff asked for further and better particulars of the allegation that the letter of 15th March did not contain the whole of the terms of any contract or agreement between them. In March 1972 the defendant delivered the particulars requested which stated that the letter of 15th March contained no date for completion of the alleged agreement and further that the defendant had told the plaintiff on 15th March 1971 that he would require three to six months to clear the land and that completion could not take place until the land was cleared; that consequently the date of completion was essential to any agreement between them; and that the completion was conditional on the plaintiff selling three houses then being built by him. In July 1972 the plaintiff started a new action against the defendant alleging the oral agreement in the terms alleged in the earlier agreement but adding the two terms specified in the particulars delivered by the defendant in the 1971 action; he further alleged that the land had been cleared, that the time needed for clearing had elapsed and that he, the plaintiff, had long since sold the three houses referred to in the particulars. The defendant applied for an order dismissing the 1972 action on the ground that it was an abuse of the process of the court in that the sole purpose of bringing a second action between the same parties relating to the same subject-matter was so that the plaintiff could rely on the particulars delivered in the 1971 action as constituting a memorandum in writing for the purposes of s 40.

Held – The 1972 action was not an abuse of the court and the summons would be dismissed. It could not be said that the 1972 action disclosed no cause of action for the allegation of the oral agreement afforded a cause of action. The agreement alleged

^a Section 40, so far as material, provides: '(1) No action may be brought upon any contract for the sale or other disposition of land or any interest in land, unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing, and signed by the party to be charged or by some other person thereunto by him lawfully authorised . . .'

- a** in the 1972 action was different from that alleged in the 1971 action and founded a different cause of action. So far as the particulars of defence in the 1971 action were concerned, either they did not constitute or contribute to a memorandum under s 40 of the 1925 Act for the purposes of the 1972 action, in which case the defendant had not been prejudiced or, if they did constitute or contribute to a memorandum, the plaintiff ought to be allowed to rely on them. Accordingly there was no ground
- b** for holding that it would be oppressive to the defendant to allow the 1972 action to continue (see p 917 h j, p 918 h to p 919 a and e f and p 920 d, post).

Notes

For the dismissal of proceedings which are an abuse of the process of the court, see 30 Halsbury's Laws (3rd Edn) 407, para 767, and for cases on the subject, see 50 Digest (Repl) 89, 730-732.

- c** For the necessity for memorandum or note in writing of contracts for the sale of land, see 34 Halsbury's Laws (3rd Edn) 207, 208, para 346, and for cases on the subject, see 40 Digest (Repl) 21, 22, 82, 83.
- For the Law of Property Act 1925, s 40, see 27 Halsbury's Statutes (3rd Edn) 399.

d Case referred to in judgment

Jackson v Oglander (1865) 2 Hem & M 465, 13 LT 16, 71 ER 544, 12 Digest (Reissue) 168, 994.

Interlocutory appeal

- The defendant, Arthur Albert Elphick, appealed against so much of an order of Foster J dated 23rd November 1972 as dismissed the defendant's application by
- e** summons dated 4th October 1972, in an action by the plaintiff, John Francis Hardy, against the defendant, for an order that the action be dismissed under the court's inherent jurisdiction and/or under RSC Ord 18, r 19, on the ground that it was an abuse of the process of the court. The facts are set out in the judgment of Buckley LJ.
- f** *N C H Browne-Wilkinson QC* and *Spencer G Maurice* for the defendant.
Leonard Bromley QC and *John Lindsay* for the plaintiff.

Cur adv vult

23rd March. The following judgments were read.

- g** **BUCKLEY LJ** read the first judgment at the invitation of Russell LJ. This is an appeal from the refusal of Foster J to dismiss an action on the ground that it is an abuse of the process of the court. The history is shortly as follows. The defendant and the plaintiff entered into negotiations for the sale by the defendant to the plaintiff of some land and a bungalow, 393 Ongar Road, Brentwood, Essex. By 15th March 1971 the negotiations had reached a stage at which the defendant wrote to the plaintiff
- h** a letter in the following terms:

'I, Mr. A. A. Elphick agree to sell to Mr. J. Hardy of 1 Steeple Road, Southminster for the sum of £30,000.00. This is for all land and bungalow situated in Broomwood Gardens and Ongar Road. This does not include Littlewoods being Millbrooks old yard.'

- i** On 15th June 1971 the defendant intimated to the plaintiff that he would not proceed with the sale. On 24th June 1971 the plaintiff registered an alleged contract for sale of the land as a class C (iv) land charge. The defendant seems to have taken no step to get this registration removed.

On 13th December 1971 the plaintiff commenced an action against the defendant for specific performance of the alleged agreement. In his statement of claim, served

on 10th January 1972, the plaintiff alleged an oral agreement of 15th March 1971 which he alleged to have been evidenced by the letter to which I have referred. a

By his defence and counterclaim, served on 24th January 1972, the defendant denied the alleged agreement and in para 2 of his defence pleaded:

'The Defendant will rely upon the provisions of Section 40 of the Law of Property Act 1925 and if contrary to the Defendant's contention the note or memorandum mentioned in paragraph 2 of the Statement of Claim contains or constitutes a memorandum of any of the terms of any contract or agreement between the Plaintiff and Defendant the Defendant will say that it does not contain the whole of such terms and is in consequence not a sufficient memorandum to satisfy the said Section.'

b

By his counterclaim the defendant alleged that the plaintiff had wrongly registered the land charge and that the defendant had thereby suffered damage, which he claimed. He also claimed cancellation of the registration. c

On 25th February 1972 the plaintiff requested further and better particulars of the allegation that the letter did not contain the whole of the terms of any contract or agreement between the plaintiff and defendant, specifying each such term or part of a term alleged not to be contained therein. On 17th March 1972 the defendant delivered particulars in response to that request. The particulars delivered under para 2 of the defence are as follows: d

'The Note described in paragraph 2 of the Statement of Claim contains no date for completion of the alleged agreement. The Defendant told the Plaintiff at the meeting between them on the fifteenth day of March One thousand nine hundred and seventy one that the Defendant required from three to six months to clear the land proposed to be sold and that completion could not take place before the land was cleared. Consequently the date of completion was essential to any agreement between the Defendant and the Plaintiff. Furthermore completion was conditional upon the Plaintiff selling three houses then being built by him at Warley Road Brentwood in the County of Essex.'

e

The particulars were signed by the defendant's counsel. f

On 2nd June 1972 the plaintiff served a reply of which it is unnecessary for me to say anything except that it did not contain any plea of part performance.

On 24th July 1972 the plaintiff started a second action against the defendant and in his statement of claim in that action, served on 5th September 1972, he alleged an oral agreement between the plaintiff and the defendant on or about 15th March 1971 in the terms alleged in the earlier action but with the addition of the two terms specified in the particulars delivered in the earlier action. He alleged that the oral agreement was evidenced in writing by (a) the letter of 15th March 1971 already referred to and (b) the particulars delivered in the 1971 action. He alleged that the land proposed to be sold had been cleared and that the time represented by the defendant to be needed for clearing the land had elapsed and that he, the plaintiff, had long since sold all of the three houses referred to in the particulars. g
h

The reason for the plaintiff's starting a new action in 1972 was that he wished to rely on the particulars delivered in the 1971 action as part of a written memorandum satisfying s 40, which he could not do in the 1971 action because the particulars were not yet in existence at the date of the issue of the 1971 writ.

By summons dated 4th October 1972 the defendant applied for an order dismissing the 1972 action on the ground that it was an abuse of the process of the court. This summons came before Foster J on 23rd November 1972. The learned judge then treated an application by the plaintiff by summons of that date to discontinue the 1971 action as before him; on that application and without prejudice to the counterclaim in the 1971 action he discontinued the 1971 action, and he made no order on the i

a defendant's summons save as to costs. It is from that decision that the defendant now appeals.

The plaintiff had issued no summons for leave to discontinue the 1971 action before the hearing by the learned judge, but before the defendant's summons came before the master the plaintiff's advisers had offered to apply for leave to discontinue that action.

b The defendant contends that bringing the 1972 action between the same parties as the 1971 action and relating to the same subject-matter without first seeking leave to discontinue the first action was a vexatious act. He further submits that, if the plaintiff had sought leave to discontinue the 1971 action, he would have been put on terms that no reliance should be placed in the 1972 action on the particulars delivered in the 1971 action as constituting part of a memorandum in writing for the purposes of s 40. This, the defendant suggests, would have been so because the plaintiff would c have been seeking leave to discontinue the first action solely in order to take advantage of material which had come into existence in the 1971 action by reason of the court's rules of procedure for a purpose for which those rules were not designed. The court, it is said, in the exercise of its discretion to permit discontinuance would not allow the plaintiff to obtain such an advantage.

d For the plaintiff, on the other hand, it is contended that the defence in the 1971 action should have contained the particulars which were later asked for and given. Had this been so, the plaintiff could within 14 days after delivery of the defence have discontinued the 1971 action without leave and without being put on any terms. It was only by delivering the particulars more than 14 days after service of the defence, in which they should have been originally incorporated, that the defendant put the plaintiff in the position of having to apply for leave to discontinue the 1971 action. e Accordingly, says the plaintiff, the defendant would have been unsuccessful in securing the insertion of terms in any order giving leave to discontinue the 1971 action, and cannot now properly assert that he has been put at any disadvantage by the fact that the plaintiff did not make an application for leave to discontinue before he launched the 1972 action.

f It is true, of course, that both actions relate to the same events, but it is not strictly accurate to say that they relate to the same subject-matter or transaction. The agreement alleged in the 1972 action is different from that alleged in the 1971 action. It founds a different cause of action which could, if this would have availed the plaintiff, have been pleaded as an alternative cause of action in the 1971 action. If all that is complained of were that the 1972 claim could have been raised in the 1971 action by amendment, this could in effect have been achieved by consolidating the two actions but for the fact that the plaintiff could then have relied on the particulars as part of a written memorandum in support of his 1972 claim, whereas, if the 1972 action were discontinued and the 1972 claim were raised in the 1971 action by amendment, the plaintiff could not so rely on the particulars because they came into existence later than the 1971 writ.

h What is said to constitute an abuse of process in this case is not in truth the lack of any new cause of action in the 1972 proceedings, but the use in those proceedings of material which was called into existence in the 1971 action to satisfy the requirements of s 40 in relation to the 1972 action. In this respect it seems to me that the defendant is somewhat in a dilemma. Either the particulars in the 1971 action do not constitute or contribute to a memorandum for the purposes of the 1972 action, in which case the defendant has not been prejudiced by what has occurred, or, if they j do constitute or contribute to a memorandum, the plaintiff ought, at least prima facie, to be allowed to rely on them.

There may be—and indeed it seems to me that there are—weighty arguments in favour of the view that the particulars do not, on a variety of grounds, constitute any part of a written memorandum of an oral agreement satisfying the requirements of s 40. If such arguments prevail—and they will be available to the defendant at the

trial if the 1972 action goes on—the defendant would not have been prejudiced either by the commencement of the 1972 action without the 1971 action being first discontinued, or by the plaintiff's attempt to rely on the particulars as part of a written memorandum of an oral agreement. If on the other hand there is a possibility of the plaintiff successfully relying on the particulars as part of a memorandum, why, I ask myself, should he be barred from prosecuting an action in which they can be so relied on?

If after the issue of the 1971 writ the defendant had inadvertently and for the first time provided a complete written memorandum of the alleged oral agreement by some document outside the action, such for instance as a letter to a third party, I can see no reason why the plaintiff should not have been permitted unconditionally to discontinue the 1971 action to make way for a later action in which that document could be relied on. If the defendant has inadvertently provided a complete memorandum by his pleading in the 1971 action, why should the plaintiff not equally be permitted unconditionally to discontinue the 1971 action to make way for the 1972 action? If the defendant had been compelled to plead material in the 1971 action constituting a memorandum, there might be substantial grounds for arguing that it would be oppressive to allow the plaintiff to take advantage of this in a later action, but I am far from satisfied that this was the case. Assuming for the present purpose that in giving the particulars in the 1971 action the defendant has afforded the plaintiff a sufficient written memorandum of the oral agreement alleged in the 1972 action, was he bound to do so? It would, I think, have been by no means impossible for the defendant to have pleaded his case in the 1971 action without putting himself in a position in which he could be called on to give those particulars. He could, for instance, have denied the alleged oral agreement (as in fact he did) and have gone on merely to plead that, if (which he denied) any oral agreement had been concluded between the plaintiff and himself, he would rely on s 40 in respect of such agreement. All that he need have pleaded in answer to para 2 of the 1971 statement of claim, in which the plaintiff alleges that the letter of 15th March 1971 evidenced the oral agreement alleged in that action, was to the effect that he did not admit that paragraph, or possibly that he did not admit that the letter constituted a sufficient memorandum for the purposes of s 40 of any oral agreement between the plaintiff and himself. On such a pleading I do not think that the defendant could have been required to give any particulars of the kind which in fact he gave, or indeed any particulars at all, and the pleading would have been incapable of being relied on as constituting any memorandum or part of a memorandum for the purposes of the section. If this is right, the defendant may have inadvertently pleaded a memorandum, but, since he could properly and successfully have avoided doing so, there seems to be no more reason why the plaintiff should be prevented from taking advantage of the defendant's inadvertence than there would be if the defendant had inadvertently provided a memorandum by writing to a friend.

It has often been said that the jurisdiction of the court to dismiss or stay an action in limine should be exercised sparingly and with great caution. A plaintiff whose statement of claim discloses a cause of action should be allowed to have his case tried, unless his conduct in bringing the action is clearly frivolous, vexatious or otherwise an abuse of the process of the court. It cannot be said of the present case that the statement of claim in the 1972 action discloses no cause of action, for the allegation of the oral agreement affords a cause of action. The defendant may be able under s 40 to prevent the plaintiff from enforcing the agreement, but this does not deprive the plaintiff of his cause of action. Moreover the plaintiff may be able to circumvent the statutory defence under s 40 by proving part performance, and we have been told by counsel that the plaintiff will plead part performance in the 1972 action.

In these circumstances I can see no good ground for holding that it would be oppressive to the defendant to allow the plaintiff to proceed with the 1972 action. The points which the defendant has sought to develop on the present application

a relating to the availability of the particulars as a memorandum or part of a memorandum evidencing an oral agreement will all be available to the defendant at the trial. I would dismiss this appeal.

b **RUSSELL LJ.** It appears to me that the crucial question is whether, quite apart from the question of any memorandum for the purposes of s 40 of the Law of Property Act 1925, it was an abuse of the process of the court or vexatious on the part of the plaintiff to launch his second action, instead of amending his statement of claim in the first action, for example by pleading the contract with different terms in the alternative. I do not think that question can be answered in the affirmative. There is, it seems to me, nothing to prevent a plaintiff from alleging two different contracts, different, that is to say, only as to their terms, in two actions: it is perhaps an c extravagant method to adopt, but that can be dealt with in large measure by consolidation of the two actions under RSC Ord 4, r 10, and for the rest by appropriate orders as to costs. Moreover, if the plaintiff is right in thinking that by this method he will be able to enforce a binding oral contract, against which for lack of sufficient memorandum the defendant would otherwise be shielded, there seems to be justification for the adoption of this method. It follows in my opinion that when the d matter was before Foster J the plaintiff was not obliged to apply for leave to discontinue the first action, and that accordingly no occasion arose for the imposition of that term which it is in effect said that the judge should have imposed, namely that the pleading in the first action should not be relied on for the purposes of s 40 in the second action.

e Accordingly, I agree that the second action must be allowed to proceed. The plaintiff will be entitled to attempt to rely on the defence in the first action as a memorandum if s 40 is pleaded by way of defence in the second action; and also, in reply, if the facts avail him, on part performance. These matters will be for determination at the trial.

f We were not invited to decide whether the plaintiff would succeed in using the defence and its particulars in the first action as constituting or contributing to a sufficient memorandum. I doubt that he would. If an oral contract is made and is alleged in a statement of claim, and no more, and the defendant, contrary to the truth, denies the contract and pleads s 40, it is clear that the pleading cannot constitute a sufficient memorandum in a subsequent action brought by the plaintiff on exactly the same contract after discontinuing the first without leave being necessary within 14 days of the defence. If the same defendant very properly admits, either expressly g or implicitly, in his defence the oral contract and pleads s 40, is the situation otherwise? If it were otherwise a defendant, pleading with the utmost propriety so as to limit the area of factual dispute, would find that the umbrella afforded by the statute immediately blows inside out. In *Jackson v Oglander*¹ Sir W Page Wood V-C said that an answer in which the statute was relied on could not be looked at: true that was the answer to the bill in the actual proceedings and therefore could not be relied on h in any event in those proceedings. But he said¹:

'The Defendant must answer, must swear to the truth of his answer, and must sign it: if I were to make any use of an admission so extorted, I should in effect repeal the statute.'

j I would say in the case instanced by me, to allow reliance in a later action on the first pleading which pleaded the statute would go far to repeal the statute. And in the first action in the present case the defendant did plead the statute, quite apart from

the question whether the paragraph denying the existence of the contract alleged is by itself a sufficient denial of any contract for the sale and purchase of the land. a

As indicated, I agree that the appeal fails.

ORR LJ. I agree. If the second action is permitted to proceed, questions will arise at the trial whether the particulars delivered on behalf of the defendant in the first action are capable in law of constituting, for the purposes of the second action, a memorandum, or part of a memorandum, under s 40 of the Law of Property Act 1925, and, if capable, whether in their terms they do so. In my judgment, it is not for this court on the present appeal to decide these questions, and all I would say about them is, first, that I consider there are solid arguments which can be advanced on both these issues for the defendant, and secondly that I agree with Russell LJ, that it would be unfortunate if a distinction were to be drawn in this context between a defence, pleading s 40, which denies or does not admit an oral contract, and a defence, also pleading s 40, which admits such a contract. One of the consequences of such a distinction would, in my judgment, be to produce a trap for a defendant who is not legally represented. But the crucial question for the present purposes is whether the commencement of the second action was an abuse of the process of the court, and for the reasons given by Russell and Buckley LJJ I am unable to hold that it was, and I therefore agree that the appeal should be dismissed. b
c
d

Appeal dismissed.

Solicitors: *Collyer-Bristow & Co*, agents for *Cunnington, Son & Orfeur*, Rayleigh, Essex (for the defendant); *Bulcraig & Davis*, agents for *Mitchell, Williams & Roland Thomas*, Malden, Essex (for the plaintiff). e

S A Hatteea Esq Barrister.

R v Cross (Patrick)

f

COURT OF APPEAL, CRIMINAL DIVISION
LORD WIDGERY CJ, JAMES LJ AND NIELD J
27th, 30th MARCH 1973

Criminal law – Appeal – Court of Appeal – Judgment or order – Alteration – Jurisdiction of court to alter its own judgment or order. g

The Court of Appeal, Criminal Division, has jurisdiction to alter a decision or order made by it at any time up to the moment when, on receipt of the notice of the court's decision transmitted by the registrar under r 15 (2)^a of the Criminal Appeal Rules 1968^b, the proper officer of the court of trial enters the decision in the record of the court of trial (see p 922 e f and p 923 e f, post). h

Notes

For notification of result of appeal in criminal cases, see 10 Halsbury's Laws (3rd Edn) 541, para 993.

For the power to alter judgments in criminal cases, see 10 Halsbury's Laws (3rd Edn) 435, 436, para 805, and for cases on the subject, see 14 Digest (Repl) 377, 3686-3698. j

For the Criminal Appeal Rules 1968, r 15, see 6 Halsbury's Statutory Instruments (Second Re-issue) 61.

^a Rule 15, so far as material, is set out at p 922 j to p 923 b, post

^b SI 1968 No 1262

Cases cited

- a** *Hancock v Prison Comrs* [1959] 3 All ER 513, [1960] 1 QB 117.
R v Batchelor (1952) 36 Cr App Rep 64, CCA.
R v Gatenby [1951] 1 All ER 173n, 34 Cr App Rep 255, CCA.
R v Hinds (1962) 46 Cr App Rep 327, CCA.

b Rehearing of appeal

- On 18th August 1972 in the Crown Court, Newington Causeway, SE1, before Judge Peck and a jury the appellant, Patrick Vernon Cross, was convicted on two counts of attempted theft, two counts of having articles in connection with theft, one count of attempted burglary and one count of malicious damage. He was sentenced in all to 18 months' imprisonment (including six months' concurrent for breach of a probation order imposed on 4th June 1971). He appealed against his sentence and the matter first came before the court (Megaw LJ, O'Connor and Phillips JJ) on 18th January 1973 when the court allowed the appeal, quashed the sentences passed at the Crown Court and made in place thereof a probation order for two years. Later on that day (18th January) the appellant was brought back to the court for it had transpired that he had failed to mention that on 19th September 1972 in the Crown Court at Croydon he had been convicted of carrying an offensive weapon without authority, sentenced to nine months' imprisonment, to run consecutively with the sentences imposed on 18th August 1972, and had also been ordered to pay £60 towards the defence costs. In those circumstances the court, on 18th January 1973, cancelled the judgment given earlier that day and ordered that the appeal should be relisted and heard before a differently constituted court. On 1st March the court (Lawton, Scarman LJ and Phillips J) again adjourned the case for the prosecution to be instructed. The facts are set out in the judgment of the court.

M A Johnstone for the appellant.

Leonard Gerber for the Crown.

Cur adv vult

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30th March. **LORD WIDGERY CJ** read the following judgment of the court. On 18th August 1972 at the Crown Court for Inner London, the appellant was convicted and sentenced for a number of offences, attempted theft, having articles for use in connection with theft, another count of attempted theft, malicious damage, having articles for use in connection with theft, attempted burglary and burglary. He was sentenced to a number of sentences to run concurrently the longest of which was 18 months, and therefore the effective sentence was 18 months. He appealed against his sentence by leave of the single judge, and the matter came on for hearing before this court on 18th January 1973, the court being presided over by Megaw LJ.

g

The court heard argument in support of the appeal against sentence, and was minded to allow the appeal and to substitute a probation order in respect of the sentences of 18 months. It is not necessary to go into the matter in detail, because it suffices to say that this court having considered the matter in detail considered that a probation order might properly be imposed in view of the fact that this young man seemed to have taken on a better way of life since the offences were committed. Accordingly, he was asked if he was prepared to be put on probation for two years; he consented, and the court ordered accordingly.

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Later in the same day, it was discovered that the appellant had been convicted of carrying an offensive weapon without authority, an offence which was committed after these matters first came under consideration, and of which the court had no knowledge when putting him on probation, as I have described. The court, I think, took the view that the appellant had at any rate been less frank in answering questions which had been put to him, and obviously was of the opinion that the decision

to allow this appeal and substitute a probation order was something which ought to be reconsidered in the light of this additional information. Accordingly, later in the day, he was brought back, these matters were discussed before the court, and the upshot of it all was that the court decided to set aside its previous judgment, and have the case relisted for a fresh hearing, when these additional matters might be taken into consideration. a

At that time the learned registrar who was sitting in court had made a note of the decision of the court, and the note which he had made read in the following terms: b

‘[The court] has allowed the appeal and quashed the sentence passed at the trial and made in place thereof a probation order for two years.’

In due course the matter came back for hearing before this court as at present constituted, as had been contemplated by the order at the previous hearing. The first point taken on behalf of the appellant before us has been that the court has no power to set aside its previous probation order, that it was in fact *functus officio* as soon as it had made that order and that accordingly we have no jurisdiction to consider the matter, it being finally determined at the earlier hearing. We have had the advantage of a good deal of argument on this particular issue, because it does not seem to have arisen for consideration before. Not having arisen before, we have to consider the jurisdiction of this court to withdraw and alter its decision by the application of first principles. c
d

It is well recognised that a court of record has power to alter a judgment or order which it has made within certain limits. The limits set in general appear to be that the power to alter the judgment ceases when the judgment is, in the words of the civil courts, drawn up. In other words, the general principle seems to be that when once the judgment has been finally recorded, then the inherent power to vary it is lost. We are satisfied from the arguments put before us, and indeed from our own experience, that that rule has been extensively applied in the criminal courts in the past. It was well recognised that at assizes the assize judge could alter a sentence which he had passed at any time prior to the moment when he signed the gaol delivery and handed it over to the governor of the prison. That was a function performed by most assize judges as almost their last act before leaving the assize town, and the signing of the gaol delivery was the moment at which any opportunity for second thoughts disappeared. Similarly, in regard to quarter sessions, once at the end of the sessions the record of the court’s decisions had been made up and forwarded to the proper authority, the inherent power to change a sentence disappeared as well. e
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We think that the same principles ought to apply to this court, and so we have investigated, partly with the assistance of counsel and partly by making our own enquiries within the internal organisation of the court, to determine the appropriate equivalent moment at which proceedings in this court reach that degree of finality when no further change in the decision of the court is possible. It is in some ways difficult to find and lay down a clear moment at which this consequence follows, because neither the Court of Criminal Appeal in its jurisdiction under the Criminal Appeal Act 1907, nor this court, is required to keep formal records of these matters. We have, therefore, had to ask ourselves what, in practice, is done in order to find within the practice that point which seems to us to be the point of finality within the principles I have tried to describe. g
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When a judgment of this court is given, the registrar is required by the rules to notify the decision to a variety of people. By r 15 of the Criminal Appeal Rules 1968¹ it is provided as follows: j

‘(1) The Registrar shall, as soon as practicable, serve notice of any determination by the court or by any judge of the court under section 31 of the [Criminal Appeal Act 1968] on any appeal or application by an appellant on—(a) the

a appellant; (b) the Secretary of State; (c) any person having custody of the appellant; (d) in the case of an appellant detained under the Mental Health Act 1959 the responsible authority.

'(2) The Registrar shall, as soon as practicable, serve notice on the proper officer of the court of trial of the order of the court disposing of an appeal or application for leave to appeal . . .'

- b It is to be observed that the formality required of the registrar under that rule is in no sense the making of a record. What the registrar is required to do, and does do, when he performs his duties under r 15, is to give notice to interested parties of what the order of the court has been. Accordingly, it does not seem to us that it would be right or appropriate to pick on the moment when these notices are issued as being the moment when the record is made up, because they are, as I have endeavoured to describe, in no sense, a record. However, by order of the Lord Chancellor following the creation of the Crown Court, there is published a Crown Court Manual which contains specific provision as to what is to be done by the court of trial on receipt of notification from the registrar under r 15. What the Crown Court Manual requires is that the officer of the court of trial on receiving notice of the determination of this court from the registrar, shall record the determination so transmitted to him. The actual words are:

'on return of the case papers to the Crown Court, with the notification of the result of the appeal . . . the decision of the Court of Appeal should be entered on the court record and the notice of the result of the appeal attached.'

- There is, therefore, for the first and really the only time the making of a formal record of the determination of this court, and we think that the proper interpretation of the position, so far as the matter presently under review is concerned, is that the court of trial is the court that maintains a formal record of proceedings in this court, and it is enabled to maintain such records by the registrar performing the duty cast on him under r 15. Consequently when the question arises, as it arises in this case, of the court's power to make a change in any decision or order which it has pronounced, the vital question is whether that decision or order has been recorded by the proper officer at the court of trial pursuant to the directions to which I have just referred.

- Applying that principle to the present case, it is quite clear that the earlier decision of this court had not been so recorded, and therefore it was open to this court to withdraw its order and direct, as it did, that the matter should be reheard before us. That, of course, has been done, and the advantage of the rehearing before us has been that it has been possible for us to see that there was no reason to think that this young man was in any way endeavouring to mislead the court in the answers which he had previously given. There was some confusion between two convictions, one for dangerous driving and one for carrying an offensive weapon. The answer which he gave relative to dangerous driving, the less serious offence, was one which he could perfectly honestly have given having regard to the form of question put to him. We therefore take the view that although it was desirable for the matter to be investigated lest there had been an attempt to mislead the court, in fact there was no such attempt to mislead the court, and we have not found anything in our reconsideration of the case which would give us reason to think that the decision reached at the earlier hearing is one which is not justified in justice and in law. Accordingly, therefore, whilst rejecting the submission that we had no jurisdiction to reconsider the matter, we have reconsidered the matter and we have come to the conclusion that the order originally proposed at the hearing of this court should be made.

Order accordingly.

Solicitors: Registrar of Criminal Appeals (for the appellant); Solicitor, Metropolitan Police.

N P Metcalfe Esq Barrister.

H G Perkins Ltd v Best-Shaw

QUEEN'S BENCH DIVISION

KERR J

27th MARCH, 2nd APRIL 1973

Arbitration – Costs – Taxation – Discretion of arbitrator – Award directing costs to be taxed 'in the High Court' – Discretion of taxing master – Appropriate scale of costs – Discretion of arbitrator to award costs on any basis he regards as proper – Taxing master acting as delegate of arbitrator in taxing costs – Direction in award to be construed as direction to tax costs on High Court scale.

The claimants were employed by the respondent under a contract containing an arbitration clause. A claim by the claimants for some £971 for work done was submitted to arbitration; the respondent counterclaimed £1,059 for alleged breaches of contract by the claimants. The disputes were compromised on the basis of a consent award made by the arbitrator to the effect that the respondent should pay the claimants £325 and costs. The award contained a direction 'that the Claimants shall submit their costs to be taxed on a party and party basis in the High Court, and these taxed costs shall be paid by the Respondent'. The claimants' solicitors drew up a bill of costs by reference to the High Court scale but on taxation the taxing master disallowed an item which would have been allowed on the High Court scale and issued an interim certificate. The claimants applied for a review of the certificate but, after hearing argument, the master held that the county court scales applied to the taxation. On appeal by the claimants, the respondent contended, *inter alia*, that, in taxing the costs of an arbitration, the taxing master had, by virtue of RSC Ord 62, r 2 (2)^a, an unfettered discretion whether to tax on the High Court scale, on a county court scale or on no scale at all.

Held – Under s 18 (1) and (2)^b of the Arbitration Act 1950 the costs of arbitration proceedings were in the sole discretion of the arbitrator and it was open to him, acting judicially, to award costs on any basis that he regarded as proper. In taxing the costs awarded by an arbitrator the taxing master's function was a ministerial one, in performing which he was merely the delegate of the arbitrator. The effect of s 18 (2) of the 1950 Act was that, *prima facie*, the arbitrator's choice lay between directing a taxation on the basis of the High Court scale or on the basis of one of the county court scales. Since the arbitrator's award directed that the costs should be taxed in the High Court rather than in a county court the proper interpretation of the award was that the costs were to be taxed by reference to the High Court scale. Accordingly the appeal would be allowed (see p 926 f and j, p 927 b c, p 929 c d and h to p 930 a and b c and d to f, post).

Notes

For the powers and duties of the taxing master, see 36 Halsbury's Laws (3rd Edn) 159, para 211, and for cases on the subject, see 43 Digest (Repl) 228-232, 2359-2405.

For the taxation of costs in arbitration proceedings, see 2 Halsbury's Laws (4th Edn) 276, 319, 320, paras 541, 607, and for cases on the subject, see 2 Digest (Repl) 741-745, 2513-2559.

For the Arbitration Act 1950, s 18, see 2 Halsbury's Statutes (3rd Edn) 448.

Cases referred to in judgment

Colton v McCaughey [1969] 3 All ER 1460, [1970] 1 WLR 63, Digest (Cont Vol C) 1101, 5341a.

^a Rule 2 (2), so far as material, is set out at p 927 e f, post

^b Section 18, so far as material, is set out at p 926 b to d, post

- a *Holdsworth v Wilson* (late Barsham) (1863) 4 B & S 1, 32 LJQB 289, 8 LT 434, 10 Jur NS 171, 122 ER 360, 2 New Rep 190, 2 Digest (Repl) 746, 2560.
- Knott v Long* (1735) 2 Stra 1025, 93 ER 1010, sub nom *Nott v Long* Lee temp Hard 181, 2 Digest (Repl) 741, 2515.
- Matthews v Inland Revenue Comrs* [1914] 3 KB 192, 83 LJKB 1552, 110 LT 931, CA, 39 Digest (Repl) 249, 66.
- b *Simpson v Inland Revenue Comrs* [1914] 2 KB 842, 83 LJKB 1318, 110 LT 909, 39 Digest (Repl) 249, 65.

Summons for review of taxation

H G Perkins Ltd, the claimants in arbitration proceedings between themselves and the respondent, S B Best-Shaw, applied for a review of the decision of Master Razzall whereby, on a taxation of the claimants' costs under an award made by the arbitrator (A S King Esq) on 19th June 1972, he disallowed an objection by the claimants to his disallowance of an item in the claimants' bill of costs. The facts are set out in the judgment.

A T K May for the claimants.

T L G Cullen for the respondent.

Cur adv vult

2nd April. **KERR J** read the following judgment. This is an application under RSC Ord 62, r 35, to review a taxing master's decision on the taxation of the costs of an arbitration. The issue is whether or not the taxing master is bound to tax on the High Court scale or whether, as a matter of discretion or obligation, the taxation should proceed on a county court scale. There appears to be no authority which covers the point.

The claimants in this matter were contractors employed by the respondent under an RIBA contract containing an arbitration clause. Disputes arose under the contract and were referred to arbitration. In the arbitration the claimants claimed a sum of about £971 on account of money due to them for work done as well as damages for breach of contract. The respondent counterclaimed £1,059 for alleged breaches by the claimants of the contract. I should add, for the sake of completeness, that this was pleaded by way of counterclaim only, though I think that it could also have been pleaded pro tanto as a set-off. The disputes were compromised on the basis of a consent award made by the arbitrator in terms agreed between the parties to the effect that the respondent would pay to the claimants the sum of £325 and costs.

The dispute arises out of the following order in the award which is in a fairly common form:

'I direct that the Claimants shall submit their costs to be taxed on a party and party basis in the High Court, and these taxed costs shall be paid by the Respondent.'

The claimants' solicitors thereupon drew up a bill of costs on a party and party basis by reference to the High Court scale. On taxation, the respondent's solicitors contended that the claimants were not entitled to taxation on the High Court scale. On reaching the first item which would have been allowed on the High Court scale but disallowed under the county court scales, an item of 75p for attending counsel to settle papers, the taxing master disallowed this item and issued an interim certificate under RSC Ord 62, r 17 (1), to enable the position to be tested. In effect he suspended the taxation pending the decision of this issue. The claimants then applied to him under RSC Ord 62, r 33, for a review of his interim certificate which disallowed this item and argued that the High Court scale applied. After hearing argument the taxing master rejected this contention and held that the county court

scales applied. The claimants now appeal from that decision and the case has been argued by counsel. a

The statutory power of the courts to tax costs in an arbitration derives from s 18 of the Arbitration Act 1950. The relevant provision is sub-s (2), but it is desirable to set out sub-s (1) as well. Section 18 (1) provides as follows:

‘Unless a contrary intention is expressed therein, every arbitration agreement shall be deemed to include a provision that the costs of the reference and award shall be in the discretion of the arbitrator or umpire, who may direct to and by whom and in what manner those costs or any part thereof shall be paid, and may tax or settle the amount of costs to be so paid or any part thereof, and may award costs to be paid as between solicitor and client.’ b

Subsection (2) provides: c

‘Any costs directed by an award to be paid shall, unless the award otherwise directs, be taxable in the High Court.’

The words in sub-s (2) ‘unless the award otherwise directs’ can, I think, only refer to a taxation in a county court, and this appeared to be common ground between counsel. It was held as long ago as 1735, in *Knott v Long*¹, that if an arbitrator does not himself tax the costs, he can only delegate the taxation to an officer of the court and not to some third party. The report of *Knott v Long*¹ consists of only one sentence and deserves to be quoted in full. It reads as follows: d

‘An award that the defendant should pay what costs two persons named in the award (who were not officers of any Court) should appoint for costs; provided they are such as a Master in Chancery would allow; was held ill, for they can only delegate their authority in that instance to one who, the Court will take notice, understands it better than themselves.’ e

Under our present system such persons are the taxing masters of the High Court and the registrars of county courts. It therefore seems clear that the effect of s 18 (2) of the Arbitration Act 1950 is that unless the award expressly provides for taxation in a county court the costs will, as the section says, be taxed in the High Court. f

The Rules of the Supreme Court and the County Court Rules contain provisions enabling such taxations to be carried out. In the Supreme Court the relevant provision is now RSC Ord 62, r 2 (2), to which I must refer in a moment, which deals expressly with the taxation of costs in any proceedings before an arbitrator or umpire. The combined effect of this rule and of r 12 (1) (b) and (2) of the same order is that such a taxation is to be carried out by a taxing master of the Supreme Court. g
In the county courts the applicable provision appears to be CCR Ord 47, r 41, which deals with the taxation of costs which under any Act fall to be taxed by a county court, though this rule does not contain any express reference to arbitration tribunals. I should add for the sake of completeness that neither side contended that the reference in the award to the taxation proceeding on a party and party basis made any difference to the issue. Both in the High Court and in the county court costs may be directed to be paid and taxed on a party and party basis or on what is now called a ‘common fund’ basis which has the same effect as what used to be called a ‘solicitor and client’ basis: see RSC Ord 62, r 28 (2) and (4), which are made applicable to county court taxations by CCR Ord 47, r 49. It therefore follows that prima facie the choice lies between the applicability of the High Court scale or of the county court scales, though of course in each case so as to include that degree of discretion beyond the provisions of the scales which remains vested in the taxing officer under the respective rules of the two courts. h

The argument on behalf of the claimants can be stated quite simply as follows. j

a The effect of s 18 (1) and (2) is that an arbitrator has a complete discretion as to costs, though this is of course subject to the obligation to exercise this discretion judicially, as to which nothing arises here. Under s 18 (1) the arbitrator may himself tax or settle the costs and, if so, decide whether to do so on the ordinary party and party basis or on a higher basis. Section 18 (1) gives him a complete discretion without binding him to apply either the High Court scale or a county court scale. Alternatively, he can delegate the taxation under s 18 (2) in which event such delegation
b will be to a taxing master of the Supreme Court unless he decides to delegate it to what on that basis would presumably be a registrar of a county court: see CCR Ord 47, rr 3 and 41. If, as here, he directs that the taxation shall proceed in the High Court and therefore delegates the taxation to a taxing master of the High Court and not to a county court registrar, then the clear construction of his award is that he intends the taxation to be carried out on the basis of the High Court scale and not on the basis of one of the county court scales.

c This is a simple and in my view sensible interpretation of what this award means as a matter of first impression. The argument for the respondent, which was attractively and succinctly put forward on his behalf by counsel, was much more complex. He submitted that the order that the costs shall be taxed in the High Court only directs the venue of the taxation and that the taxation is to be carried out on the basis of the Rules of the Supreme Court and not on the basis of the County Court Rules. He therefore submitted that one then has to turn to the Rules of the Supreme Court to consider what they provide in this connection. The relevant rule, as already mentioned, is RSC Ord 62, r 2 (2), and I must first set this out:

d 'Where by virtue of any Act the costs of or incidental to any proceedings before an arbitrator or umpire or before a tribunal or other body constituted by or under any Act, not being proceedings in the Supreme Court, are taxable in the High Court, the following provisions of this Order [and then it refers to a number of provisions following the one that I am reading] shall have effect in relation to proceedings for taxation of those costs as they have effect in relation to proceedings for taxation of the costs of or arising out of proceedings
e in the Supreme Court, other than proceedings in the Family Division.'

f I must also read para (3) of this rule, which is in the following terms:

'This Order shall have effect subject to sections 47 and 60 of the County Courts Act, 1959 (which limit the costs recoverable in relation to certain proceedings which could have been commenced in a county court) and to any other Act of Parliament.'

g I should add that para (3) of this rule which I have just read is not one of the ones which is mentioned in para (2) among the 'following provisions of this Order' which are to have effect.

h I must also set out part of s 47 of the County Courts Act 1959 which was strongly relied on by counsel for the respondent. The relevant parts are as follows. Section 47 (1):

i 'Where an action founded on contract or tort is commenced in the High Court which could have been commenced in the county court then, subject to [sub-s (3)] of this section, the plaintiff—(a) if he recovers a sum less than £500 shall not be entitled to any more costs of the action than those to which he would have been entitled if the action had been brought in the county court [and then I can omit the following provisions] so, however, that this section shall not affect any question as to costs if it appears to the High Court or a judge thereof (or where the matter is tried before a referee or officer of the Supreme Court, to that referee or officer) that there was reasonable ground for supposing the amount recoverable in respect of the plaintiff's claim to be in excess of the amount recoverable in an action commenced in the county court.'

The material parts of s 47 (3) are as follows:

'In any such action as aforesaid, whether founded on contract or tort, the High Court or a judge thereof (or where the matter is tried before a referee or officer of the Supreme Court, that referee or officer), if satisfied—(a) that there was sufficient reason for bringing the action in the High Court [and then I can go to the end of the subsection] may make an order allowing for costs or any part of the costs thereof on the High Court scale or on such one of the county court scales as he may direct.'

Counsel for the respondent made three main submissions, as follows. First, that the taxing master has an unfettered discretion whether to tax on the High Court scale or on a county court scale or on no scale at all in taxing the costs of an arbitration because on the true construction of the Rules of the Supreme Court he is not bound to apply any particular scale, whether of the High Court or county court. He said that no scale applies to such taxations. Secondly, he submitted that it would be illogical to give to the claimants costs on the High Court scale when the amount recovered was only £325, having regard to the provisions to which I have just referred. His third submission was that in the alternative to his first submission on discretion, the master in this case was bound to apply s 47 of the County Courts Act 1959 which I have just read.

It is convenient to deal first with the latter submission, and it is right to say that this was the main, if not the only, submission made to the taxing master below on the basis of which he appears to have decided that the county court scales apply. Counsel for the respondent submitted that when one analyses RSC Ord 62, those provisions which are expressly mentioned in r 2 (2), and which do not include para (3) which incorporates s 47 of the County Courts Act 1959, cannot be exhaustive, because one can see that a number of other general provisions, which are not expressly mentioned in r 2 (2), must apply as well as those which are expressly mentioned. One of these, he submitted, was r 2 (3) which applies s 47. He submitted that this rule must be treated as applicable because it applies to RSC Ord 62 as a whole in the same way as other provisions which must have been intended to be included although also not expressly mentioned. So far as concerns the point that in this case the matter terminated by a settlement as opposed to a recovery under a judgment, he relied on the decision of Buckley J in *Colton v McCaughey*¹ to show that s 47 applies to a recovery by way of settlement as it does to a recovery under a judgment, and this point was not challenged.

In my view counsel for the respondent may well be right on the construction of RSC Ord 62, r 2 (2), to the extent that the provisions there expressly mentioned as applicable to the taxation of costs in an arbitration may not be exhaustive. I will not lengthen this judgment by going through the various parts of RSC Ord 62 which, on this submission, should be treated as applicable to arbitration taxations even though not expressly mentioned. But it appears to me that in any event the opening words of s 47 itself present an insuperable obstacle to this line of argument. These words are:

'Where an action founded on contract or tort is commenced in the High Court which could have been commenced in the county court ...'

The present matter is neither an action which was commenced in the High Court nor one which could have been commenced in the county court but an arbitration pursuant to an arbitration clause in the contract between the parties. It is therefore in my view impossible to hold that this taxation must proceed on the basis that s 47 of the County Courts Act 1959 applies to it. There is also good sense in this.

¹ [1969] 3 All ER 1460, [1970] 1 WLR 63

a By s 18 of the Arbitration Act 1950 Parliament obviously intended that the costs of an arbitration should be in the discretion of the arbitrator and not of the courts. There is therefore no reason why the costs of an arbitration should come within s 47 or why they should have been brought within it by the terms of the Supreme Court Rules.

b The second submission of counsel for the respondent was that it was illogical that the claimants should be entitled to recover costs on the High Court scale when they had in fact only recovered £325. He pointed out that, subject to the residual discretion to award costs on the High Court scale, if these proceedings had been instituted in any other way than by arbitration, the claimants would prima facie only be entitled to costs on a county court basis. If instituted in the High Court this would follow from RSC Ord 62, r 2 (2), which incorporates s 47 of the 1959 Act. If instituted in a county court the same result would follow from CCR Ord 47. But in my view this is far from conclusive. It must always be borne in mind that under s 18 (1) and (2) of the 1950 Act the costs are in the sole discretion of the arbitrator and that subject to acting judicially he can award costs on any basis which he regards as proper. The only question in the present case is therefore: what basis has been selected by the arbitrator on the true construction of the award? This question is not answered by referring to s 47 of the 1959 Act or CCR Ord 47 which have nothing to do with the discretion as to costs vested in arbitrators by s 18 of the 1950 Act. I should however add for completeness that there was no argument before me as to how the discretion should have been exercised in the present case if s 47 or CCR Ord 47 were applicable to this matter, and I say nothing about this.

c I therefore come to the third and perhaps most powerful submission of counsel for the respondent. This was that even if s 47 does not apply, the result is nevertheless that on the true construction of RSC Ord 62, r 2 (2), the taxing master has an unfettered discretion to apply any scale he likes or, as I understand it, no scale at all. This, as I have mentioned, was counsel's primary argument. He said that although all other proceedings are prima facie subject to the High Court scale or to one of the county court scales, subject always to the residual discretion of the taxing officer, this is not the position in relation to the costs of arbitrations if these are taxed in the High Court. He submitted that in such cases there is an unfettered discretion. He founded this submission on the fact that the provisions of RSC Ord 62, which are expressly referred to in r 2 (2) of that order as being applicable to the taxation of arbitrations, do not include rr 28 to 32 of that order which are headed 'Assessment of Costs', and in particular do not include r 32 itself which applies the High Court scale. He therefore submitted that a taxation of the costs of an arbitration by a taxing master under RSC Ord 62, r 2, does not, by virtue of the express terms of the rule, apply the High Court scale to such a taxation.

d It seems to me that this is a somewhat difficult argument when the other submission of counsel for the respondent in relation to s 47 of the County Courts Act 1959, which I have already mentioned, rested on the basis that the provisions expressly incorporated by r 2 (2) could not be treated as exhaustive. But in my judgment this submission is in any event not the correct answer to the problem, for the following reasons. First, it seems to me that it does not give any sufficient or sensible effect to the award itself in the context of s 18 (2) of the Arbitration Act 1950. It is clear from that subsection and from what I have said that the arbitrator's choice lay between delegating the taxation to a taxing master of the Supreme Court or to a registrar of a county court. Prima facie, therefore, the choice resulting from a delegation under this subsection lies only between a taxation on the basis of the High Court scale or on the basis of the county court scales. In the ordinary case the taxing masters of the Supreme Court will tax on the basis of the High Court scale and the registrars of county courts on the basis of the county court scales. The sensible interpretation of the award is therefore that by directing a taxation in the High Court the arbitrator has impliedly directed a taxation

on the High Court scale. Secondly, it seems to me to be an improbable and unsatisfactory analysis of the position that in relation to the costs of an arbitration a taxing master of the High Court should have an unfettered discretion without reference to any scale as the *prima facie* basis for that exercise of his discretion. This is not so in any other case. His normal basis is the High Court scale. The only exception is if s 47 of the County Courts Act 1959 applies by reason of the amount recovered and if a judge or referee or officer of the High Court makes no special order for High Court costs. In that event the taxing master will proceed on the basis of CCR Ord 47 and exercise his discretion within the framework of the county court scales. But there is no case in which a taxing master proceeds on the basis that no scale whatever is *prima facie* applicable. Further, counsel for the respondent frankly and properly drew my attention to the position before the present RSC Ord 62 came into force and conceded that this line of argument would not then have been open to him. The position under the former RSC Ord 65, r 8, would then have been that the taxing master would have been bound to apply the so-called 'lower scale', unless directed by the court or a judge to apply the so-called 'higher scale', assuming that this was procedurally possible in relation to the taxation of the costs of arbitrations which it is now unnecessary to decide. I cannot think that the intention underlying the new rules was to change this position so as to give to the taxing master an unfettered discretion without reference to any scale. In this connection it is also worth bearing in mind that the function performed by a taxing master, when taxing costs under an award made by some outside tribunal, has been authoritatively described as a ministerial function in settling or taxing the amount of the costs awarded by the arbitrator or other tribunal: see Erle CJ in *Holdsworth v Wilson*¹, and Scrutton J in *Simpson v Inland Revenue Comrs*², and *Matthews v Inland Revenue Comrs*³. These cases show that the taxing master is merely the delegate of the arbitrator or other tribunal in assessing the amount. It would therefore be very surprising if he had what would in effect be a total discretion without reference to any scale.

I therefore decide this review on the basis that the proper interpretation of this award, that the costs be taxed in the High Court, is that they be taxed by reference to the High Court scale and I accordingly allow this appeal.

Objection allowed. Bill of costs referred back to taxing master to be taxed on High Court scale.

Solicitors: *Masons* (for the claimants); *Frere, Cholmeley & Co* (for the respondent).

E H Hunter Esq Barrister.

¹ (1863) 4 B & S 1 at 8

² [1914] 2 KB 842

³ [1914] 3 KB 192

***a* R v Supplementary Benefits Commission, ex parte Singer**

QUEEN'S BENCH DIVISION

LORD WIDGERY CJ, ASHWORTH AND BRIDGE JJ

b 7th, 29th MARCH 1973

Legal aid—Entitlement – Income exceeding prescribed figure – Income – Income including benefits and privileges – Sums received as benefits and privileges rather than by way of legal right – Element of recurrence – Gifts and loans – Whether gifts and loans from friends and relations constituting ‘income’ – Legal Aid (Assessment of Resources) Regulations 1960 (SI 1960 No 1471), reg 1 (2), Sch 1, para 1.

d The applicant, who was engaged as a plaintiff in litigation, was refused legal aid by the Supplementary Benefits Commission on the ground that his disposable income from the 12 ensuing months would be more than the statutory limit of £950 imposed by s 2 of the Legal Aid and Advice Act 1949. By para 1^a of Sch 1 to the Legal Aid (Assessment of Resources) Regulations 1960 an applicant's income was to be calculated, in the absence of other means of determination, as the income received during the preceding year. In the preceding year the applicant had received about £17,000, consisting largely of loans and gifts from friends and relations. The commission stated that it was deemed reasonable to estimate a reduction in income which had, therefore, been fixed at approximately £5,000, which was ‘the sum expected from a combination of earnings, gifts and loans etc. from relatives and friends of yourself and your wife plus benefit of any long-term credit facilities available’. On an application for certiorari to quash the determination, the commission contended that the definition of income as including ‘benefits and privileges’ in reg 1 (2)^b of the 1960 regulations was wide enough to embrace loans and gifts of every kind.

f **Held** – The definition in reg 1 (2) was intended to secure that receipts which would be regarded in a colloquial sense as part of a person's income should not escape from consideration merely because they were receivable as ‘benefits and privileges’ and not by legal right. The essential feature of receipts by way of income was that they displayed an element of recurrence; ‘income’ could not include ad hoc receipts. Although some gifts were clearly capable of forming part of a person's income, it was wrong to treat all gifts and loans as income indiscriminately. Accordingly ***g*** certiorari would be granted (see p 934 d e and f g, post).

Notes

For rules of computing rate of income for legal aid purposes, see 30 Halsbury's Laws (3rd Edn) 496-498, paras 921, 922, and for a case on the subject, see 50 Digest (Repl) 488, 1710.

h For the Legal Aid and Advice Act 1949, s 2, see 25 Halsbury's Statutes (3rd Edn) 759, 764.

For the Legal Aid (Assessment of Resources) Regulations 1960, reg 1, Sch 1, para 1, see 5 Halsbury's Statutory Instruments (2nd Re-issue) 231, 235.

***j* Case referred to in judgment**

St Aubyn (LM) v Attorney-General (No 2) [1951] 2 All ER 473, [1952] AC 15, HL, 21 Digest (Repl) 49, 199.

a Paragraph 1 is set out at p 933 c, post

b Regulation 1 (2), so far as material, provides: ‘In these regulations, unless the context otherwise requires ... “income” includes benefits and privileges ...’

Case also cited

Taylor v National Assistance Board [1957] 1 All ER 183, [1957] P 101, CA; *affd* [1957] 3 All ER 703, [1958] AC 532, HL. a

Motion for certiorari

This was an application by way of motion by David Mortimer Singer for an order of certiorari to quash a decision of the Supplementary Benefits Commission made on 8th June 1972 whereby they determined that under the Legal Aid and Advice Act 1949 the applicant's disposable income was greater than £950 a year and therefore he was ineligible for legal aid. The facts are set out in the judgment of the court. b

I S Richard QC and *P E J Focke* for the applicant.

Gordon Slynn for the commission. c

Cur adv vult

29th March. **BRIDGE J** read the following judgment of the court at the request of Lord Widgery CJ. In these proceedings counsel moves on behalf of David Mortimer Singer for an order of certiorari to bring up and quash a decision of the Supplementary Benefits Commission made in June 1972 under the Legal Aid and Advice Act 1949 (hereinafter called 'the Act') determining that the applicant's disposable income was greater than £950 a year. d

The applicant is engaged as plaintiff in complex litigation against solicitors who formerly acted for him. For reasons we need not consider, there are two actions on foot commenced by writs issued on 4th February 1971 and 24th March 1972. The applicant was granted limited legal aid under the terms of two emergency certificates dated 2nd and 24th March 1972. However, on 8th June 1972 the Law Society notified him that the emergency certificates were revoked and his application for legal aid was refused on the ground that the Supplementary Benefits Commission had determined disposable income at an amount greater than £950 a year, that being the upper limit prescribed as a condition of legal aid by s 2 of the Act, as amended. e

There is no document before the court embodying the commission's determination, although that is the order sought to be quashed, because it was not communicated directly to the applicant but only to the Law Society. But on hearing of it the applicant wrote to the Department of Health and Social Security, as representing the commission, on 15th June 1972 expressing himself as 'completely mystified' by the decision, setting out his financial circumstances, and asking that the matter might receive further consideration. The department replied on 29th June 1972 on behalf of the commission: 'A thorough re-examination', the writer says, 'has been made of the basis of the determination already issued to the Law Society'. The letter proceeds to set out that basis, in other words, to disclose the reasons for the earlier determination, and concludes: 'I must confirm that the determination was correct.' f

Counsel for the commission has taken the point that the letter of 29th June is not part of the record relating to the determination which is questioned; indeed, that there is no such record available for the court to consider. We cannot accept this submission. It seems to us that whenever a statutory body, having made a decision of a kind which can be questioned in proceedings for an order of certiorari, has subsequently chosen to disclose the reasons for the decision, whether it could have been compelled to do so or not, and however informal the document embodying the reasons, the decision with the added reasons becomes a 'speaking order' and if an error of law appears in the reasons certiorari will lie to quash the decision. g

Before turning to the reasons it will be convenient to refer to the relevant legislation. The Legal Aid and Advice Act 1949, s 4, provides: h

'(1) References in this Act to a person's disposable income or disposable capital shall be taken as referring to the rate of his income or amount of his capital after j

a making—(a) such deductions as may be prescribed in respect of the maintenance of dependants, interest on loans, income tax, rates, rent and other matters for which the person in question must or reasonably may provide. . .

(2) Regulations may make provision as to the manner in which the rate of a person's income and the amount of his capital are to be computed for the purposes of the foregoing subsection, and in particular for determining whether any resources are to be treated as income or capital and for taking into account fluctuations of income.'

b

The regulations in force are the Legal Aid (Assessment of Resources) Regulations 1960¹. Regulation 7 requires that disposable income be calculated in accordance with the provisions of Sch 1. Paragraph 1 of Sch 1 provides:

c 'The income of the person concerned from any source shall be taken to be the income which that person may reasonably expect to receive (in cash or in kind) during the period of computation, that income in the absence of other means of ascertaining it being taken to be the income received during the preceding year.'

d By the definitions in reg 1 (2) 'income' includes benefits and privileges and 'the period of computation' means the period of 12 months next ensuing from the date of application for a certificate.

The department's letter of 29th June 1972, having quoted para 1 of Sch 1 to the regulations, states the reasons for the commission's determination as follows:

e 'We note that the income from the Quebec Trust has been frozen by the trustees since January 1971 and no account was therefore taken of any income from this source. The bank statements supplied for you and your wife's accounts covered a period of roughly 12 months prior to the application in March 1972 and did not therefore include income from the trust. Nevertheless during the year credits were in the order of £17,000. In view of the claim that sources of loans and credits were drying up it was deemed reasonable to estimate a reduction in income and this was therefore fixed at approximately £5,000. This is the sum expected from a combination of earnings, gifts and loans etc from relatives and friends of yourself and your wife plus benefit of any long-term credit facilities available.'

f

The letter then explains why, not surprisingly, the deductions to be made in calculating 'disposable income' are insufficient to reduce the figure of £5,000 below the critical limit of £950.

g

Counsel for the applicant's basic submission is that neither loans nor gifts can constitute 'income' within the regulations, since they are not receivable as of right. Counsel for the commission, on the other hand, invites us to construe 'benefits and privileges' in the definition of 'income' in the widest sense which the words will bear, and submits that so construed they are apt to embrace both loans and gifts of every kind. He seeks support from the decision of the House of Lords in *St Aubyn (L M) v Attorney-General (No 2)*² in which it was held that periodical payments by way of loan from a company to an individual were 'benefits accruing' to the individual from the company within the context of the extremely complex provisions of ss 46 and 47 of the Finance Act 1940. Save as emphasising that, as a matter of language, a loan is in some senses of the word a 'benefit' to the borrower, we do not find that this decision on very different statutory subject-matter is of much assistance in the present case. It may be open to doubt how far the power to make regulations conferred by s 4 (2) of the 1949 Act authorises the introduction by the regulations of an artificial definition of 'income', which has no definition in the Act. But assuming that this subsection gives

h

j

1 SI 1960 No 1471

2 [1951] 2 All ER 473, [1952] AC 15

an unfettered power to enlarge the concept of 'income' by definition in the regulations, we would be reluctant to construe the definition in reg 1 (2) as requiring that receipts of a kind which no one would normally regard as forming part of his income should be treated as income for this purpose, unless constrained to that conclusion by the language used. Acceptance of the full width of counsel for the commission's submission would indeed allow the definition to extend the ordinary concept of what constitutes income to a degree which would produce some quite bizarre results. Thus, for example, a legacy, a win in a football pool, a mortgage loan from a building society, or an overdraft from the bank, would all qualify as part of the recipient's income in the year of receipt.

It would seem, on the other hand, that the narrow construction for which counsel for the applicant contends would permit no effective function to the phrase 'benefits and privileges' in the definition.

In our judgment it is possible to steer a middle course between these extremes and to give a sensible meaning to the language used in the definition without producing an unreasonable result. We believe that all the draftsman of the regulations was concerned to secure was that receipts which would, in a colloquial sense, be regarded as part of a person's income, should not escape from consideration in the assessment of legal aid entitlement by reason only that they were receivable qua 'benefits and privileges' and not by legal right. An example which springs to mind is a periodic allowance made by a parent to an adult son, other than under covenant, to provide for or assist in the son's maintenance.

The essential feature, in our judgment, of receipts by way of income is that they display an element of periodic recurrence. Income cannot include ad hoc receipts. This principle of distinction is untouched by the definition in the regulations. On the contrary, its importance is emphasised by the provision in para 1 of Sch 1 for assessment of the current year's income by reference to that of the previous year. This provision would work most inequitably if it meant that the ad hoc receipts of one year must be assumed to be repeated in the ensuing year.

Beyond stating this general principle of discrimination it is unnecessary and probably undesirable for the court to go further in considering the broad categories of gifts and loans. Some gifts are clearly capable of forming part of a person's income. It is difficult to visualise a basis for the periodically recurrent receipt of loans to qualify as income, which is likely to be encountered in practice, but it is certainly unnecessary to decide in the present case that loans per se cannot in any circumstances be received as income.

What is clear is that the commission have treated all loans and gifts as income indiscriminately. In this they have erred and the order must go to quash their determination.

Certiorari granted.

Solicitors: *Philip Mills & Co* (for the applicant); Solicitor, *Department of Health and Social Security* (for the commission).

N P Metcalfe Esq Barrister.

^a Riches v Director of Public Prosecutions

COURT OF APPEAL, CIVIL DIVISION
DAVIES, STEPHENSON AND LAWTON LJJ
27th MARCH 1973

^b Practice – Striking-out – Pleading – Statement of claim – No reasonable cause of action – Limitation of action – Cause of action accruing before limitation period – Power of court to strike out statement of claim – Defendant proposing to rely on Statute of Limitations – Nothing before court to suggest that plaintiff having any escape from statute – RSC Ord 18, r 19.

^c Malicious prosecution – Reasonable and probable cause — Prosecution instigated by Director of Public Prosecutions – Whether conclusive that reasonable and probable cause for prosecution.

^d In 1963, at the instigation of the Director of Public Prosecutions, criminal proceedings were commenced against the plaintiff and others in connection with lime subsidies under the Agriculture Act 1947. In February 1964 the plaintiff was committed for trial at assizes. After a lengthy trial the plaintiff was convicted in July 1964. He was fined and ordered to pay a large amount of costs. On 7th April 1965 the plaintiff's convictions were quashed by the Court of Criminal Appeal. On 6th March 1972 the plaintiff brought an action against the Director of Public Prosecutions claiming damages for malicious prosecution. The Director applied to the master to strike out the statement of claim under RSC Ord 18, r 19, and under the inherent jurisdiction of the court on the grounds that it disclosed no reasonable cause of action against the Director, that it was vexatious and an abuse of the process of the court, and that the facts and matters relied on occurred more than six years before the issue of the writ and the claim (if any) was barred by the Limitation Act 1939.

^f **Held** – The statement of claim should be struck out for the following reasons—

(i) although it did not necessarily follow that because a prosecution had been instigated by the Director of Public Prosecutions there must have been reasonable and probable cause for it, on the facts disclosed it would be impossible for the judge at the trial to rule that there was any want of reasonable or probable cause for the prosecution of the plaintiff (see p 938 a b and d, p 941 a to d and p 942 a b, post);

^g (ii) it was open to the court to strike out a statement of claim as disclosing no reasonable cause of action where the facts alleged fell outside the limitation period, although in certain circumstances a plaintiff might be held to have a reasonable cause of action, for example where it could be shown that there might be an escape from the Statute of Limitations; where, however, it was clear that the defendant ^h was going to rely on the statute and there was nothing before the court to suggest that the plaintiff could escape from it, the claim would be struck out (see p 938 e f and h j, p 939 g to p 940 a, p 941 e to g and p 942 b c, post); *Dismore v Milton* [1938] 3 All ER 762 not followed.

Notes

^j For pleading of a statute of limitation, see 24 Halsbury's Laws (3rd Edn) 206, para 370, and for cases on the subject, see 32 Digest (Repl) 626, 627, 2029-2041.

For the power to strike out a pleading as showing no reasonable cause of action, see 30 Halsbury's Laws (3rd Edn) 37, 38, para 76, and for cases on the subject, see 50 Digest (Repl) 63-65, 504-520.

For want of reasonable and probable cause in actions for malicious prosecution, see

25 Halsbury's Laws (3rd Edn) 357-359, paras 698, 699, and for cases on the subject, see 33 Digest (Repl) 414-420, 323-389. a

Cases referred to in judgments

Abbott v Refuge Assurance Co Ltd [1961] 3 All ER 1074, [1962] 1 QB 432, [1961] 3 WLR 1240, CA, 33 Digest (Repl) 416, 355.

Bradshaw v Waterlow & Sons Ltd [1915] 3 KB 527, 85 LJKB 318, 113 LT 1101, CA, 33 Digest (Repl) 431, 503. b

Dismore v Milton [1938] 3 All ER 762, 159 LT 381, CA, 32 Digest (Repl) 627, 2033.

Hanratty v Lord Butler of Saffron Walden (1971) *The Times*, 13th May, [1971] Bar Library transcript 171, CA.

Metropolitan Bank Ltd v Pooley (1885) 10 App Cas 210, [1881-85] All ER Rep 949, 54 LJQB 449, 53 LT 163, 49 JP 756, HL, 51 Digest (Repl) 1000, 5357. c

Wenlock v Shimwell (27th April 1966) unreported, [1966] Bar Library transcript 114A, CA.

Appeal

This was an appeal by the plaintiff, Frederick William Riches, from an order of Phillips J made on 5th October 1972 affirming a decision of Master Lubbock dated 9th May 1972 that the plaintiff's statement of claim in his action against the Director of Public Prosecutions be struck out under RSC Ord 18, r 19, and under the inherent jurisdiction of the court and that the action be dismissed. The facts are set out in the judgment of Davies LJ. d

The plaintiff appeared in person.
Gordon Slynn for the defendant. e

DAVIES LJ. This is an appeal from an order of Phillips J made on 5th October 1972 whereby he dismissed an appeal from Master Lubbock who had on 9th May struck out the plaintiff's statement of claim and dismissed his action as showing no cause of action and being frivolous and vexatious and an abuse of the process of the court. f

The story, with regard to which one cannot help having some sympathy with the plaintiff, starts a long time ago. In November 1963 criminal proceedings were commenced at the instigation of the Director of Public Prosecutions, who is the defendant in this case, against Mr Riches, the present plaintiff, and a number of other people with regard to lime subsidies under the Agriculture Act 1947. The allegation was that the Ministry were induced to provide moneys for lime subsidies in much greater amounts than they ought to have been and that the lime supplied was not in accordance with the declarations made by the accused persons. The plaintiff himself, with two others, was the subject of three specific counts in the indictment, counts 17 to 19 inclusive, which charged him, with these two other men, with fraudulently inducing the Minister of Agriculture, Fisheries and Food to execute a valuable security. In addition to that he was, in what sometimes has been called a rolled-up count of conspiracy, charged together with others with conspiracy to defraud the Ministry by obtaining excessive contributions of the lime subsidy. g

As I say, those proceedings were commenced by informations on 7th November 1963. On 12th February 1964 the accused were committed for trial; and the case was heard at the Bury St Edmunds Assizes. It took an enormously long time before the late Elwes J, and a verdict of guilty was returned by the jury on 16th July 1964. Sentences were pronounced on 17th July. The plaintiff himself was fined and ordered to pay a large amount of costs. Eventually the case came before the Court of Criminal Appeal, as it then was, presided over by Paull J, on 7th April 1965, when at any rate so far as the plaintiff was concerned (and we are not concerned with anybody else) his convictions were quashed, and the fine, of course, was remitted, though he h

a was not granted any order for costs. That case, as I say—most unfortunate as it was for the plaintiff; he has resented the whole thing; he says that he is an honest man and has never done anything wrong in his life—finished on 7th April 1965. As recently as 6th March 1972 he issued this writ. The claim, though perhaps not very professionally put forward, and one would not expect it to be because he is not a lawyer, was in effect for damages for malicious prosecution. I think I need not read the statement of claim, but it will be necessary to refer very briefly to two of the paragraphs in it.

b Shortly after the issue of the writ and the service of the statement of claim, which is dated 30th March 1972, the defendant, through the Treasury Solicitor, took out a summons to dismiss the action, in these terms:

c ‘... on the grounds that: 1. It discloses no reasonable cause of action against the Defendant; 2. It is vexatious and an abuse of the process of the Court; 3. The facts and matters relied on occurred more than six years before the issue of this Writ and the claim (if any, which is denied) is barred by the Limitation Act 1939.’

d The matter, as I have said, came before Master Lubbock on 9th May, and he made the order asked for. On 9th June the plaintiff gave notice of appeal, and the matter came before Phillips J on 5th October. He upheld the master by an order which is the order under appeal; and on 16th October and on 21st October the plaintiff gave two notices of appeal against the decision of the learned judge.

e I think that really three grounds are put forward on behalf of the defendant in support of the order that was made by the master and the judge. It is said, first of all, that it is an essential ingredient, on a claim for malicious prosecution, that express malice should be pleaded, and it said that malice was not properly pleaded in this case. It is said, secondly, that, on the facts disclosed in the evidence before the court, it is perfectly plain that it would be impossible for a judge hearing this action to come to the conclusion that there was any want of reasonable and probable cause for the prosecution, which, of course, if so, would be fatal to the plaintiff's case. It is said,

f thirdly, that as all the matters out of which this claim arises happened more than six years before the issue of the writ, the plaintiff is barred by the Limitation Act 1939.

To deal with the first point first, the only reference to malice in the statement of claim appears in paras 3 and 7. Paragraph 3 is in these terms:

g ‘That the Prosecution had in fact no evidence of criminal action whatsoever against the principal defendant, the Lime Merchant, Mr Griffiths, but pursued the action against that defendant with equal irresponsible malice.’

It is to be observed that that is only dealing with the case against Mr Griffiths, the first of the men charged; but one does find the word ‘malice’ there. Then, in para 7:

h ‘That the only reason why this plaintiff was chosen for prosecution, (there being at no time any evidence against him), was political malice, the determination of his political opponents to destroy him, and that this obvious and clearly apparent malice was plainly demonstrated in other directions.’

j It is very difficult, I think, to construe that as an allegation of malice against the then Director of Public Prosecutions; but, for myself, this being a litigant in person, were the only relevant point the absence of a proper plea of malice on the part of the defendant, I do not think that I would feel justified in putting an end to this action. But the other two matters are quite different.

Want of reasonable and probable cause. Here, from the facts that I have already adumbrated and from the evidence that we see in the papers, these prosecutions were naturally, it being a Director's case, launched on the advice of counsel. We have the

fact that the evidence put forward before the justices was sufficient to cause them to order this plaintiff, together with other accused, to be committed for trial. We have the fact that the jury came to the conclusion that the plaintiff was guilty as charged. It does seem to me that in those circumstances it would be utterly impossible for a judge to be able to rule—and of course it is a matter for the judge at the trial—that there was any want of reasonable and probable cause in the present case.

I would like in that behalf to refer to some words of Russell LJ in an unreported case, *Wenlock v Shimwell*, heard in this court on 27th April 1966, where he dealt in that case with the question of reasonable and probable cause:

'I may perhaps add this, that I cannot see how an allegation of prosecution without reasonable and probable cause and with malice really can stand any chance of success when you find that the view that the Director of Public Prosecutions presumably had of the evidence seems to have been shared by the committing magistrate, by the judge who allowed the matter to go to the jury and by the 12 jurymen.'

I think that those words apply with great force in the present case, and I do not propose to say any more on that matter.

I do, however, want to say a word or two about the third matter, the question of limitation. The plaintiff suggests that it was said before the master and the judge that the defendant and his advisers were not pursuing the point of limitation in this case. But I have already read, in the course of this judgment, the summons to dismiss the action which the defendant took out. It is perfectly plain from that that, if he was not putting that point forward positively in the courts below, nevertheless he was reserving it and had it in mind and it was in the forefront of his summons.

Some authorities there are which suggest that, at any rate on an application based on the ground that a statement of claim discloses no cause of action, it is not open to the defendant to rely on the fact, if fact it be, that the matters in question arose more than six years (or whatever the appropriate limitation period might be in the individual case) before the action was commenced. We were very properly referred by counsel for the defendant in that regard to *Dismore v Milton*¹. It is perfectly true that Greer LJ² and Slessor LJ³ in this court did use words to that effect. But that was a case which was confined to an allegation that the statement of claim disclosed no cause of action: it was not one of the cases where, either alone or together with that allegation, it was said that the action was frivolous and vexatious and an abuse of the process of the court. In his judgment, Greer LJ, as one of the reasons for the decision at which he had arrived, said this²:

'It is because a plaintiff may be able to show that he is entitled to bring his action, notwithstanding the expiration of the statutory period, by reason of one of the exceptions contained in the Limitation Act . . . When the cause of action arose, he may have been an infant, or *non compos mentis*.'

That is perfectly true; but in the present instance it is not suggested that the plaintiff enjoys any of the escape clauses from the provisions of the Limitation Act 1939, and I am bound to say, for myself, that I think that the dicta in *Dismore v Milton*¹, even though they are confined to a case where it is said that there is no cause of action, are somewhat too wide.

There are in this court two more recent cases in which observations on this matter have been made. First of all, there was, in *Hanratty v Lord Butler of Saffron Walden*⁴,

1 [1938] 3 All ER 762

2 [1938] 3 All ER at 763

3 [1938] 3 All ER at 764

4 (1971) *The Times*, 13th May

a an obiter dictum of Lord Denning MR with regard to this matter. That was a case in which the parents of a convicted murderer brought an action, out of time, against the then Home Secretary for alleged negligence with regard to the fate that had befallen their son. Lord Denning MR said this:

b 'If Lord Butler had wished to raise the Statute of Limitations he could certainly have done so. The action is long out of time. But we were told that Lord Butler does not wish to raise the statute. We must, therefore, approach the case on the assumption—and I hasten to say that it is only an assumption—that there was negligence on his part. On that assumption, the question is whether such an action lies against the Home Secretary'.

That is the first authority.

c The other dictum, or perhaps more than dictum, was in an earlier case in this court before Russell LJ and myself: *Wenlock v Shimwell*¹, to which I have already referred in another context, heard on 27th April 1966. On this point I am recorded as having said:

d 'As I have said, the writ in this action was issued on 21st September 1964 and when one seeks to see the date of the alleged injurious falsehoods the simplest way to see what the plaintiff is setting up is to see what he says in certain further and better particulars of his amended statement of claim which he delivered on 3rd January of this year. I am not going to read them, but it is the fact that in every single instance he alleges that the injurious falsehoods were made "prior to September 1958". If these injurious falsehoods (if made) were made prior to September 1958 then they were statute-barred by 21st September 1964. I think, therefore, e that there is no justification for allowing that allegation to stand.'

Then Russell LJ said this:

f 'So far as injurious falsehood is concerned, it was not in the minds of this court when it gave leave to amend that amendment should extend beyond malicious prosecution, and it is perhaps a salutary lesson that any tribunal authorising an amendment ought to authorise the precise amendment asked for and not use general terms. Strictly I think it is proper to describe the injurious falsehood as an amendment made without leave to the writ. But whatever the situation, it is quite plain that the claim in respect of injurious falsehood was already statute-barred at the date of the writ and there is no justification for it remaining on g the record.'

In the light of those more recent authorities, I think, as I say, that perhaps the observations of this court in *Dismore v Milton*² went too far. I do not want to state definitely that, in a case where it is merely alleged that the statement of claim discloses no cause of action, the limitation objection should or could prevail. In principle, h I cannot see why not. If there is any room for an escape from the statute, well and good; it can be shown. But in the absence of that, it is difficult to see why a defendant should be called on to pay large sums of money and a plaintiff be permitted to waste large sums of his own or somebody else's money in an attempt to pursue a cause of action which has already been barred by the statute of limitations and must fail.

i For those reasons, though, as I have said, I am not so impressed by the point about the absence of an appropriate plea of malice, on the other two grounds, namely that I cannot see here that there is any possible room for a holding of want of reasonable and probable cause, and on the other ground that this whole case of the plaintiff's

1 Unreported

2 [1938] 3 All ER 762

was at any rate, if not earlier, barred in 1971—and probably it was barred a good deal earlier—I think that the learned judge, Phillips J, in the court below was completely right in the conclusion at which he arrived; and I would dismiss the appeal. a

STEPHENSON LJ. I agree. Two courts have upheld the contentions of the respondent to this appeal set out in the summons to dismiss this action under RSC Ord 18, r 19, and under the court's inherent jurisdiction— b

‘on the grounds that: 1. It discloses no reasonable cause of action against the Defendant; 2. It is vexatious and an abuse of the process of the Court; 3. The facts and matters relied on occurred more than six years before the issue of this Writ and the claim (if any, which is denied) is barred by the Limitation Act 1939.’ c

Like Davies LJ, I think that this is not a case in which this court ought to look too nicely at the pleaded allegations in the statement of claim, and for my part I am prepared to assume that the statement of claim does allege, though very indirectly and imperfectly, want of reasonable and probable cause and malice against the Director of Public Prosecutions himself. In this court very little, if any, time has been taken up by the plaintiff in making such a submission. He proceeded from a general allegation against the crookedness and corruption, as I understood him, of magistrates, judges, counsel and all concerned with the administration of the law in the prosecution of himself to a consideration of the respects in which the conduct of leading counsel for the Crown during the 19 days of the committal proceedings fell short both of competence and of honesty. d

It is well established, of course, that the Director of Public Prosecutions, or any other prosecutor, is not ordinarily responsible for any malice that there may be on the part of prosecuting counsel. The independent duty of prosecuting counsel and the fact that he is not an instrument of the person who initiates the prosecution are amply supported by the authority of *Abbott v Refuge Assurance Co Ltd*¹: see the observations of Ormerod LJ², and indeed of this court in *Wenlock v Shimwell*³, where Davies LJ said very much the same thing. e

So the only way really in which the plaintiff can put his case against the defendant, as I see it, is that the defendant had some material which he either disclosed to counsel, who himself put it out of his mind or suppressed it, or himself suppressed from the knowledge of counsel material which showed that there was no evidence of fraud against the plaintiff whatever. That, of course, is a very difficult contention; and, as is shown in the passage which Davies LJ has quoted from the judgment of Russell LJ in *Wenlock v Shimwell*³, there is particular difficulty in a case where not only the committing magistrates but counsel and a judge and jury have all found that there was at least a prima facie case of fraud leading ultimately, until the matter was put right by the Court of Criminal Appeal, to a proved case of fraud. And the matter does not become any easier where a defendant has the advantage of being represented by experienced counsel and neither he nor counsel for any of his co-defendants, as far as we know, ever submitted to the jury that there was no case to answer. f

We have also been referred to the observation of Pickford LJ in *Bradshaw v Waterlow & Sons Ltd*⁴ where he said: g

‘... it is difficult to see how under those circumstances there can be said to be h

¹ [1961] 3 All ER 1074, [1962] 1 QB 432

² [1961] 3 All ER at 1084, 1085, [1962] 1 QB at 450, 451

³ (27th April 1966) unreported

⁴ [1915] 3 KB 527 at 535 j

a an absence of reasonable and probable cause when the Attorney-General had granted his fiat and the facts were not shown to be unfairly put before him.'

I do not wish to be taken as saying that there may never be a case where a prosecution has been initiated and pursued by the Director of Public Prosecutions in which it would be impossible for an acquitted defendant to succeed in an action for malicious prosecution, or as saying that the existence of the Attorney-General's fiat where
b required conclusively negates the existence of malice and conclusively proves that there was reasonable and probable cause for the prosecution. There may be cases where there has been, by even a responsible authority, the suppression of evidence which has led to a false view being taken by those who carried on a prosecution and by those who ultimately convicted. But that case is, as it seems to me, many miles from this one. There is nothing in the judgment of the Court of Criminal Appeal
c in this particular case which lends any support to the view that there was no case for the plaintiff to answer; and I cannot find in anything that he has said to us or in any document that has been put before us anything to suggest that there was in existence material showing that there was no basis in evidence for a prosecution of him on the conspiracy charge or on any of the three substantive charges which he had to meet at the Suffolk Assizes. In those circumstances, as it seems to me, he has failed to show
d that the defendant put the facts unfairly before prosecuting counsel, that there was anything like a lack of reasonable or probable cause, or malice, on the defendant's part or that there is any possibility of such material being produced.

On the other point, I am willing to assume that a cause of action which is statute-barred as clearly as the plaintiff's cause of action, nonetheless may be a reasonable cause of action within RSC Ord 18, r 19 (1) (a). I say that on the authority of *Dismore v Milton*¹, to which Davies LJ has referred. But I agree with his comments on that case. It seems to me that that case is in no way a decision that the court cannot strike out a claim which is statute-barred on the ground that it is an abuse of the process of the court, where it is clear from the terms of the summons that the statute is going to be relied on and where, as here, counsel has told the court that he has express instructions to rely on the statute. Even in such a case there may be a possibility of
f a defendant bringing himself within one of the exceptions which avoid the statute and make it inapplicable. Again, however, this is not such a case. There is no material put before the court which could possibly suggest that the statute will not be a complete answer to the plaintiff's claim. I think that it would be absurd for the court, faced with an application such as this to strike out, under its inherent jurisdiction or under the rules, a claim as an abuse of the process of the court, to shut its eyes to the
g fact that there is going to be raised an apparently unanswerable plea of the Limitation Act 1939. That was the view of this court in *Wenlock v Shimwell*², to which Davies LJ has referred, and was clearly the view of Lord Denning MR in *Hanratty's case*³ in the passage which Davies LJ has also cited. Why should such a claim not be an abuse of the process of the court? Why should not the court exercise its inherent jurisdiction to stay or to dismiss an action which must fail?

h In my judgment, justice requires that no further time or money should be wasted by either party on litigation which can only end with the failure of the plaintiff's claim. I therefore agree that, both in justice and in mercy, we ought to put an end to it own by dismissing this appeal.

j **LAWTON LJ.** I too agree that this appeal should be dismissed. For my own part, I would not have been prepared to say that the statement of claim discloses no

1 [1938] 3 All ER 762

2 (27th April 1966) unreported

3 (1971) The Times, 13th May

cause of action. The language was inept; but the essence of what has to be pleaded in a claim for malicious prosecution can be found amongst the words which were used. I adopt what has been said by Davies and Stephenson LJJ about this case being hopeless because of the failure to establish want of reasonable cause for the prosecution.

I would like to add a few words about the problem which arises under the decision of *Dismore v Milton*¹. That case has led, in my judgment, to much waste of time over the years which have gone by since it was decided. The object of RSC Ord 18, r 19, is to ensure that defendants shall not be troubled by claims against them which are bound to fail having regard to the uncontested facts. One of the uncontested sets of facts which arises from time to time is when on the statement of claim it is clear that the cause of action is statute-barred and the defendant tells the court that he proposes to plead the statute and, on the uncontested facts, there is no reason to think that the plaintiff can bring himself within the exceptions set out in the Limitation Act 1939. In those circumstances it is pointless for the case to go on so that the defendant can deliver a defence. The delivery of the defence occupies time and wastes money; and even more useless and time-consuming from the point of view of the proper administration of justice is that there should then have to be a summons for directions, and an order for an issue to be tried, and for that issue to be tried before the inevitable result is attained. It seems to me that when that situation arises the comments of Lord Blackburn in *Metropolitan Bank Ltd v Pooley*² are applicable. He said that a stay or even dismissal of proceedings may 'often be required by the very essence of justice to be done'. The White Book³, having called attention to that statement by Lord Blackburn, goes on to say that the object is 'to prevent parties being harassed and put to expense by frivolous, vexatious or hopeless litigation'. It would be contrary to the public interest that justice should be shackled by rules of procedure when the shackles will fall to the ground the moment the uncontested facts appear; and that is just this case.

Appeal dismissed.

Solicitors: *Treasury Solicitor* (for the defendant).

Mary Rose Plummer Barrister.

¹ [1938] 3 All ER 762

² (1885) 10 App Cas 210 at 221, [1881-85] All ER Rep 949 at 954

³ Supreme Court Practice 1973, vol 1, p 301, para 18/19/3A

Norwich Pharmacal Co and others v Commissioners of Customs and Excise

HOUSE OF LORDS

LORD REID, LORD MORRIS OF BORTH-Y-GEST, VISCOUNT DILHORNE, LORD CROSS OF CHELSEA
AND LORD KILBRANDON

23rd, 26th, 28th FEBRUARY, 1st, 2nd, 5th, 6th, 9th, 12th, 13th, 14th, 16th, 19th, 20th,
21st MARCH, 26th JUNE 1973

Discovery – Production of documents – Parties – Defendant for purposes of discovery only – No reasonable cause of action against party from whom discovery sought – Purpose of order to obtain information so that proceedings may be brought against third parties – Circumstances in which order may be made – Defendant having innocently facilitated commission of wrongful acts – Commissioners of Customs and Excise – Information in possession of commissioners including names of importers of goods – Information obtained under statutory powers – Importation of goods constituting an infringement of plaintiffs' patent – Plaintiffs seeking order for discovery against commissioners to enable plaintiffs to proceed against importers.

Discovery – Production of documents – Privilege – Confidential documents – Documents obtained under statutory powers – Commissioners of Customs and Excise – Information relating to importation of goods – Importation of goods constituting an infringement of plaintiffs' patent – Plaintiffs wishing to obtain information as to names of importers in order to bring proceedings against them – Whether commissioners privileged from disclosing information on grounds of public interest.

The appellants were the owners and licensees of a patent covering a chemical compound known as 'furazolidone'. Information published by the respondents, the Commissioners of Customs and Excise, showed that some 30 consignments of furazolidone had been imported into the United Kingdom between 1960 and 1970. None of those importations had been licensed by the appellants. Each of the consignments therefore involved a tortious infringement of the appellants' patent. The appellants tried to discover the identity of the importers in order to bring legal proceedings against them but were unable to do so. When the goods were imported the respondents, in the exercise of their statutory duty, had obtained information relating to the goods including the names of the importers. On importation the goods came under the control of the respondents who directed the goods to be held in transit sheds until, the necessary formalities having been completed and the customs duties paid, they were released to the consignees. The appellants asked the respondents to supply them with the names of the importers of furazolidone but the respondents replied that they had no authority to do so. The appellants then brought an action against the respondents claiming, inter alia, an order for discovery of the names of the importers. Graham J^a granted the order sought but the Court of Appeal^b reversed his decision holding (i) that since the appellants had no cause of action against the respondents they could not obtain an order for discovery against them and (ii) that in any event, since the names of the importers had been given to the respondents in confidence and under a statutory duty, the public interest required that they should not be compelled to disclose them. On appeal,

Held – The appeal would be allowed and an order for discovery made for the following reasons—

(i) Although as a general rule no independent action for discovery would lie against

^a [1972] 1 All ER 972

^b [1972] 3 All ER 813

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a person against whom no reasonable cause of action could be alleged, or who was in the position of a mere witness in the strict sense, the rule did not apply where (a) without discovery of the information in the possession of the person against whom discovery was sought no action could be begun against the wrongdoer, and (b) the person against whom discovery was sought had himself, albeit through no fault of his own, been involved in the wrongful acts of another so as to facilitate the wrongdoing. In such circumstances, although he might have incurred no personal liability, he was under a duty to assist the person who had been wronged by giving him full information and disclosing the identity of the wrongdoer. In the performance of their statutory duties the respondents had been sufficiently involved in the importation of furazolidone in breach of the appellants' patent as to impose on them, subject to considerations of public policy, a duty to disclose the identity of the importers so that the appellants could commence proceedings against them (see p 947 h to p 948 a c d g h and j, p 951 g to j, p 953 c and e f, p 954 b, p 960 a to f, p 966 b c and d e, p 968 c to e, p 973 b to f and g, p 974 a b and d e and p 975 g h, post); *Moodalay v Morton* (1785) 1 Bro CC 469, dicta of Lord Romilly MR and Lord Hatherley LC in *Upmann v Elkan* (1871) LR 12 Eq at 145, 7 Ch App at 133, *Orr v Diaper* (1876) 4 Ch D 92, and *Post v Toledo Cincinnati and St Louis Railroad Co* (1887) 11 NE 540 applied; *Queen of Portugal v Glyn* (1840) 7 Cl & Fin 466 distinguished.

(ii) Even if the respondents had been right in treating the information relating to the identity of the importers as confidential, there was no statutory provision which prohibited the court from ordering discovery for the purpose of legal proceedings if the public interest in the proper administration of justice required it. In the circumstances the public interest in such confidentiality as might attach to the names and addresses of the importers was outweighed by the interests of justice in disclosure for the purpose of the appellants' intended proceedings (see p 949 a and c and h, p 954 j to p 955 b, p 961 a b and d e, p 962 b c, p 968 h, p 969 a b and g h and p 976 b to d and g, post).

Per Lord Reid, Viscount Dilhorne and Lord Cross of Chelsea. In any case in which there is the least doubt whether a person asked to disclose the name of a third party should do so, that person would be fully justified in saying that he would only make disclosure under an order of the court, the costs of the application to the court being borne by the person making the request (see p 949 g h, p 962 b, p 969 j to p 970 c, post).

Decision of the Court of Appeal [1972] 3 All ER 813 reversed.

Notes

For discovery when party defendant for purposes of discovery only, see 12 Halsbury's Laws (3rd Edn) 10, 11, para 11, and for cases on the subject, see 18 Digest (Repl) 6, 7, 17-23.

For privilege where disclosure of documents is contrary to the public interest, see 12 Halsbury's Laws (3rd Edn) 53-55, para 73, and for cases on the subject, see 18 Digest (Repl) 139-142, 1256-1282.

Cases referred to in opinions

- Angel v Angel* (1822) 1 LJOSch 6, 1 Sim & St 83, 57 ER 33, 22 Digest (Repl) 608, 7006.
Butterworth v Bailey (1808) 15 Ves Jun 358, 33 ER 789.
Colonial Government v Tatham (1902) 23 NLR 153.
Dixon v Enoch (1872) LR 13 Eq 394, 41 LJCh 231, 26 LT 127, 18 Digest (Repl) 184, 1589.
Fenton v Hughes (1802) 7 Ves Jun 287, 32 ER 117, 18 Digest (Repl) 8, 39.
Hart v Stone (1883) 1 Buch AC 309.
Hunt v Maniere (1864) 34 Beav 157, 5 New Rep 181, 34 LJCh 142, 11 LT 469, 11 Jur NS 28, 55 ER 594, 3 Digest (Repl) 108, 308.
Mayor and Commonalty and Citizens of London v Levy (1803) 8 Ves Jun 398, 32 ER 408.
Moodalay v Morton (1785) 1 Bro CC 469, Dick 652, 28 ER 1245, 18 Digest (Repl) 142, 1277.
Nelson (James) & Sons Ltd v Nelson Line (Liverpool) Ltd [1906] 2 KB 217, 75 LJKB 895, 95 LT 180, 10 Asp MLC 265, 11 Com Cas 228, CA, 18 Digest (Repl) 19, 134.

- Orr v Diaper* (1876) 25 WR 23, 4 Ch D 92, 46 LJCh 41, 35 LT 468, 18 Digest (Repl) 6, 17.
- Plummer v May* (1750) 1 Ves Sen 426, 27 ER 1121, 18 Digest (Repl) 8, 38.
- Portugal (Queen of) v Glyn* (1840) 7 Cl & Fin 466, 7 ER 1147, HL; *rvsg sub nom Glyn v Soares* (1836) 1 Y & C Ex 644, 18 Digest (Repl) 8, 41.
- Post v Toledo Cincinnati and St Louis Railroad Co* (1887) 11 NE 540.
- Rowell v Pratt* [1937] 3 All ER 660, [1938] AC 101, 106 LJKB 790, 157 LT 369, HL, 22 Digest (Repl) 394, 4221.
- Upmann v Elkan* (1871) LR 12 Eq 140; *on appeal* (1871) 7 Ch App 130, 41 LJCh 246 25 LT 813, 36 JP 295, 28 (2) Digest (Reissue) 1157, 1589.
- Upmann v Forester* (1883) 24 Ch D 231, 52 LJCh 946, 49 LT 122, 47 JP 807, 28 (2) Digest (Reissue) 1162, 1636.
- Willis & Co v Baddeley* [1892] 2 QB 324, 61 LJQB 769, 67 LT 206, CA, 18 Digest (Repl) 20, 147.

Appeal

By a writ issued on 4th February 1969, subsequently amended, and re-issued and re-amended, the appellants, Norwich Pharmacal Co (now known as Morton-Norwich Products Inc), Smith, Kline and French Laboratories Ltd and Norwich Pharmacal Co, brought an action (1969 N 230) against the respondents, the Commissioners of Customs and Excise, claiming (i) a declaration that the respondents had infringed and caused, enabled or assisted others to infringe letters patent no 735,136 relating to goods known as 'furazolidone', (ii) a declaration that it was the respondents' statutory duty to forfeit all imported furazolidone in their possession, custody or control which had not been licensed for importation by the appellants, and (iii) an order that the respondents (a) set forth and disclose to the appellants in the case of each consignment of furazolidone imported without the appellants' licence the names and addresses of the consignors and consignees thereof, the quantity of furazolidone therein and the date thereof; (b) give the appellants full and complete discovery of all documents which were, or had been, in their possession relating to the imported consignments of furazolidone. On 19th May 1970 the appellants re-served an amended statement of claim together with particulars of breaches describing how third parties, whose names were unknown to the appellants, had infringed the letters patent of which the appellants were respectively at all material times the registered proprietors and exclusive licensees; para 2 of the amended particulars of breaches gave a list of the acts of the unknown third parties of which the appellants complained and which had occurred between March 1960 and August 1968; the particulars specified the month in which each consignment of furazolidone had been imported, the country from which it had been imported, and the quantity and value of each consignment.

By their defence dated 5th August 1969, as amended, the respondents admitted that goods described as furazolidone had been imported into the United Kingdom by persons other than the appellants and that, by virtue of ss 26, 28 and 29 of the Customs and Excise Act 1952, they had knowledge of the names and addresses of the consignor and importer of each consignment of furazolidone and the date of importation, but denied that they were or had been parties to, or had caused, enabled or assisted, the infringements of the third parties and made no admission that proceedings against the third parties could not be initiated or maintained by the appellants without the discovery sought. On 7th April 1970, in pursuance of an order for discovery on an interlocutory summons by the appellants, the respondents served a list of documents which were, or had been, in their possession or control; the list included (in Part 3 of Sch 1) the special chemical register, customs entries delivered to the respondents by persons other than the appellants relating to the importation of goods declared as furazolidone, and ships' reports, cargo manifests, correspondence and books of account relating to such importations; the respondents objected to the production of the documents listed in Part 3 of Sch 1 on the grounds (a) that they

were precluded by law from disclosing them and (b) that their disclosure would be injurious to the public interest because they contained confidential information about the affairs of persons other than the appellants furnished to the respondents by such persons pursuant to ss 26, 28 and 29 of the 1952 Act.

By a writ issued on 5th August 1970, and subsequently re-issued and amended, the appellants brought a second action (1970 N 1809) against the respondents claiming relief similar to that claimed in the first action; the statement of claim served on 5th August 1971 alleged continuing breaches of the letters patent; the particulars of infringement served with the statement of claim specified, in para 2, the consignments of furazolidone which had been imported between November 1968 and February 1970. The respondents' defence was similar in terms to that served in the first action and in their list of documents the respondents objected to discovery of the customs entries etc (listed in Part 3 of Sch 1) relating to the importation of furazolidone on the same grounds as in the first action.

By an order dated 21st January 1971 following summonses for directions Master Smith ordered that both actions be consolidated and that the respondents produce all documents which by the list of documents appeared to be in their possession custody or power except those documents to whose production they objected. By a summons for directions dated 3rd March 1971 the appellants applied for discovery of the documents listed in Part 3 of Sch 1 to each of the respondents' lists of documents and further requested that those documents should be produced for inspection by a master for the purpose of his deciding as to the validity of the claim of privilege for them. The summons was adjourned into court.

On 8th December 1971 Graham J¹ ordered the respondents to set forth and disclose to the appellants in the case of each importation referred to in para 2 of the amended particulars of breach served by the appellants in action 1969 N 230 and in the case of each importation referred to in para 2 of the particulars of infringements served by the appellants in action 1970 N 1809 (a) if the customs entry in respect of such importations was still in the possession of the respondents the name and address of the person appearing from the customs entry to be the importer thereof, and (b) if the customs entry in respect of each importation was no longer in the possession of the respondents the name of any person appearing from the special chemical register to be the importer thereof, and (c) in every case identifying such importation by the quantity thereof and the month in which the customs entry in respect thereof had been delivered to the respondents.

The respondents appealed to the Court of Appeal and, on 25th July 1972, the court² (Lord Denning MR, Buckley and Roskill LJ) allowed the appeal and discharged the order of Graham J. The court refused leave to appeal to the House of Lords but, on 7th November 1972, the appeal committee allowed a petition by the appellants for leave to appeal.

*Anthony Walton QC, Robin Jacob and Peter Prescott for the appellants.
P R Oliver QC, P L Gibson and W Bruce Spalding for the respondents.*

Their Lordships took time for consideration.

26th June. The following opinions were delivered.

LORD REID. My Lords, the appellants own patent no 735,136 which covers a chemical compound called furazolidone. The validity of the patent is not in dispute. This substance is widely used and matter published by the respondents shows that some 30 consignments of it were imported into the United Kingdom between 1960

¹ [1972] 1 All ER 972, [1972] Ch 566.

² [1972] 3 All ER 813, [1972] 3 WLR 870.

a and 1970. None of these were licensed by the appellants. Each of these consignments therefore involved a tortious infringement of their right. The appellants have tried, but with little success, to discover the identity of the importers.

b When any goods are imported the master of the ship bringing them and the importer have to lodge documents with the customs which disclose the identity of the importer. It is not disputed that the respondents have in their possession documents shewing who imported each of these consignments and the appellants now seek to get from the respondents by way of discovery the names of those who are shewn in their records to have imported furazolidone during the last six years in order that the appellants may be able to take proceedings against such importers. The respondents for a number of reasons say that they are not entitled or are not willing to give this information and they assert that the appellants have no right to obtain discovery.

c On 27th June 1967 the appellants wrote a long letter to the respondents setting out their contentions and seeking information in respect of the persons responsible for the importation of this substance. On 25th July the respondents replied that they had no authority to give such information. The appellants then issued a writ. They alleged infringement by the respondents and sought wider discovery than they now seek. But they now admit that they have no cause of action against the respondents.

d The question therefore now is whether the respondents are in law liable to make discovery of the names of the wrongdoers who imported the patented substance. Graham J¹ held that they were but his decision was reversed by the Court of Appeal².

e Discovery as a remedy in equity has a very long history. The chief occasion for its being ordered was to assist a party in an existing litigation. But this was extended at an early date to assist a person who contemplated litigation against the person from whom discovery was sought, if for various reasons it was just and necessary that he should have discovery at that stage. Such discovery might disclose the identity of others who might be joined as defendants with the person from whom discovery was sought. Indeed in some cases it would seem that the main object in seeking discovery was to find the identity of possible other defendants. It is not clear f to me whether in all these cases the plaintiff had to undertake in some way to proceed against the person from whom he sought discovery if he found on discovery being ordered that it would suit him better to drop his complaint against that person and concentrate on his cause of action against those whose identity was disclosed by the discovery. But I would think that he was entitled to do this if he chose.

g But it is argued for the respondents that it was an indispensable condition for the ordering of discovery that the person seeking discovery should have a cause of action against the person from whom it was sought. Otherwise it was said the case would come within the 'mere witness' rule.

h I think that there has been a good deal of misunderstanding about this rule. It has been clear at least since the time of Lord Hardwicke that information cannot be obtained by discovery from a person who will in due course be compellable to give that information either by oral testimony as a witness or on a subpoena duces tecum. Whether the reasons justifying that rule are good or bad it is much too late to enquire: the rule is settled. But the foundation of the rule is the assumption that eventually i the testimony will be available either in an action already in progress or in an action which will be brought later. It appears to me to have no application to a case like the present case. Here if the information in the possession of the respondents cannot be made available by discovery now, no action can ever be begun because the appellants do not know who are the wrongdoers who have infringed their patent. So the appellants can never get the information.

To apply the mere witness rule to a case like this would be to divorce it entirely from its proper sphere. Its purpose is not to prevent but to postpone the recovery

1 [1972] 1 All ER 972, [1972] Ch 566

2 [1972] 3 All ER 813, [1972] 3 WLR 870

of the information sought. It may sometimes have been misapplied in the past but I see no reason why we should continue to do so. a

But that does not mean, as the appellants contend, that discovery will be ordered against anyone who can give information as to the identity of a wrongdoer. There is absolutely no authority for that. A person injured in a road accident might know that a bystander had taken the number of the car which ran him down and have no other means of tracing the driver. Or a person might know that a particular person is in possession of a libellous letter which he has good reason to believe defames him but the author of which he cannot discover. I am satisfied that it would not be proper in either case to order discovery in order that the person who has suffered damage might be able to find and sue the wrongdoer. Neither authority, principle nor public policy would justify that. b

So discovery to find the identity of a wrongdoer is available against anyone against whom the plaintiff has a cause of action in relation to the same wrong. It is not available against a person who has no other connection with the wrong than that he was a spectator or has some document relating to it in his possession. But the respondents are in an intermediate position. Their conduct was entirely innocent; it was in execution of their statutory duty. But without certain action on their part the infringements could never have been committed. Does this involvement in the matter make a difference? c

On the view which I take of the case I need not set out in detail the powers and duties of the respondents with regard to imported goods. From the moment when they enter the port until the time when the consignee obtains clearance and removes the goods, they are under the control of the customs in the sense that the customs authorities can prevent their movement or specify the places where they are to be put, and in the event of their having any suspicions they have full powers to examine or test the goods. When they are satisfied and the appropriate duty has been paid the consignee or his agent is authorised to remove the goods. No doubt the respondents are never in possession of the goods, but they do have considerable control of them during the period from entry into the port until removal by the consignee. And the goods cannot get into the hands of the consignee until the respondents have taken a number of steps and have released them. d

My noble and learned friends, Lord Cross of Chelsea and Lord Kilbrandon, have dealt with the authorities. They are not very satisfactory, not always easy to reconcile and in the end inconclusive. On the whole I think they favour the appellants, and I am particularly impressed by the views expressed by Lord Romilly MR¹ and Lord Hatherley LC² in *Upmann v Elkan*. They seem to me to point to a very reasonable principle that if through no fault of his own a person gets mixed up in the tortious acts of others so as to facilitate their wrongdoing he may incur no personal liability but he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoers. I do not think that it matters whether he became so mixed up by voluntary action on his part or because it was his duty to do what he did. It may be that if this causes him expense the person seeking the information ought to reimburse him. But justice requires that he should co-operate in righting the wrong if he unwittingly facilitated its perpetration. e

I am the more inclined to reach this result because it is clear that if the person mixed up in the affair has to any extent incurred any liability to the person wronged, he must make full disclosure even though the person wronged has no intention of proceeding against him. It would I think be quite illogical to make his obligation to disclose the identity of the real offenders depend on whether or not he has himself incurred some minor liability. I would therefore hold that the respondents f

¹ (1871) LR 12 Eq 140 at 145

² (1871) 7 Ch App 130 at 133 g

a must disclose the information now sought unless there is some consideration of public policy which prevents that.

Apart from public policy the respondents say that they are prevented by law from making this disclosure. I agree with your Lordships that that is not so. If it were they could not even disclose such information in a serious criminal case, but their counsel were, quite rightly, not prepared to press their argument so far as that.

b So we have to weigh the requirements of justice to the appellants against the considerations put forward by the respondents as justifying non-disclosure. They are twofold. First it is said that to make such disclosures would or might impair or hamper the efficient conduct of their important statutory duties. And secondly it is said that such disclosure would or might be prejudicial to those whose identity would be disclosed.

c There is nothing secret or confidential in the information sought or in the documents which came into the hands of the respondents containing that information. Those documents are ordinary commercial documents which pass through many different hands. But it is said that those who do not wish to have their names disclosed might concoct false documents and thereby hamper the work of the customs. That would require at least a conspiracy between the foreign consignor and the importer and it seems to me to be in the highest degree improbable. It appears

d that there are already arrangements in operation by the respondents restricting the disclosure of certain matters if the importers do not wish them to be disclosed. It may be that the knowledge that a court might order discovery in certain cases would cause somewhat greater use to be made of these arrangements. But it was not suggested in argument that that is a matter of any vital importance. The only other point was that such disclosure might cause resentment and impair good relations with other traders: but I find it impossible to believe that honest traders would resent failure to protect wrongdoers.

e Protection of traders from having their names disclosed is a more difficult matter. If we could be sure that those whose names are sought are all tortfeasors, they do not deserve any protection. In the present case the possibility that any are not is so remote that I think it can be neglected. The only possible way in which any of these imports could be legitimate and not an infringement would seem to be that someone might have exported some furazolidone from this country and then whoever owned it abroad might have sent it back here. Then there would be no infringement. But again that seems most unlikely.

f But there may be other cases where there is much more doubt. The validity of the patent may be doubtful and there could well be other doubts. If the respondents have any doubts in any future case about the propriety of making disclosures they are well entitled to require the matter to be submitted to the court at the expense of the person seeking the disclosure. The court will then only order discovery if satisfied that there is no substantial chance of injustice being done.

g I would therefore allow this appeal. The respondents were quite right in requiring the matter to be submitted to the court. So they are entitled to their costs down to the date of the judgment of Graham J¹. Thereafter the appellants caused much extra expense by putting their case much too high. In the circumstances I would award no costs in the Court of Appeal² or in this House.

h **LORD MORRIS OF BORTH-Y-GEST.** My Lords, the question which calls for consideration arises in proceedings which by now have shed many of their original features. Two actions were begun. They were later consolidated. The appellants were respectively the registered proprietors of, and the exclusive licensees in the

¹ [1972] 1 All ER 972, [1972] Ch 566

² [1972] 3 All ER 813, [1972] 3 WLR 870

United Kingdom under, letters patent which covered a specific chemical compound called furazolidone. The claims made by the appellants in each action were as follows. Firstly, there was a claim for a declaration that the respondents (the commissioners) had infringed or had caused enabled or assisted others to infringe the letters patent. Secondly, there was a claim for a declaration that it was the respondents' statutory duty to forfeit all the imported furazolidone in their possession custody or control which was not licensed for importation by the appellants. Thirdly, there was a claim for an order that the respondents should:

'(a) Set forth and disclose to the [appellants] in the case of each consignment of furazolidone imported without the licence of the [appellants] or one or other of them the names and addresses of the consignors and consignees thereof, the quantity of furazolidone therein and the date thereof.

'(b) Give the [appellants] full and complete discovery of all documents which are or have been in their possession custody or control relating to such imported consignments of furazolidone.'

It was pleaded that third parties whose names were unknown to the appellants had infringed the letters patent by importing furazolidone without the leave and licence of the appellants. Particulars were given setting out dates, quantities, values and countries from which imported. The discovery claimed was sought in aid of proceedings which the appellants wished to bring against others but which they could not initiate without at least knowing the names of the importers.

After delivery of defences both parties filed lists of documents. In one part of the respondents' list there were included the following documents: special chemical register; customs entries (comprising forms XS107 and C105 and supporting documents) delivered by persons other than the appellants relating to the importation of furazolidone: and ships' reports, cargo manifests, correspondence and books of account relating to such importations. The respondents objected to produce those documents. The objection was on the following grounds:

'(a) that the [respondents] are precluded by law from disclosing them and

'(b) that their disclosure would be injurious to the public interest, because they contain confidential information about the affairs of persons other than the [appellants] furnished to the [respondents] by such persons pursuant to sections 26, 28 and 29 of the Customs and Excise Act 1952.'

The appellants took out a summons by which they asked that the respondents be ordered to produce the documents for inspection. The summons was adjourned into court and was heard by Graham J¹.

Though the learned judge held that the appellants had no reasonable cause of action against the respondents he held in a most careful and illuminating judgment that the court could make an order requiring them to disclose to the appellants the names and addresses of the importers of furazolidone. The respondents appealed to the Court of Appeal² against this order. The appellants persisted in their contention that they had causes of action against the respondents and by a respondent's notice they contended (a) that the respondents had infringed (or had caused or enabled or assisted others to infringe) the letters patent and (b) that the respondents were in breach of a statutory duty to forfeit all imported furazolidone in their possession custody or control which the appellants had not licensed for importation.

Having lost in the Court of Appeal² the appellants by leave appealed to this House. Though by their printed case the appellants set out that to a limited extent they desired to maintain the contention that they had a cause of action for infringement by the respondents themselves, that contention was abandoned when the appeal

1 [1972] 1 All ER 972, [1972] Ch 566

2 [1972] 3 All ER 813, [1972] 3 WLR 870

a was opened. The case proceeded therefore on the basis (a) that it consisted solely of a claim for limited discovery against the respondents and (b) that no other relief could be or could have been claimed against the respondents. It must be approached on the footing that it was and always had been an action solely for discovery. The claim is now expressly limited so as to relate only to the names and addresses of any persons appearing from the customs entry to be the importers (a) in the case of the last importation referred to in para 2 of the amended particulars of breaches b in the first action and (b) in the case of each importation referred to in para 2 of the particulars of infringements in the second section.

It is important to mention certain matters. (1) The respondents by their pleadings admitted (for the purposes of this case) the validity of the letters patent. But beyond this there was evidence showing that the validity of the patent (the complete specification of which was published nearly 16 years ago) had never been challenged. c Some infringements had been detected and all infringers who had been detected had been sued: the actions had been settled on the basis that there was infringement (2) The respondents publish certain monthly statistics of goods imported into the United Kingdom and the importation of furazolidone has been specifically mentioned. The appellants are in a position to assert that the persons who have imported, who- d ever they are, must have been infringers and therefore wrongdoers. The respondents know the names and addresses of these people. The appellants wish to sue such people and intend to sue them if they can find out who they are. The appellants say that they are unable to find out who the people are unless the respondents tell them.

The appellants wrote (in June and July 1967) to the respondents and asked for the information they sought. The respondents stated that they were advised that e information furnished to them under a requirement of the Customs and Excise Act 1952 should not be disclosed to third parties.

In my view, it would be reasonable, and in a broad sense of the term just, if the desired information could be supplied. The facts are very special. The appellants are fully entitled to protect their interests. Subject always to the emergence of f some possible explanation of a nature not at present known, the importers whose names are known to the respondents are wrongdoers. It will be unfortunate not only from the point of view of the appellants but also of that of the public if the wrongdoers cannot be challenged. In this situation two questions arise: (1) is it within the power of the court to assist the appellants or is the law powerless? (2) if the court has power to make the desired order—would it be against the public interest to make it?

g In the review of very many authorities to which we were referred in painstaking and learned arguments it seemed clear that as a broad and general rule it is true to say that a court will not order discovery against a mere witness. On behalf of the appellants it is not sought to challenge this. A witness is one who may be able to give testimony in either pending or anticipated proceedings. Here there are h no pending proceedings and unless the appellants secure the help of the court there are no anticipated proceedings. If the names are given and if the appellants take proceedings it is unlikely that there would be any need to rely on any evidence from the respondents.

It is not suggested that in ordinary circumstances a court would require someone to impart to another some information which he may happen to have and which i the latter would wish to have for the purpose of bringing some proceedings. At the very least the person possessing the information would have to have become actually involved (or actively concerned) in some transactions or arrangements as a result of which he has acquired the information. In all ordinary circumstances there would then be some proceedings in the course of which the machinery of the court would enable all relevant and admissible evidence to be obtained.

My Lords, the review of numerous authorities undertaken by learned counsel

has left me with the impression that unless supplied by *Orr v Diaper*¹ clear-cut authority is meagre in support of the very limited order now sought by the appellants; equally I am left with the impression that it would be very unfortunate if the law could not come to the aid of the appellants. The respondents have had public duties to discharge. They have acted with complete propriety. But in the course of their public duties they have come to know, and have been obliged to come to know, the names of those who can reasonably be assumed to be wrongdoers vis-à-vis the appellants. Assuming that only the necessities of the public service (a matter to which I will later refer) have deterred the respondents from disclosing the names of the appellants, and always assuming that there is no statutory prohibition against such disclosure, is there any reason why the court, in the interests of justice, and in the absence of any real doubt that certain wrongdoers are enjoying a quite fortuitous protection, should not authorise and require the respondents to disclose the names?

So far as authority goes the sheet anchor of the appellants is the decision in 1876 in *Orr v Diaper* which is reported in the Law Reports¹ and other reports². In the much earlier case, *Moodalay v Morton*³, there was a bill for discovery against the East India Co and against Morton their secretary. The plaintiffs had had a lease for a period of ten years from the East India Co of the permission to supply the inhabitants of Madras with tobacco; the plaintiffs alleged that the company, by their servants in India, had dispossessed the plaintiffs and had granted a lease to others; the plaintiffs intended to sue the East India Co but in order to do so they needed the evidence of persons resident in the East Indies; they therefore prayed for a commission for the examination of witnesses and they required the company and the secretary to discover by whom and under what authority the second lease was granted. The plaintiffs wanted to know whether those who had dispossessed them were or were not servants of the company; if they were not they would be liable in their own persons. A demurrer to the bill was overruled. The fact that no action had been brought was no answer.

*Moodalay v Morton*³ was much discussed in *Angel v Angel*⁴ in 1822. It was considered whether it was not exceptional to grant a commission to examine witnesses before an action was begun. Sir John Leach V-C⁵ said in reference to *Moodalay v Morton*³: 'The plaintiff there required a commission, in order to know against whom the action should be brought.' While in the present case there is now no suggestion that the respondents are to be sued, the justice of the case would just as much warrant help being given to the appellants as to *Moodalay*.

Numerous cases firmly recognise the rule that a bill of discovery would not lie against a mere witness. *Fenton v Hughes*⁶ was but one of many cases which illustrated the rule. Someone who was not being sued and could not be sued would be regarded as a mere witness. The rule was recognised in *Mayor and Commonalty and Citizens of London v Levy*⁷ where the demurrer was allowed because the bill did not allege with sufficient certainty by whom the duties which were claimed were payable. Lord Eldon LC said⁸:

'But it has never yet been, nor can it be, laid down, that you can file a bill, not venturing to state, who are the persons, against whom the action is to be brought; not stating such circumstances as may enable the Court, which must be taken to know the law, and therefore the liabilities of the Defendants, to

1 (1876) 4 Ch D 92

2 25 WR 23, 46 LJCh 41, 35 LT 468

3 (1785) 1 Bro CC 469

4 (1822) 1 LJOSch 6

5 (1822) 1 LJOSch at 9

6 (1802) 7 Ves Jun 287

7 (1803) 8 Ves Jun 398

8 (1803) 8 Ves Jun at 404, 405

a judge; but stating circumstances; and averring, that you have a right to an action against the Defendants or some of them. That of necessity admits, that some of the Defendants may be only witnesses; and against them there is no right to file such a bill.'

In the present case the appellants are able to say that they have rights which they intend to pursue and rights which as far as can be known must succeed: they know
b everything except the names and addresses of those whom they desire and intend to sue; they further know that those names and addresses appear on customs entries in the possession of the respondents and of which the respondents have become possessed in pursuance of their duties. Is there any reason why the court should not sanction and direct discovery?

I do not propose to refer to the majority of the cases which were cited for our
c consideration because I agree with the conclusion reached both by the learned judge¹ and by the Court of Appeal² that in general the cases support the view that no independent action for discovery lies against a party against whom no reasonable cause of action can be alleged or who is in the position of a mere witness in the strict sense. If this is, in general, the conclusion which is reached after a study of numerous decisions how, then, is the decision in *Orr v Diaper*³ to be viewed? No less
d an authority than Mr Bray⁴ regarded it as a special case. From the broad general rule Graham J¹ considered that there could be exceptional cases and that, of such, *Orr v Diaper*³ was an example. We have studied and re-studied that case and it was the subject of very careful analysis in the Court of Appeal and in particular by Buckley LJ⁵ who most helpfully examined the report of the case in the Weekly Reporter⁶. The conclusion which I for my part have reached, in agreement with
e the Court of Appeal², is that *Orr v Diaper*³ perhaps need not on its facts have been regarded as an exception to the broad general rule. Yet I think it was so regarded. Nor I think did Mr Bray⁴ regard the decision as heretical but rather as being an exception from a broad general rule which permitted of certain exceptions being made, and an exception which, in the particular case, a court in the interests of justice had been warranted in making. To prevent a denial of justice must at all
f times be the aim of a judge and the concluding words of Hall V-C would surely have been regarded as wholly commendable in any court of equity⁷:

'In this case the Plaintiffs do not know, and cannot discover, who the persons are who have invaded their rights, and who may be said to have abstracted their property. Their proceedings have come to a dead lock, and it would be
g a denial of justice if means could not be found in this Court to assist the Plaintiffs.'

But whatever may be the true view of *Orr v Diaper*³ I think that it is very significant that it has been quoted as an authority and has not been overruled, with the result that after this lapse of time it may be regarded as furnishing a precedent for a
h course that justice would seem to demand.

We were referred to the cases of *Hunt v Maniere*⁸, *Upmann v Elkan*⁹ and *Upmann v Forester*¹⁰. But the position of the respondents is not I think to be equated with

1 [1972] 1 All ER 972, [1972] Ch 566

2 [1972] 3 All ER 813, [1972] 3 WLR 870

3 (1876) 25 WR 23, 4 Ch D 92

j 4 Principles and Practice of Discovery (1885), p 40

5 [1972] 3 All ER at 821, 822, [1972] 3 WLR at 881, 882

6 (1876) 25 WR 23

7 (1876) 4 Ch D at 96

8 (1864) 34 Beav 157

9 (1871) LR 12 Eq 140; on appeal (1871) 7 Ch App 130

10 (1883) 24 Ch D 231

that of wharfingers or forwarding agents or shippers. The position of the respondents is rather special. They are not engaged in commercial activities; they differ from those who voluntarily engage in trade for their own profit. In no ordinary sense are the respondents in possession of goods though they are endowed with certain wide powers which they need to enable them to discharge their statutory duties. But they are not mere outsiders or volunteers or, so to speak, mere bystanders. They become obliged to have active concern with, to acquire positive knowledge of, and to exercise certain powers in respect of the affairs of traders and the movement of goods. a

What, then, was the position of the respondents when they were asked by the appellants voluntarily to give the names? Were they entitled or obliged to do so? In this connection the words of Lord Romilly MR in *Upmann v Elkan*¹ were referred to. (It may here be mentioned that neither in that case nor in *Upmann v Forester*² did the proceedings take the form of a bill of discovery.) Lord Romilly MR said this¹: b

'I begin by assuming (which facts are proved here) that the correspondent of a London house sends goods to a London dock company to the order of that London house, and that the goods have on them the spurious trade-mark or brand of a person to which the goods do not belong, and who has not been concerned in sending them thither. The person whose trade-mark is fraudulently imitated ascertains this fact before the goods leave the dock: he applies to the dock company not to allow them to leave the dock with the spurious trade-mark, and he applies to the persons at whose order they stand, and asks them to give him all information respecting them, and to undertake not to sell or distribute the goods until the spurious brand is removed. I assume, then, in addition, that the person so applied to is innocent and ignorant of the fraud. It is his duty at once to give all the information required, and to undertake that the goods shall not be removed or dealt with until the spurious brand has been removed, and to offer to give all facilities to the person injured for that purpose.' c

In my view, the position of the respondents differed from that of the forwarding agents in the case cited. I think that the respondents were at the date of the request to them warranted in declining voluntarily to give the names. It is quite different if the court having considered all aspects of the public interest authorises and requires them to give the names. But the information possessed by the respondents was information which others had been obliged to give them under statutory compulsion and for some particular purposes. I think that the respondents were correct in taking the view that they ought to treat the information possessed by them as confidential. In this respect the provisions of s 3 of the Finance Act 1967 are of importance. The commissioners are given power to disclose some information to some others if the Secretary of State is satisfied that it would be in the national interest, but no power is given to sanction the disclosure of 'the price of the goods or the name of the importer of the goods'. This shows that the names of importers come within an area indicated by the legislature as being one of special sensitivity. (See also s 127 of the Finance Act 1972.) d

The next step is to consider whether the court should make the desired order and whether it would be in the public interest or against the public interest to make the order. If there was some statutory prohibition (such as that contained in s 17 (2) of the Agricultural Marketing Act 1931: see *Rowell v Pratt*³) then that, of course, would be conclusive. In the absence of any such prohibition it seems to me that in the special circumstances of this case, and with some support from authority, the interests of justice warrant the court in making the desired order unless there are some features of the public interest which are of such weight as to outbalance the e

¹ (1871) LR 12 Eq at 145

² (1883) 24 Ch D 231

³ [1937] 3 All ER 660, [1938] AC 101

a public interest of advancing the cause of justice. I can well appreciate the importance of the considerations which were advanced and which undoubtedly carry some weight, but having considered them in relation to the very limited order now sought I am firmly of the view that the balance of the public interest warrants the making of the order as now requested. I consider that the fair order as to costs is that the appellants should pay to the respondents their costs at first instance¹ and that there should be no order as to costs in the Court of Appeal² and in this House.

b I would allow the appeal accordingly.

VISCOUNT DILHORNE. My Lords, the appellants hold the patent for a chemical called 'furazolidone' which is used in poultry food. The respondents publish monthly statistics of the goods imported into the United Kingdom. Those statistics revealed that in 32 months between March 1960 and February 1970 furazolidone was imported into this country, but they do not reveal who were the importers. Each importation, the appellants say, constituted an infringement of their patent, though they say that it is conceivable that some of the chemical sold by them was reimported into this country, in which case there would be no infringement. The appellants say that although there must have been infringement in, if not all, at least the majority of these importations, they are unable to take any steps to protect their patent as they do not know and cannot find out, unless successful in these proceedings, the names of the importers, all of which are known to the respondents.

c On 29th June 1967 the appellants' solicitors wrote to the respondents asking for the names, not only of the consignees, but also of the consignors of the imported furazolidone and alternatively alleging that they were under a duty to seize and forfeit the imported furazolidone. The respondents in reply said that they were under no such duty and that in the absence of statutory authority it was impossible for them to disclose the names of the importers.

d On 4th February 1969 the appellants issued a writ against the respondents in which they claimed a declaration that the respondents were infringing or enabling or assisting others to infringe their patent, an injunction to restrain them from doing so and an injunction to compel them to forfeit the imported furazolidone. The writ was later amended to include a claim for discovery by the respondents of the names and addresses of the consignors and consignees and of all documents which were or had been in their possession relating to the imported consignments.

e On 5th August 1970 the appellants issued another writ claiming similar relief in respect of later importations in five months in 1968, 1969 and 1970. The two actions were consolidated and a summons for directions was taken out on 3rd March 1971. It was adjourned into court and came before Graham J¹. After a five day hearing he gave judgment dealing with all the appellants' claims. He rejected the claim that the respondents were themselves infringers of the patent and also the claim that they were under a duty to forfeit the furazolidone.

f By their defence the respondents admitted the validity of the letters patent and at the hearing before Graham J¹. Counsel for the appellants said that if the respondents gave the information asked for it was improbable that the question of infringement would be pressed against them. He agreed that the proceedings could be treated as a pure action for discovery for the production of information as to the identity of the importers.

g And so although the claims in respect of infringement and forfeiture were not abandoned until the hearing in this House, the proceedings have continued to be treated as those for discovery of the names of the importers alone. Graham J¹ held that discovery should be made and made an order in a form agreed between the parties. In the Court of Appeal² his decision was reversed, the court holding

1 [1972] 1 All ER 972, [1972] Ch 566

2 [1972] 3 All ER 813, [1972] 3 WLR 870

that the appellants had no conceivable cause of action against the respondents and that they could not bring an action merely for the purpose of discovering from them the names of the importers. They also held that the information required was received in confidence by the respondents and that the balance of public interest demanded that the respondents should keep the names and addresses of the importers secret.

So there are three questions to be decided. First, on the facts of this case can the respondents, who are not themselves wrongdoers, be ordered to disclose the names of the importers who, the validity of the patent being admitted, are wrongdoers? Secondly, in the exercise of the discretion vested in the court, should they be ordered to do so? and thirdly, are the respondents in any event prohibited from disclosing that information?

Numerous authorities were referred to on the first question. Few of them I found of much assistance. Many of them are very briefly reported and throw little, if any, light on the principles to be applied. The most recent and the most relevant case on which the appellants relied was decided nearly 100 years ago, *Orr v Diaper*¹.

In that case the plaintiffs were sewing cotton and thread manufacturers. The cottons and threads were made up for sale in different coloured papers and specially designed tickets were used to distinguish them from the cottons and threads of other manufacturers. The defendants were shippers and the plaintiffs discovered that they had for some time been shipping to Valparaiso and elsewhere cotton thread packed in the same manner as their own and bearing the same tickets. The plaintiffs sought to find out the names and addresses of the parties from whom they had received the cotton for shipment and wrote saying they quite understood that the defendants were innocent of any intention to act prejudicially to them and that if they gave the names and addresses 'the necessity for further proceedings would cease'. No reply was sent and proceedings were commenced, the statement of claim alleging that the defendants 'well knew the tickets and of the injury' and that they ought to give the information that was sought in aid of proceedings in contemplation by the plaintiffs to restrain the piracy of their tickets and that the proceedings contemplated could not be maintained without the discovery sought.

The defendants demurred. There are many differences in the report of the case in the Law Reports² and in the Weekly Reporter³, both in the report of the arguments advanced on behalf of the defendants, counsel for the plaintiffs not being called on, and in the report of the judgment of Hall V-C.

It appears from the reports of the arguments that the main point taken on demurrer was that discovery was not obtainable from persons who will not be and who are not intended to be parties to an action and that, to be granted, 'the discovery sought must be material, either to the relief prayed by the bill, or to some other suit actually instituted, or capable of being instituted' (Mitford on Pleadings⁴); and no relief was sought against the defendants and no other suit instituted or capable of being instituted against them. In the report in the Weekly Reporter it is said that it was submitted that⁵ 'these defendants are merely witnesses, and you cannot make a mere witness a party to obtain discovery' and then it was recognised that there may be circumstances under which discovery may be sought against persons who otherwise would not be parties to the action. Two examples were given: first, the case of a corporation where a person holding a representative position is made a party who otherwise would only be a witness—that, it was said, was an exception to the rule—and, secondly, where there is statutory authority compelling discovery

¹ (1876) 25 WR 23, 4 Ch D 92

² (1876) 4 Ch D 92

³ (1876) 25 WR 23

⁴ 4th Edn (1827), p 191

⁵ (1876) 25 WR at 25

*(Dixon v Enoch*¹). In that case Wickens V-C said that the object of the Act was to enable the plaintiff to extract from the defendant the name or names of some other person or persons other than himself who might be sued at law. He then said²:

'The supposition that if the Plaintiff knows the name of one proprietor he can make him tell the names of all the others, but that, not knowing one name, he cannot get information from the printer and publisher, who is the agent of the proprietors, and is put forth to stand between them and the public, is one that does not commend itself to one's common sense, and is not to be accepted without absolute necessity.'

Hall V-C began his judgment with the citation of this passage from Wickens V-C's judgment, saying³: 'That is the view which I take in this case, and nothing but absolute necessity would compel me to allow this demurrer'. He clearly thought that Wickens V-C's observations, in relation to a case where there was a defendant being sued for libel and a statute provided for the disclosure, were applicable to a case when the person from whom discovery was sought was not in fact a defendant from whom relief was sought.

In the report in the Weekly Reporter⁴ it is said that he expressed the opinion that the position of the defendants in shipping the goods 'might subject them to proceedings by way of injunction to restrain them from continuing to ship these goods'. He rejected the contention that they were mere witnesses, saying according to the report in the Law Reports⁵ '... their position, they being the actual shippers, is different from that of mere witnesses' and according to the report in the Weekly Reporter⁶—

'but I think that the position of the defendants is different from that of a mere witness... That view of the case seems to me to bring it within the rule as stated in *Mitford*.'

He ended his judgment by saying according to the Law Reports⁵—'it would be a denial of justice if means could not be found in this court to assist the Plaintiffs', and overruled the demurrer.

As I read the reports of his judgment he based his conclusion on two grounds: first, that the defendants were not mere witnesses and, secondly, on the fact that in his opinion they could themselves have been sued. Whether he would have overruled the demurrer if he had been of the opinion that the defendants could not have had proceedings brought against them apart from the claim for discovery is not clear, though it would seem probable from Hall V-C's other observations to which I have referred that he would have done all in his power to assist the plaintiffs.

In *Plummer v May*⁷ Earl Hardwicke LC said that a person could not be made a defendant to a bill—

'who is merely a witness, in order to have a discovery of what he can say to the matter... But as against a party interested, the plaintiff is entitled to have a discovery from him, if he is charged to be concerned in the fraud...'

So the rule that discovery is not obtainable from a mere witness is of very considerable antiquity.

There are some more cases decided before *Orr v Diaper*⁸ to which I must now

¹ (1872) LR 13 Eq 394

² (1872) LR 13 Eq at 400

³ (1876) 4 Ch D at 95

⁴ (1876) 25 WR 23

⁵ (1876) 4 Ch D at 96

⁶ (1876) 25 WR at 25

⁷ (1750) 1 Ves Sen at 426

⁸ (1876) 25 WR 23, 4 Ch D 92

refer. The first of these is *Moodalay v Morton*¹. There discovery was sought from the East India Co in order to discover by what authority the plaintiffs were dispossessed of a lease for supplying the inhabitants of Madras with tobacco. The plaintiffs wanted to find out if the persons who had dispossessed them were acting as servants of the company. If they were, then the plaintiffs intended to sue the company. Lord Kenyon MR held that the plaintiffs were entitled to the discovery sought. It was sought not to ascertain the identity of anyone but whether the company was responsible for the injury the plaintiffs had suffered. I regard the case as an authority for the proposition that discovery can be granted before an action is instituted, but it was information, not names, that was sought, information to discover whether the company were responsible, not to identify the wrongdoer.

In the *Mayor and Commonalty and Citizens of London v Levy*², in which *Moodalay v Morton*¹ was not cited, the defendants had refused to discover whose property were certain goods and without which discovery an action of law could not be proceeded with. Lord Eldon LC, in the course of his judgment, said³:

'That, where the bill avers, that an action is brought, or, where the necessary effect in law of the case stated by the bill appears to be, that the Plaintiff has a right to bring an action, he has a right to a discovery, to aid that action, so alleged to be brought, or which he appears to have a right and an intention to bring, cannot be disputed. But it has never yet been, nor can it be, laid down that you can file a bill, not venturing to state, who are the persons, against whom the action is to be brought . . . but stating circumstances; and averring, that you have a right to an action against the Defendants or some of them. That of necessity admits, that some of the Defendants may be only witnesses; and against them there is no right to file such a bill.'

*Moodalay v Morton*¹ was commented on in *Angel v Angel*⁴, where Sir John Leach V-C said it was an exception to the general rule—

'for it would be absurd to demand that an action should be brought before the commission is granted, where the purpose of the commission is to ascertain against whom the action ought to be brought.'

I do not see that it is possible to reconcile Lord Eldon LC's observations with the decision in *Moodalay v Morton*¹ except on the narrow ground that in *Moodalay v Morton*¹ the name of the proposed defendant was known and the company would be sued if discovery showed it to be responsible. It would indeed be odd if you could get discovery if you named the party you intended to sue if you could discover his responsibility, but that you could not get discovery though you had suffered an injury if you were not able to name the person who might be responsible.

In *Story on Equity Jurisprudence*⁵ it is stated:

' . . . in general, it was necessary in order to maintain a bill of discovery that an action should be already commenced in another court to which it should be auxiliary. There were exceptions to this rule, as where the object of discovery was to ascertain who was the proper party against whom the suit should be brought. But these were of rare occurrence.'

A similar passage appears in the first edition⁶ and in a footnote to it *Moodalay v Morton*¹, *Angel v Angel*⁴ and *Mayor and Commonalty and Citizens of London v Levy*² are cited. Story thus does not appear to have thought that the right to discovery

¹ (1785) 1 Bro CC 469

² (1803) 8 Ves Jun 398

³ (1803) 8 Ves Jun at 404, 405

⁴ (1822) LJOSCh 6 at 9

⁵ 2nd English Edn (1892), pp 1011, 1012, para 1483

⁶ (1836)

a of the proper party against whom the suit should be brought depended on the ability of the plaintiff to give his name.

In *Queen of Portugal v Glyn*¹ the majority in this House, Lord Cottenham LC, Lord Lyndhurst, and Lord Brougham, Lord Wynford dissenting, held that a bill of discovery could not be granted against the Queen of Portugal who was not a party to an action brought against Glyns, the bankers, but who was clearly an interested party in that action as it was brought by her agent, Lord Cottenham LC holding that it was a long established rule that discovery on a bill would only be granted against a party to the action. *Moodalay v Morton*² and *Angel v Angel*³ were not cited and I do not consider that the decision in those cases, *Moodalay v Morton*² being regarded as an exception to the general rule, are to be regarded as inferentially overruled by this decision of this House.

*Hunt v Maniere*⁴ and *Upmann v Elkan*⁵ were neither of them cases on discovery. In *Hunt v Maniere*⁴ the question was whether wharfingers had rightly refused to deliver up wine with a false label to the consignee. I do not think that this case assists.

In *Upmann v Elkan*⁵ though the dispute was about costs there were observations by Lord Romilly MR⁶ at first instance, and by Lord Hatherley LC⁷ on appeal, which are of interest. There a bill had been filed praying an injunction to restrain Elkans, who were forwarding agents and the consignees, from removing boxes of cigars marked falsely with the plaintiff's brand from St Katharine's Docks. With regard to the St Katharine Dock Co who were also joined as defendants, Lord Romilly MR said that there was not the least pretence for making them parties to the suit and⁸ that it was the duty of the consignees, despite their innocence and ignorance of the fraud 'at once to give all the information required' and to undertake that the goods should not be removed from their possession. Before the bill was filed the defendants had disclosed the names of the consignors and ultimate consignees. In the Court of Appeal⁷ it was held, affirming the decision of Lord Romilly MR⁶ that the fact that Elkans were agents and merely carriers was no defence to the suit, and Lord Hatherley LC⁹ said it was the business of Elkans, once the complaint was made, to give all proper information. This case, while it states the duties of consignees of goods where complaint is made that they are spurious, does not decide that discovery could have been ordered against Elkans.

From these decisions it is apparent that little support is given to the decision in *Orr v Diaper*¹⁰. The most helpful case is *Moodalay v Morton*². However, *Orr v Diaper*¹⁰ has not, so far as I am aware, ever been questioned or criticised in any subsequent case or in any textbook and the principle it enunciates has been followed on several occasions in other countries. In the textbooks, in addition to the observations of Story J in his book¹¹ to which I have referred, there are statements to a similar effect in Bray¹², in Sichel and Chance on Discovery¹³, and in Ross¹⁴ and it is not without interest to note that in the third edition of Snell on Equity published in 1874 before the decision in *Orr v Diaper*¹⁰, it is said that there are exceptions to the general rule that to maintain a bill of discovery an action should have been commenced in another court:

- 1 (1840) 7 Cl & Fin 466
- 2 (1785) 1 Bro CC 469
- 3 (1822) LJOSCh 6 at 9
- 4 (1864) 34 Beav 157
- 5 (1871) LR 12 Eq 140; on appeal (1871) 7 Ch App 130
- 6 (1871) LR 12 Eq 140
- 7 (1871) 7 Ch App 130
- 8 (1871) LR 12 Eq at 145
- 9 (1871) 7 Ch App at 133
- 10 (1876) 25 WR 23, 4 Ch D 92
- 11 Equity Jurisprudence (2nd English Edn, 1892)
- 12 Principles and Practice of Discovery (1885), p 40
- 13 (1883), p 180
- 14 The Law of Discovery (1912) Pt I, ch 1, p 11

'As where the object of discovery is to ascertain who is the proper party against whom a suit should be brought, but these are of rare occurrence.'

In these circumstances it is, in my opinion, far too late to challenge that decision. What exactly did it decide? In my view, that a discovery can be granted against a person who is not a mere witness to discover, the fact of some wrongdoing being established, who was responsible for it. The 'mere witness' rule has lost a great deal of its importance since the Common Law Procedure Act 1852 removed the bar to persons interested giving evidence, but it still has significance. Someone involved in the transaction is not a mere witness. If he could be sued, even though there be no intention of suing him, he is not a mere witness. In *Orr v Diaper*¹ Diapers were involved, so were Elkans in *Upmann v Elkan*² so was the East India Co in *Moodalay v Morton*³ and it matters not that the involvement or participation was innocent and in ignorance of the wrongdoing.

Are the respondents to be regarded as so involved in this case? I think the answer is yes. They were not, it is true, involved of their own volition. They were involved in the performance of their statutory duty. The furazolidone was in customs charge until cleared and the respondents could control its movement until cleared (Customs and Excise Act 1952, s 22 (1)). I do not see how it can be said that they were not involved in the importation of this chemical.

So for these reasons in my opinion the answer to the first question I formulated, can the respondents be ordered to disclose the names of the importers? is in the affirmative. As to the second question, should they be ordered to do so? I think that the answer is also yes, unless in consequence of their special position the answer to the third question is in the negative. Subject to the public interest in protecting the confidentiality of information given to customs, in my opinion it is clearly in the public interest and right for the protection of patent holders, where the validity of the patent is accepted and the infringement of it not disputed, that they should be able to obtain by discovery the names and addresses of the wrongdoers from someone involved but not a party to the wrongdoing.

I now turn to the third question. In their list of documents the respondents asserted that they were precluded by law from disclosing the names of the importers and that that disclosure would be injurious to the public interest. In their notice of appeal to the Court of Appeal⁴ they gave notice that the grounds of appeal were:

'Information about a taxpayer or his affairs furnished to a revenue collecting Department of the Crown pursuant to the requirements of a statute is confidential and, in circumstances in which its disclosure is not authorised by statute, exceptionally strong reasons must exist to permit its disclosure to persons outside that Department . . .'

In their case they contend that discovery should not be ordered because disclosure would be contrary to the public interest on two grounds (1) that the information is given to the respondents and their officers in confidence and under compulsion in order that the respondents may perform their statutory duties. 'The informant' it is said 'is entitled to assume that information for this purpose will not be disclosed to others for a different purpose': and (2) that it is essential that the confidence of importers should be respected in order to ensure that full and candid information continues to be given by them. 'The furnishing of the information' they submit 'would inhibit importers from making full and frank disclosure'. The affidavit of Sir Louis Petch, the chairman of the Commissioners of Customs and Excise, sets out these contentions more fully.

The respondents were unable to point to any statutory provision prohibiting them

¹ (1876) 25 WR 23, 4 Ch D 92

² (1871) LR 12 Eq 140

³ (1785) 1 Bro CC 469

⁴ [1972] 3 All ER 813, [1972] 3 WLR 870

a from disclosing the names of the importers. I do not accept the proposition that all information given to a government department is to be treated as confidential and protected from disclosure, but I agree that information of a personal character obtained in the exercise of statutory powers, information of such a character that the giver of it would not expect it to be used for any purpose other than that for which it is given, or disclosed to any person not concerned with that purpose, is to be regarded as protected from disclosure, even though there is no statutory prohibition of its disclosure. But not all information given to a government department, whether voluntarily or under compulsion, is of this confidential character and the question is whether the names of the importers of the furazolidone were given in confidence. I do not think that that is established. The names and addresses of the importers had to be given to the master of the ship and made known to all those taking part in securing the transit of the chemicals. Presumably the parcels of furazolidone had on them the names and addresses of the consignees for all to see, though they may, I do not know, have not disclosed that the contents of the parcels were furazolidone. The documents completed for the transit of the chemicals and for customs which show the names of the consignees and the contents of the parcels do not seem to me more confidential than consignment notes completed for British Railways and British Road Services.

d I do not doubt that a great deal of the information obtained by customs is of a highly confidential character which it would be most improper for them to disclose but I do not consider that this information, even if it be of a confidential character, was of a highly confidential nature.

e I do not forget that by s 127 of the Finance Act 1972 it is provided that no obligation as to secrecy or other restriction on the disclosure of information imposed by statute or otherwise is to prevent the communication of information by the Commissioners of Inland Revenue to the Commissioners of Customs and Excise and vice versa, or that the disclosure of information obtained by one from the other is prohibited by s 127 (2), save for the purposes there specified, and I do not forget that by s 3 of the Finance Act 1967 power is given to the commissioners to disclose, on it being notified to them by the Secretary of State that it is in the national interest, that certain information about imported goods should be given, and that, though by order the Secretary of State can add to the description of information which can be disclosed, he is expressly debarred from authorising the disclosure of the price of the goods or the name of the importer.

g I can well understand that customs, taking the view that they are prohibited by law from disclosing information obtained by them, would require a provision expressly authorising disclosure to be included in these Acts. The reason for the prohibition in s 3 of the 1967 Act of the Secretary of State requiring information to be given as to the name of an importer are not apparent from the section. It may have been, I do not know, on account of the 'candour' argument of customs and excise.

h The inclusion of these provisions in these two recent Acts does not appear to me to lead to the conclusion that the assumption that the respondents are prohibited by law from disclosing all information obtained by them is well based. Much of the information they obtain is no doubt of such a character that it is implicit that it is not to be used or disclosed for any purpose other than that for which it is given. The question here is whether the names of importers of furazolidone in infringement of the patent are of that character.

i For the reasons I have given I do not think they are. If any degree of confidentiality is attached to them I think it must be a low degree. I must confess that I am not in the least impressed by the 'candour' argument. I really cannot conceive it to be realistic to suggest that the vast majority of importers who do not infringe patents or do other wrongs will be in the least deterred from giving proper information to customs by the knowledge that pursuant to an order of the court the names of the wrongdoers are disclosed by customs.

Having said this, I want to make it clear that in my opinion the respondents have acted perfectly properly throughout these proceedings. Applications for discovery by persons who are not sued and who have done no wrong were a rare occurrence in the last century and are even rarer in this. The respondents are right to be solicitous for the interests of those who give them information. They were right initially to refuse the appellants' request. Indeed I think that it may well be that in cases which are not absolutely on all fours with this, they would be right in future to refuse disclosure except on the order of the court.

And the question is, should the court now order it? If a degree of confidentiality does attach to the names and addresses of the importers, I think that on the balance of national interest the interests of justice in this case far outweigh any interest there may be in non-disclosure. The appellants now only seek discovery of the names and addresses of the consignees of the imported furazolidone in the last six years and, in my opinion, that discovery should be ordered in the form which has been agreed between the parties.

As to costs, I agree with the order proposed by my noble and learned friend, Lord Reid.

For the reasons I have stated, in my opinion this appeal should be allowed.

LORD CROSS OF CHELSEA. My Lords, on the appellants' summons for inspection Graham J¹ held that the respondents had not infringed the patent and that the goods were not liable to forfeiture under s 44 of the Customs and Excise Act 1952 as 'prohibited goods'; but that nevertheless they were bound to disclose the names for which the appellants were asking. His order¹, made on 8th December 1971, which gave effect to this decision was technically an interlocutory order but in reality it disposed of all the issues raised in the consolidated actions. The respondents appealed to the Court of Appeal² which by a judgment given on 25th July 1972 agreed with the judge on the question of infringement and on the construction of s 44; but held that, even apart from the question of privilege, the respondents, not being infringers, were under no obligation to disclose the names of the importers; and that in any case it would have been contrary to the public interest to have ordered them to disclose them. On their appeal to this House the appellants abandoned the contention that the respondents had infringed the patent. They did not, as I understood, abandon their contention that goods imported in infringement of a patent are goods 'imported contrary to a prohibition in force with respect thereto under or by virtue of an enactment' within the meaning of s 44; but—in common I think with all your Lordships—I have no doubt that Graham J¹ and the Court of Appeal² were right in rejecting this contention. The action falls, therefore, to be treated as a pure action for discovery and the questions to be decided are (A) whether in the circumstances the respondents, although not themselves infringers, would be bound—apart from any question of privilege—to make the discovery asked and (B) whether, if so, it would be contrary to the public interest to order them to make it. For the purpose of answering these questions one must make three assumptions in favour of the appellants, *first* that the patent is valid; *secondly*, that the patent has been infringed by importers whose names are known to the respondents; and *thirdly*, that the appellants cannot discover the identity of the infringers unless the respondents disclose it to them.

The most recent English authority to which the appellants could refer us in support of the proposition that the court can entertain an action by A against B in which the only relief asked is that B disclose to A the identity of someone who has to his knowledge infringed A's rights, in order to enable A to bring an action against him, is

1 [1972] 1 All ER 972, [1972] Ch 566

2 [1972] 3 All ER 813, [1972] 3 WLR 870

Orr v Diaper decided by Hall V-C in 1876 and reported in the Law Reports¹ and, more fully, in the Weekly Reporter². Unfortunately, however, in order to understand the argument and the judgment in that case it is necessary to plunge still further into the past and consider the practice of the Court of Chancery with regard to bills of discovery. I say 'unfortunately' because the lawyer of today can at best have only a superficial understanding of a procedure developed when law and equity were administered in separate courts and the parties to common law actions were not permitted to give evidence. A further source of difficulty is that the chancery reports before the time of Lord Eldon often take the form of brief notes which may have been useful to those for whose benefit they were published but mean very little to the modern reader. I am, therefore, far from confident that what I am about to say is an accurate summary of the position. One starts with the distinction which came to be drawn by equity lawyers between a bill of relief and a bill of discovery. Since the ordinary chancery bill asking for relief in equity always included a request that the defendant be ordered to answer on oath a number of interrogatories framed to elicit admissions which would help the petitioner to prove the case set out earlier in the bill it can be said that every chancery bill was in a sense a bill of discovery. But a bill of discovery properly so called was a bill which simply asked for the disclosure of facts known to the defendant or of documents in his possession to aid the petitioner in prosecuting or defending other proceedings and asked no other equitable relief save, if the petitioner was the defendant to an action at law, an injunction staying that action until the discovery was given. A defendant from whom discovery was sought either by a bill of relief or by a bill of discovery might object to giving discovery on the ground that he had no 'interest' in the proceedings but was 'a mere witness' and ought not to be compelled to give his evidence before the hearing. To this rule exceptions were allowed in the interests of justice but by the end of the 18th century the list of exceptions was closed. Further, what constituted an 'interest' for the purpose of the rule came to be defined. In the case of a bill of relief it was such an interest as that a decree could be made against him or that he would be affected by the decree. As to a bill of discovery it was finally decided by this House in *Queen of Portugal v Glyn*³ that such a bill could not be maintained against a person who was not a party to the record in the action in aid of which the discovery was sought even though he was deeply interested in its success. It is, incidentally, not without interest to observe that whereas in earlier days, in particular at the time of the disputes between Lord Ellesmere LC and Coke CJ, the common lawyers had bitterly resented the granting of injunctions by the Chancellor staying proceedings at law where the defendant could make out a *prima facie* case of fraud on the part of the plaintiff with which the common law was unable to deal, in *Queen of Portugal v Glyn*³ it was common lawyers—Lord Abinger and Lord Wynford—who thought that an injunction could and should be granted to stay an action by an agent of the Queen on bills of exchange to which, if the allegations in the bill were true, she was not 'in conscience' entitled, whereas it was the equity lawyer, Lord Cottenham LC, who gave the leading speech upholding the demurrer to the bill of discovery on the ground that the Queen was not a party to the record at law and could in theory have been called as a witness by the defendant. But the 'mere witness' rule has in principle nothing to do with the question whether or not a defendant to a bill should be obliged to disclose the identity of someone against whom the plaintiff wishes to claim relief. In such cases there can be no question of calling the defendant to give the evidence at the hearing since without the disclosure of the name proceedings cannot be brought at all. In this field it was settled that if a party was properly made a defendant to a bill of relief the petitioner was

¹ (1876) 4 Ch D 92

² (1876) 25 WR 23

³ (1840) 7 Cl & Fin 466

entitled to discovery from him of the existence or whereabouts of other persons not parties in order that they might be made parties; but whether one could bring a bill of discovery in order to find out whom to sue in proceedings which you had not yet brought was not entirely clear. On one side reliance could be placed on *Moodalay v Morton*¹ decided in 1785 by Sir Lloyd Kenyon MR. There the plaintiff who said that the East India Co had granted him the right to supply the inhabitants of Madras with tobacco for a term of years and that persons who were servants of the company had dispossessed him and purported to grant a lease of the right to someone else filed a bill of discovery against the company and Morton their secretary asking them to disclose by whom and under what authority the second lease had been made so that he might know how to frame the action at law which he wished to bring in respect of the injury done to him. Obviously it was material for that purpose for him to discover whether those who had dispossessed him were acting by the authority of the company or not. That case differs from the present case in that there the discovery might well have shown that the proper defendant to the proposed action was in fact the person—the East India Co—from whom discovery was sought; but that does not seem a very substantial distinction. Further in *Angel v Angel*² Sir John Leach V-C appears to have regarded *Moodalay v Morton*¹ as an authority showing that a 'would be' plaintiff at law could bring a bill of discovery in equity to discover against whom the action should be brought. On the other side reliance could be placed on some language used by Lord Eldon LC in his judgment in *Mayor and Commonalty and Citizens of London v Levy*³, though *Moodalay v Morton*¹ was not referred to in that case and the decision can be justified on the ground that the bill was a 'fishing enquiry' by plaintiffs who were trying to find out whether their rights had in fact been infringed. It is noteworthy that Story⁴ states on the authority of *Moodalay v Morton*¹ and *Angel v Angel*² that a bill of discovery may be brought when the object of the discovery is to ascertain who is the proper party against whom a suit should be brought and that as his note also contains a reference to *Mayor and Commonalty and Citizens of London v Levy*³ he presumably did not consider that anything which Lord Eldon LC said in that case cast any doubt on the general principle.

With this by way of introduction one can now turn to *Orr v Diaper*⁵—though it is not irrelevant to bear in mind that since 1851 the parties to civil actions at law had been able to give evidence and that by the Supreme Court of Judicature Act 1873 a single court had been established in place of the separate courts of law and equity in which both law and equity could be administered concurrently with the proviso that in case of conflict the rules of equity should prevail.

*Orr v Diaper*⁵ was argued on demurrer. The facts alleged in the statement of claim which must be taken to have been true were that the plaintiffs were manufacturers of sewing cotton which they packed in a distinctive way and which was sold abroad in—among other countries—Chile; that sewing cotton of an inferior quality packed according to their style and bearing counterfeit tickets had been sold in Chile for the past few years and that in April 1876 they discovered that the defendants who were shippers in Liverpool had been for some years and were still 'shipping' these goods to Valparaiso. On 10th April 1876 the plaintiffs' solicitors asked the defendants to give them the names of the consignors and, on their refusal to do so, started an action on 25th April asking for discovery of the names and addresses of the consignors of the

¹ (1785) 1 Bro CC 469, Dick 652

² (1822) 1 LJOSCh 6

³ (1803) 8 Ves Jun 398 at 402, 404

⁴ Equity Jurisprudence (2nd Edn, 1839), para 1483

⁵ (1876) 25 WR 23, 4 Ch D 92

a goods bearing the counterfeit tickets¹—‘in aid of proceedings now in contemplation by the Plaintiffs to restrain the piracy of their tickets’ which could not, as they said, be maintained without the discovery sought. There is no doubt that if these allegations were established—and the demurrer of course proceeded on the footing that they were established—the plaintiffs could have obtained an injunction against Messrs Diaper, in proceedings framed for that purpose, to restrain them from continuing to ship goods which were being ‘passed off’ as the plaintiffs’ goods. This appears from *Upmann v Elkan*². The relevant facts there were that on 14th June 1869 Messrs Elkan who were continental forwarding agents carrying on business in London received a letter from a firm in Hamburg saying that they had shipped to them a case of cigars containing cigars of various brands, requesting them to pay the duty thereon and to forward the contents to various persons resident in England whose names and addresses were given. The case duly arrived and was warehoused with the St Katharine’s Dock Co. The plaintiffs who were cigar manufacturers discovered—somehow or other—that the cigars which were not of their manufacture were packed in boxes bearing an imitation of their brand and on 19th June their solicitors told Messrs Elkan, who said that up to that time they had no reason to suspect that anything was wrong, that the cigars consigned to them bore a forged brand. After, as they said, verifying that this was indeed the fact, Messrs Elkan offered to give the plaintiffs the names of the consignors and actually gave them the names on 8th July. Meanwhile, on 1st July, the plaintiffs filed a bill against Messrs Elkan and the dock company asking for an injunction to restrain Messrs Elkan from removing the cigars from the docks and from infringing their mark and asking for damages. They obtained an ex parte injunction on 2nd July. A motion for interim injunction was made on 8th July which stood over until 15th July on Messrs Elkan giving an undertaking, and on 15th July the injunction was granted—Messrs Elkan expressing their willingness to act as the court should direct by saying that they preferred to have an injunction granted against them to simply continuing their undertaking. When the suit came on the court held that Messrs Elkan were not privy to the infringement of the mark and the dispute became a dispute as to costs—but to resolve it the court had to decide what were the rights and duties of the parties on the footing that Messrs Elkan had no knowledge of the fraud before the plaintiffs’ solicitors told them of it. Lord Romilly MR³ expressed the view that as soon as Messrs Elkan were told of the fraud it was their duty to give the plaintiffs the information as to the identity of the consignors for which they were asking and to undertake that the goods should not be taken from the warehouse until the spurious brand had been removed. He added that persons in the position of Messrs Elkan could not reasonably complain if proceedings were started against them before they gave the information. It was their misfortune that they had dishonest correspondents. In the result on Messrs Elkan undertaking that if any fresh cigars should be sent to them bearing the plaintiffs’ brand they would at once give the plaintiffs notice, he made no order as to costs as between the plaintiffs and Messrs Elkan—leaving each side to pay its own. That decision was affirmed on appeal by Lord Hatherley LC⁴ who agreed with what Lord Romilly MR³ had said as to the duty of Messrs Elkan on hearing of the fraud.

To return now to *Orr v Diaper*⁵—counsel for the defendant pointed out that the action was a pure action for discovery, that no relief was asked against his clients beyond the disclosure of names to enable the plaintiff to bring proceedings against the consignors, and he submitted that the ‘mere witness’ rule applied. When Hall V-C asked whether the plaintiff could not add to his suit a claim for relief in equity

1 (1876) 4 Ch D at 93

2 (1871) LR 12 Eq 140; on appeal (1871) 7 Ch App 130

3 (1871) LR 12 Eq at 145

4 (1871) 7 Ch App 130

5 (1876) 25 WR 23, 4 Ch D 92

against the defendant counsel referred to the rule (laid down by Lord Eldon LC in *Butterworth v Bailey*¹) that a bill of discovery could not be turned by amendment into a bill for relief. Hall V-C—perhaps unfortunately—did not call on counsel for the plaintiff. If he had done so it may be that counsel would have pointed out that the ‘mere witness’ rule could have no application to a case where all that was being asked for was the identity of a wrongdoer whom the plaintiff would be unable to sue unless the defendant gave it to him. As it was the judge overruled the demurrer on the ground that the defendant was not a ‘mere witness’ because on the facts taken to be admitted the plaintiff could have obtained an injunction against him if he had chosen to apply for one. To make the right of a plaintiff to obtain the sort of discovery which was being sought in *Orr v Diaper*² and is being sought in the present case dependent on whether or not the plaintiff could have obtained some relief against the defendant if he had chosen to ask for it is to my mind utterly illogical. Suppose that Diaper after having innocently and unwittingly shipped infringing goods for some consignor for several years had gone out of business shortly before the plaintiff asked him for the consignor’s name. In such a state of facts the plaintiff could not have obtained any relief against him since he was not continuing to ship infringing goods nor was there any danger that he would do so in the future. Yet if Lord Romilly MR and Lord Hatherley LC were right in saying that a man who has become innocently mixed up in fraudulent trading is under a duty to disclose the name of the wrongdoer to the injured party in order to enable him to bring his action that duty must be just the same in a case where because, for example, some infringing goods are still in his possession an injunction could be obtained against him and a case such as I have supposed where it could not. Bray, in his well-known work³, treats *Orr v Diaper*² as a modern example of what he regards as the old principle that a bill of discovery might be filed against a person in order to discover the names of other persons for the purpose of bringing an action against them although no proceedings were to be brought against the defendant to the bill—and makes no reference to the fact that in *Orr v Diaper*² it so happened that such proceedings could have been brought⁴. He suggests⁵ that the language used by Lord Eldon LC in *Mayor and Commonalty and Citizens of London v Levy*⁶ ‘requires some little qualification’. The same view of *Orr v Diaper*² was taken in 1887 by the Supreme Court of Massachusetts in *Post v Toledo Cincinnati and St Louis Railroad Co*⁷. There an Ohio corporation had recovered judgment in Ohio against another Ohio corporation under whose statutes its stockholders were personally responsible for its debts. The business of the debtor corporation was conducted in Massachusetts and the creditor corporation brought a bill of discovery in the court of that state against the debtor corporation and its officers who were resident in Massachusetts for discovery of the names of its stockholders so that the creditor corporation could take proceedings against them in Ohio. Although the debtor corporation was made a defendant it was not served with the bill since there was no way in which effectual service could be made on it. So in substance the only defendants to the bill were the officers of the corporation against whom no relief was or could be claimed. They demurred to the bill. In support of the demurrer it was argued that Lord Eldon LC’s decision in *Mayor and Commonalty and Citizens of London v Levy*⁶ was inconsistent with the badly reported earlier cases such as *Moodalay v Morton*⁸, that Hall V-C could not have meant to overrule a decision of Lord Eldon LC universally accepted for 75 years

1 (1808) 15 Ves Jun 358

2 (1876) 25 WR 23, 4 Ch D 92

3 Principles and Practice of Discovery (1885), p 40

4 See the note on p 40

5 Op cit, p 614

6 (1803) 8 Ves Jun 398

7 (1887) 11 NE 540

8 (1785) 1 Bro CC 469

a and that *Orr v Diaper*¹ should be treated as a special case not to be followed unless the facts were exactly the same. On the other side it was said that if a plaintiff could obtain from a person whom he had properly made defendant to a bill for relief discovery of the names of other parties necessary to be made defendants to the suit, why should he not be able to bring a bill of discovery against persons against whom he could claim no relief in order to obtain the names of defendants to a proposed action which he could not bring unless he knew the names?—*Orr v Diaper*¹, was cited in support of that argument. In overruling the demurrer the court said²:

c 'The present case must be determined by the principles declared in the few cases where the plaintiff does not know the names of the persons against whom he intends to bring a suit, and brings a bill against persons who stand in some relation to them, or to their property, in order to discover who the persons are against whom he may proceed for relief. . . It is settled that a bill of discovery may be maintained to aid the plaintiff in a suit which he intends immediately to bring, as well as in a suit already brought, if the bill discloses a cause of action; and the difficult question is under what circumstances may such a bill be maintained for the purpose of ascertaining the proper parties against whom the suit should be brought.'

d The court then pointed out that the facts in *Mayor and Commonalty and Citizens of London v Levy*³ were not such as required Lord Eldon LC to overrule *Moodalay v Morton*⁴ and that in fact no reference is made to that case in his judgment and they quote *Orr v Diaper*¹ for the proposition that under some circumstances discovery may be had for the purpose of ascertaining the persons against whom the plaintiff may bring a suit although he does not allege that he has a cause of action against e or intends to sue the persons who are the defendants in the proceedings for discovery. They then state their conclusion on the facts in the case before them as follows⁵:

f 'It is clear that courts do not compel discovery from persons who sustain no other relation to the contemplated litigation, or to the subject of the suit, than that of witnesses; and it is also clear that a bill for discovery cannot be used to enable a plaintiff to fish for information of any causes of action he may have against other persons than the defendant. . . But when a plaintiff has a cause of action against persons who are defined either by statute, or by their relations to property or a business by the management of which the plaintiff has suffered injury, and the names and residences of these persons are unknown to him, it is not clear that there may not be such a state of facts that a court ought to compel a discovery of the names and residences of these persons from their agents in charge of the property or business; and the decisions recognize that this may sometimes be done. In the present case it is the duty of the corporation to pay the plaintiff's judgment if it have sufficient assets. A part of its assets for that purpose is the liability of its stockholders. The corporation acts only through its directors and other principal officers; and it is necessary that the plaintiff, in order to enforce the liability of the stockholders, and thus obtain satisfaction of its judgment, should bring suit against the corporation and all its stockholders; h and the plaintiff, except by discovery, cannot ascertain who these stockholders are.'

i I find that case of great assistance in the solution of the problem before us in this case. The court which decided it was of high standing; it was decided in the light of the old English chancery authorities which as the case was decided as long

1 (1876) 25 WR 23, 4 Ch D 92

2 (1887) 11 NE at 547

3 (1803) 8 Ves Jun 398

4 (1785) 1 Bro CC 469

5 (1887) 11 NE at 547, 548

ago as 1887 the judges were probably in a better position to understand than we are; and it lays down a reasonable principle by which to judge whether a plaintiff should have this sort of discovery. To make his right depend on whether or not he could obtain some other relief against the defendant is to my mind quite irrational. The court in *Post v Toledo Cincinnati and St Louis Railroad Co*¹ makes it depend on the nature of the relation which subsists or subsisted between the defendant to the action for discovery and the persons the disclosure of whose names is sought. In that case the relation was that of agents in charge of the undertaking of which the persons whose names were sought were in effect the owners. In cases such as *Upmann v Elkan*² and *Orr v Diaper*³ the relation was that of persons engaged by the tortfeasor to deal with the goods in question and who in the course of doing so unwittingly facilitated the commission of the tort. In my judgment no sensible distinction can be drawn in applying the *Post v Toledo*¹ principle between the position of the respondent commissioners and the position of Diaper or Messrs Elkan or the St Katharine's Dock Co. It is true that Messrs Elkan were under no obligation to enter into the business relations with the dishonest consignors which made them unwitting facilitators of a fraud whereas the respondents were under a statutory duty to bring under their control for the purpose of exacting duty these infringing imports of furazolidone. But the fact remains that these goods passed through their hands and—assuming that they cannot claim privilege on the grounds of public interest—I cannot see any reason why they should not be under the same duty to disclose the names as the dock company who owned the transit shed in which the imports were stored under the surveillance of customs officers. The dock company would certainly have been bound to give discovery of the names if the plaintiffs discovered that furazolidone was in a particular transit shed and that the dock company who were in possession of it knew the names of the importers. If so, why not the respondents who had effective control of the goods?

That being my conclusion on this part of the case I do not find it necessary to express any opinion on a point to which a good deal of argument was devoted—namely, whether the appellants could have obtained against the respondents the equivalent of an injunction in the shape of a declaration that they ought not to give clearance to imports of furazolidone without giving the appellants the name of the importers.

This brings me to the claim of privilege. In his affidavit sworn on 28th April 1971 Sir Louis Petch put the claim on two grounds: first, that the respondents were not entitled to disclose the information requested even if they wished to do so and, secondly, that assuming that they had the power to give it the disclosure would be contrary to the public interest. Counsel for the respondents in his able and candid argument wisely did not seek to support the first ground. Of course a statute may provide that information of a certain character shall not be disclosed even for the purpose of legal proceedings. An example of such a prohibition is s 17 (2) of the Agricultural Marketing Act 1931, which was considered in *Rowell v Pratt*⁴. But the respondents are not prohibited by statute from disclosing the names of importers. No doubt the respondents consider very properly that they ought to treat as confidential and not voluntarily to disclose even to another government department information which comes to them as a result of the exercise of the powers given to them by the Customs and Excise Act 1952 for the purpose of enabling them to collect the revenues of customs and excise. Section 3 of the Finance Act 1967, and s 16 (9) of the Agriculture Act 1970, to which Sir Louis refers—and also s 127 of the Finance Act 1972, passed after he had sworn his affidavit—were enacted in order to make it clear that the obligation of secrecy which the respondents very properly consider to be binding

1 (1887) 11 NE 540

2 (1871) LR 12 Eq 140; on appeal (1871) 7 Ch App 130

3 (1876) 25 WR 23, 4 Ch D 92

4 [1937] 3 All ER 660, [1938] AC 101

a on them as a general rule is not to apply in the cases there specified. But this has nothing to do with disclosure under an order of the court for the purpose of legal proceedings, whether criminal or civil, for outside the field of legal professional privilege the fact that information has been imparted confidentially is not—in the absence of an express statutory prohibition—any bar to the court ordering its disclosure. Then is it contrary to the public interest that this information should be disclosed? This problem falls to be considered under two heads—first, from the point of view of the individuals who have supplied the information; secondly, from the point of view of the efficiency of customs. Now on the admitted facts in this case the great majority of those whose names will be disclosed have infringed the appellants' patent and it does not lie in their mouths to complain that their identity is revealed. It is no doubt conceivable—though most unlikely—that some persons who bought furazolidone from the appellants and exported it for sale abroad have re-imported it. Such people, if they exist, might possibly dislike their identity being disclosed—but in this connection we should bear in mind that the information in question is given to many others besides the respondents. The shippers, the master of the ship and the employees of the owners of the transit sheds or warehouses in which the goods are stored will all know or have means of getting to know the names of the importers. This information accordingly cannot fairly be regarded as highly confidential information in the hands of the respondents. I turn now to the effect of the disclosure on the efficient working of the customs service. Sir Louis says that he is afraid that the good relations and mutual confidence which usually exist between the officers of the customs and traders would be seriously impaired if it became known that any information of a confidential character obtained from traders under statutory powers might have to be disclosed by the commissioners otherwise than under the provisions of a statute enabling them to disclose it. The traders whose good relations with the customs Sir Louis is anxious to maintain are, presumably, honest traders. Any honest trader who was disturbed at the thought that a court could order the disclosure of importers' names in circumstances such as exist here would be a most unreasonable man and I cannot believe that there would be many such. No doubt dishonest traders might be disturbed by the knowledge that such disclosure could be ordered, and Sir Louis gives it as a further ground for the claim of privilege that dishonest traders who now tell the customs the truth with regard to the character of the goods and the identity of the importers may be driven to giving false information. An argument that one should not try to stop one form of wrongdoing out of fear that some of the wrongdoers may take to committing yet further offences in order to be able to maintain their original course of wrongdoing is not very attractive. But in any case I think that Sir Louis's fears on this head are exaggerated. On the question of public interest I agree with Graham J¹ and disagree with the Court of Appeal². I would therefore allow the appeal and I agree that the costs should be dealt with in the manner proposed by my noble and learned friend, Lord Reid.

b In the course of the argument fears were expressed that to order disclosure of names in circumstances such as exist in this case might be the 'thin end of the wedge', that we might be opening the door to 'fishing requests' by would-be plaintiffs who want to collect evidence or to requests for names made to persons who had no relevant connection with the person to be sued or with the events giving rise to the alleged cause of action but just happened to know the name. I think that these fears are groundless. In the first place, there is a clear distinction between simply asking for the name of a person whom you wish to make a defendant and asking for evidence. This case has nothing to do with the collection of evidence. Secondly, although in any case which was on all fours with this case or any subsequent case which may be

1 [1972] 1 All ER 972, [1972] Ch 566

2 [1972] 3 All ER 813, [1972] 3 WLR 870

decided the respondents or any other person who was asked for a name would no doubt give it without putting the applicant to the expense of obtaining an order of the court; in any case in which there was the least doubt whether disclosure should be made the person to whom the request was made would be fully justified in saying that he would only make it under an order of the court. Then the court would have to decide whether in all the circumstances it was right to make an order. In so deciding it would no doubt consider such matters as the strength of the applicant's case against the unknown alleged wrongdoer, the relation subsisting between the alleged wrongdoer and the respondent, whether the information could be obtained from another source, and whether the giving of the information would put the respondent to trouble which could not be compensated by the payment of all expenses by the applicant. The full costs of the respondent of the application and any expense incurred in providing the information would have to be borne by the applicant.

LORD KILBRANDON. My Lords, the facts which are basic to the question of law arising in this appeal lie in a very narrow compass. Between May 1967 and February 1970 there were six individual months' importations into the United Kingdom of furazolidone, a chemical substance of which the first appellants are patentees in the USA, and the second appellants (whom I shall refer to as 'the appellants'), are exclusive licensees in the United Kingdom. While it is possible, it is commercially very improbable, that some of these importations may have included importations or re-importations of the patented article manufactured by or under licence from the appellants. In spite of some unhappy ambiguities in the appellants' pleadings, it is right that the appeal should be decided on the footing that the importers of these parcels of furazolidone are by their use of the substance infringers in the United Kingdom of the appellants' patent right, could be restrained by law from future infringement, and are liable in law for the pecuniary consequences of their past infringements.

The appellants have come to know of these infringements through the publication by the respondents, the Commissioners of Customs and Excise, of monthly special chemical returns prepared by them and made available by them to the chemical industry. The name of the importer, otherwise 'infringer', does not appear in the return. I do not think it is necessary to go into the details of the compilation of, and the sources of information for, the respondents' published statistics. Nor do I need to refer, except in the broadest way, to the procedures governing the passage of imported goods through customs. In the present context, that is the disclosure of names of importers, it is enough to say that, on the arrival of a ship (or aircraft) at a customs port, the master has to prepare, sign and deliver to customs a 'report' of his ship and her lading, which report contains a description of each purchase of goods and the name of the consignee thereof, while the importer or his agent must prepare, sign and deliver to customs a form of 'entry' specifying the description, quantity, tariff code number and value of goods consigned to him. No goods can be released out of customs' charge until these forms have been presented, and the appropriate duty paid.

The case has been conducted on the footing that it is impossible for the appellants to find out the names of the infringers of their patent unless the respondents disclose them. The respondents refuse to do so, and the present action, as it is now maintained, is like the old bill of discovery inasmuch as it prays for no relief, but seeks an order for discovery only. This is not by any means the extent of the claim against the respondents which was before the courts below¹. Until the appeal was opened in your Lordships' House, the appellants were claiming a declaration that the respondents had infringed, or caused, enabled or assisted others to infringe their patent, a declaration that it was the respondents' duty to forfeit the imported furazolidone,

¹ [1972] 3 All ER 813, [1972] 3 WLR 870; *rvsg* [1972] 1 All ER 972, [1972] Ch 566

a and an order that they make a complete discovery of documents relating to the importations.

It will be convenient to consider first whether such an application as this would succeed against a person not in the position of a department of state, that is, treating as a separate and subsequent question whether any special considerations of public policy apply to such bodies as the Commissioners of Customs and Excise. It is easy to envisage a dock authority, probably operating under powers conferred in a local Act within the framework of the Harbours Clauses Act 1847; the authority is empowered to demand sight of a ship's manifest, or otherwise obtain a detailed account of her cargo, broken down into quite narrow categories, in order that the dock charges appropriate to each category of goods can be calculated and imposed. There will be some provision for the detention of goods in the dock area until dues are paid, and the authority will necessarily be aware of the names of the consignees. The dock authority is apprised that the importation of certain goods which passed through the port infringed a patent conceded to be valid—as the respondents concede for the purposes of the present case—and the patentee can get no remedy unless the dock authority disclose the names of the importers. Will discovery lie against the authority at the instance of the patentee? To make the comparison completely valid, and with an eye to some of the precedents to which it will be necessary to refer, it must also be predicated not only that the patentee has no intention of bringing suit against the dock authority for any relief other than discovery, but also that he has no ground in law or equity for doing so. That would, I apprehend, be the situation if the goods were no longer in the control of the authority, and if there were no grounds which would support an application for an injunction against them at the instance of the patentees in respect of future importations.

e Among the large number of cases cited to us, I believe it is not possible to find a precedent for the granting of an application for discovery in the precise circumstances I have figured. Indeed, I think I can greatly shorten what I have to say on this topic, which is of a technical character involving an expert knowledge of English legal history in the nature of things denied to me, by saying that I respectfully agree with the analysis made in the Court of Appeal by Buckley J¹ of the cases of *Upmann v Elkan*² and *Orr v Diaper*³. These seem to be generally regarded as the root cases on the subject, especially perhaps the latter since it post-dates the Supreme Court of Judicature Act 1873, and are widely cited as leading cases in the foreign jurisdictions to which we were copiously referred. In both cases the plaintiff claimed to have a right of action against the defendant arising out of the import or export of goods masquerading as his own; in *Upmann*², too, the defendant had refused, wrongly as Lord Hatherley LC held, to disclose the names of the 20 consignees. In *Orr v Diaper*³, while the plaintiff had no intention of suing the defendant, he alleged in his statement of claim that the defendants 'had been for some time and were still shipping' the offending goods; this statement was made after the defendants had acquired knowledge of the offences. This is no doubt the foundation for Hall V-C's observation that the plaintiffs showed a right to sue the defendants at law, 'which expression, since the change made by the Judicature Acts, must mean this court, in some other proceeding'.

h In *Moodalay v Morton*⁴, as I read it, the plaintiff had an action not only against the person who had infringed his right of property by purporting to give it to another, but also against the East India Co if that person turned out to be their servant or agent. With special reference to that case, I would heartily agree with some remarks made by Sir John Leach V-C in *Angel v Angel*⁵. (Presumably the reference in the quotation is to Mitford on Pleadings.)

i [1972] 3 All ER at 820-823, [1972] 3 WLR at 879-882

1 (1871) LR 12 Eq 140; on appeal (1871) 7 Ch App 130

2 (1876) 25 WR 23, 4 Ch D 92

3 (1785) 1 Bro CC 469

4 (1822) 1 LJOSch 6 at 8

'In the several cases to be found in the reporters, the expressions are for the most part indistinct and confused; and Lord Redesdale, adhering to the language of these authorities, has, with their words, adopted in some measure their inaccuracies and obscurities.'

We were offered two reports of the Vice-Chancellor's judgment in *Moodalay*, one by Brown¹, which was criticised by Sir John Leach V-C in *Angel*², and the other by Dickens³; they are entirely different from one another. Both cannot be authentic, so I suppose it is possible that neither of them is. We were shown at least three versions of the judgment in *Orr v Diaper*⁴; the Court of Appeal⁵ made a point of preferring that in the *Weekly Reporter*⁶ to that in the *Law Reports*⁷. The former is certainly fuller and easier to follow, but for all I know it was deliberately altered by the learned judge on revision. These considerations make one reluctant to rely on the old cases except insofar as they deal with the actual subject-matter arising for decision in them. To erect on them a structure of principles which should guide a modern court in the administration of justice seems to me to be building on quicksands. If, without the positive assistance of the ancient precedents, it seems possible to identify principles *prima facie* acceptable, the only limitation to their adoption might be to see whether these principles had ever been authoritatively negated.

A case which gives rise to some difficulty is *Queen of Portugal v Glyn*⁸. One Soares sued Glyns to recover the proceeds of certain bills. Glyns filed a bill of discovery against Soares and the Queen, alleging that Soares was a mere agent for the Queen. The Queen demurred; in the demurrer Glyns' averments had to be accepted *pro veritate*. The House, reversing the decision of Lord Abinger CB⁹, Lord Wynford dissenting, sustained the demurrer, on the ground that since the Queen was not a party to the record in the action at law, she could not be made respondent in the bill of discovery in equity. The case exhibits some curious features. The appeal was heard in 1837; judgment⁸ was given more than three years later, after an unusually controversial debate. This case is ignored by Bray¹⁰, by Story¹¹, and by Snell in his first edition¹², being the only one published before the Judicature Acts. The sole reference to it in Halsbury¹³ is under Agency, not Discovery. Two decisions of the Court of Appeal¹⁴ are there cited in support of the proposition:

'In any action brought by an agent, the defendant is entitled to discovery from the principal as fully as if he were the plaintiff on the record, even though he is a foreign principal'.

The footnote concludes, 'but see *Queen of Portugal v. Glyn*⁸', which certainly appears to decide the contrary. The case was not included in the extensive citation before the Court of Appeal⁵. Since much of the rather acrimonious discussion in this House related to the technical requirements of bills in chancery, the opinion may be ventured that the case, at least since 1873, has not been regarded as authoritative;

1 (1785) 1 Bro CC 469

2 (1822) 1 LJOSch 6

3 (1785) Dick 652

4 (1876) 25 WR 23, 4 Ch D 92

5 [1972] 3 All ER 813, [1972] 3 WLR 870

6 (1876) 25 WR 23

7 (1876) 4 Ch D 92

8 (1840) 7 Cl & Fin 466

9 Sub nom *Glyn v Soares* (1836) 1 Y & C Ex 644

10 Principles and Practice of Discovery (1885)

11 Equity Jurisprudence (2nd English Edn, 1892)

12 Snell on Equity (1868)

13 Halsbury's Laws of England (3rd Edn), vol 1, p 237, para 528

14 *I e Willis & Co v Baddeley* [1892] 2 QB 324 and *James Nelson & Sons Ltd v Nelson Line (Liverpool) Ltd* [1906] 2 KB 217

a in any event it does not deal with the problem of discovery for the purpose of finding the name of a proposed defendant. This point is made in *Bray*¹ contrasting *Queen of Portugal*² with *Orr v Diaper*³.

Assuming that there are some characteristics attaching to a defendant in such an issue, which will be decisive of the question whether he can be called on to make discovery in order to enable the plaintiff in that issue to maintain a just cause of action against a third party, it seems to me incredible that one of those characteristics b should be the defendant's vulnerability in an action brought against him by the plaintiff. Why should A be bound to disclose to B the information which he must have before he can sue C if, and only if, B could, if he wished, also have sued A, although he has no intention of doing so? There is no rational distinction observable here.

c This may be the place to dispose of the 'mere witness' rule. It is settled, rightly or wrongly, that you cannot get discovery against someone who has no connection with the litigious matters other than that he might be called as a witness either to testify or to produce documents at the trial. We are not here in that territory. The defendant is not a mere witness, or any kind of witness, because the whole basis of the application is that, until the defendant has disclosed what he knows, there can be no litigation in which he could give evidence. Furthermore, if he were to d disclose, either voluntarily or under compulsion, the names of the third parties whom the plaintiff desires to pursue, even then he might well not be a witness in the ensuing litigation. He might have no evidence to give; what he knew would not necessarily be required post litem motam.

The most attractive way to state an acceptable principle, intellectually at least, may be as follows. The dispute between the plaintiff and the defendants is of a peculiar character. The plaintiff is demanding what he conceives to be his right, but that right insofar as it has patrimonial substance is not truly opposed to any interest of the defendants; he is demanding access to a court of law, in order that he may establish that third parties are unlawfully causing him damage. If he is successful, the defendants will not be the losers, except insofar as they may have been put to a little clerical trouble. If it be objected that their disclosures under f pressure may discourage future customers, the answer is that they should be having no business with wrongdoers. Nor is their position easily distinguishable from that of the recipient of a subpoena, which, in total disregard of his probable loss of time and money, forces him to attend the court for the very same purpose as that for which discovery is ordered, namely, to assist a private citizen to justify a claim in law. The policy of the administration of justice demands this service from him.

g But it is not necessary, in such a case as is being figured, to go as far as this. The defendants are not mere bystanders—although even if they be such they could in due time be called on to give oral evidence. The position in which they find themselves has been described in several ways; in a rather different context Lord Romilly MR in *Upmann v Elkan*⁴ said of the importer that he was 'mixed up with the transaction', and of the dock company who were mere warehousemen, that 'in many respects the position of the dock company does not differ from his [the importer's]'. Again, the case of *Post v Toledo Cincinnati and St Louis Railroad Co*⁵ in which the Supreme Judicial Court of Massachusetts reviewed all the earlier English authorities, was concerned to state—

h 'the principles declared in the few cases where the plaintiff does not know the names of the persons against whom he intends to bring suit, and brings a bill against persons who stand in some relation to them, or to their property, in order to discover who are the persons against whom he may proceed for relief.'

i 1 Principles and Practice of Discovery (1885) p 40n

2 (1840) 7 Cl & Fin 466

3 (1876) 25 WR 23, 4 Ch D 92

4 (1871) LR 12 Eq 140

5 (1887) 11 NE at 547

These words appear to me to provide an apt, and by no means too wide, classification of those against whom discovery may in such circumstances be obtained, though I think the court, perhaps misled by the fact that they had available only the report in the Law Reports¹, may have been wrong in saying that in *Orr v Diaper*² the plaintiffs neither alleged that they had a cause of action nor intended to sue the defendants. But the state of the reports does not make this clear.

Turning, then, from the imaginary dock authority we have been considering to the respondents, do they stand in some relation to the appellants or to their property which makes the respondents bound to disclose, on an order of the court, the names of the persons who imported goods in prejudice of the appellants' rights, in order to enable them to sue? In my opinion they do. The goods are at the order of the respondents from the time they enter the customs port until they go out of customs charge. The goods are reported to them in detail, are directed by them to a particular transit shed, and are constructively in their possession and control in the sense of being removable only on their authority; the respondents have the goods under their control so that they can exact in respect of them the duties authorised by the legislature. The importation of these goods infringes the appellants' property right, and the functions which they perform must I think place the respondents in a relation with the appellants which entitles the latter to demand from them the names of the infringers.

As I have said, I do not know of any direct authority which will support such an entitlement. But the proposition seems to be not inconsistent with the ratio of the judgments in *Upmann*³, *Post*⁴ and *Hunt v Maniere*⁵. What is more important, if one is searching for principles rather than collating decisions, is that there are broad statements to be found in authoritative sources which are in harmony with the spirit of the decisions, and do not seem to depend on any seemingly extraneous fact, such as the liability of the defendant in discovery to be sued, which, as I have said, had in my view no bearing on the liability to discovery in a suit proposed to be brought against a third party. Bray on Discovery⁶ says (of the old chancery practice, with which the present action is said to be on all fours):

'A party might file a bill of discovery before he commenced his action, where he required discovery in order to ascertain what form of action to bring ... or in order to ascertain the proper person against whom to bring the action ...'

and he cites, inter alia, *Orr v Diaper*², *Angel v Angel*⁷, and *Moodalay v Morton*⁸. Story J, in his Commentaries on Equity Jurisprudence, says⁹:

'... in general, it was necessary, in order to maintain a bill of discovery, that an action should be already commenced in another court, to which it should be auxiliary. There were exceptions to this rule, as where the object of discovery was to ascertain who was the proper party against whom the suit should be brought.'

After citing, among other cases, *Moodalay v Morton*⁸, the learned editor of this edition goes on to explain the effect on that exception of the Judicature Act 1873, as exemplified by *Orr v Diaper*². The first edition of this work was published in 1836, and Snell, whose first edition is dated 1868, appears to adopt Story freely: his account is very similar.

1 (1876) 4 Ch D 92

2 (1876) 25 WR 23, 4 Ch D 92

3 (1871) LR 12 Eq 140; on appeal (1871) 7 Ch App 130

4 (1887) 11 NE 540

5 (1864) 34 Beav 157

6 Principles and Practice of Discovery (1885), p 612

7 (1822) 1 LJOSch 6

8 (1785) 1 Bro CC 469

9 2nd English Edn (1892), pp 1011, 1012, para 1483

a In another jurisdiction a similar principle has been applied. In *Colonial Government v Tatham*¹, while the familiar relationship of agency could perhaps have been said to make the defendants liable in discovery, the basis is put much more broadly, first by Bale CJ and Finnemore J. After quoting *Orr v Diaper*² they say³:

b 'Before granting such an application we must be satisfied that the applicant believes that he has a *bona fide* claim against some person or persons whose names he seeks to discover, and whose name can be supplied by the respondent, and that he has no other appropriate remedy. We are satisfied upon these points.'

Agency does not seem to have been founded on. Beaumont AJ refers to the passages in *Story*⁴ to which I have adverted, and says⁵:

c 'The principle which underlies the jurisdiction which the law gives to Courts of Equity in cases of this nature, is that where discovery is absolutely necessary in order to enable a party to proceed with a *bona fide* claim, it is the duty of the Court to assist with the administration of justice by granting an order for discovery, unless some well-founded objection exists against the exercise of such jurisdiction.'

d I observe that here the duty is said to lie rather on the court to make an order necessary to the administration of justice than on the respondent to satisfy some right existing in the plaintiff. In *Hart v Stone*⁶ de Villiers CJ had cited Voet as authority for saying that 'the Judges had very large powers of ordering a disclosure of facts where justice would be defeated without such a disclosure'. And in another civil law system, though the example is rather on the margin of relevance, Erskine, in his *Institute*⁷, after pointing out that Scots law had borrowed from Rome the doctrine that the heir is entitled, on succeeding, to deliberate whether his *haereditas* is to be *damnosa* or *lucrosa* (for he will be liable unless he renounce the succession, for his ancestor's debts), says that the heir has⁸—

e 'a privilege to pursue for exhibition *ad deliberandum*, against all possessors or havers, of writings, whether granted in favour of the ancestor . . . or by him in favour of others . . .'

f here is no suggestion that in so doing he is pretending to exercise any right of relief against the discoverers.

In my opinion, accordingly, the respondents, in consequence of the relationship in which they stand, arising out of their statutory functions, to the appellants and their rights of property, can properly be ordered by the court to disclose to the appellants the names of persons whom the appellants *bona fide* believe to be infringing these rights, this being their only practicable source of information as to whom they should sue, subject to any special right of exception which the respondents may qualify in respect of their position as a department of state. It has to be conceded that there is no direct precedent for the granting of such an application in the precise circumstances of this case, but such an exercise of the power of the court seems to be well within broad principles authoritatively laid down. That exercise will always be subject to judicial discretion, and it may well be that the reason for the limitation in practice on what may be a wider power to order discovery, to any case in which the defendant has been 'mixed up with the transaction', to use Lord Romilly MR's⁹ words, or 'stands in some relation' to the plaintiff or his property, within the meaning of the decision in *Post*¹⁰, is that that is the way in which judicial discretion ought to be exercised.

1 (1902) 23 NLR 153

2 (1876) 25 WR 23, 4 Ch D 92

3 (1902) 23 NLR at 157, 158

4 2nd Edn (1892), p 1011

5 (1902) 23 NLR at 159

6 (1883) 1 Buch AC 309 at 314

7 Book III, title VIII, paras 54, 55

8 Book III, title VIII, para 56

9 In *Upmann v Elkan* (1871) LR 12 Eq 140

10 (1887) 11 NE 540

I will now turn to an aspect of that public policy which, exceptionally, protects from disclosure, either by discovery or testimony, communications which public policy decrees shall be held confidential. The commonest example arises from the relationship between attorney and client. The aspect relied on by the respondents in the present appeal is that usually but not very happily called 'Crown privilege'.

The respondents base their claim to refuse discovery on two broad grounds. First, they say they are not permitted by law to disclose matters which they have acquired in the course of the exercise of their statutory functions and have no statutory authority to disclose. They found on s 3 of the Finance Act 1967, as authorising limited disclosure, and impliedly by therefore forbidding wider disclosure. But we are here considering the power of the court to make an order. *Rowell v Pratt*¹ provides an instance of a statute which authorises the gathering of information, and also limits disclosure of it so as to prevent the court from exercising such a power. This is not such a case. It was conceded that, for example, the information here called for would in practice be disclosed by the respondents on their own responsibility if that course were shown to be necessary for the prosecution of, or the defence in, criminal proceedings of a grave character, other than customs prosecutions. If that be so, the court must, in my opinion, be entitled to call for the same sort of information in order to make possible the prevention of a civil wrong.

The other objections were, if I may say so, of a rather stereotyped and unconvincing character. It was said that disclosure of names would, as it were, drive future infringements underground, giving rise to falsehoods, frauds, forgeries and circumventions, so that, as experience in the United States of America has shown, the last state of matters would be worse than the first. Even if this plea involved no element of exaggeration, I would not favour refusing to stop one glaring fraud lest another be substituted for it. Lastly came the 'candour' point—that if the persons now under statutory obligation to make disclosure to customs in the course of their business come to appreciate that, in certain circumstances, the names of importers may have to be disclosed to the court, the good relations which now exist between them and the respondents would be endangered, and they might not give the information required by statute with their customary candour. Some such argument is generally accepted as convincing when the confidential relationship between the taxpayer and the Inland Revenue is in question. The information here sought is, however, to be found in documents very different from income tax returns. It exists in bills of lading, ships' manifests, masters' 'reports', and the records of the keepers of transit sheds, quite apart from 'entries' made by importers. This is not a conclusive factor, but it is in my opinion an important factor which the court should take into account in exercising its judgment whether public policy demands that this information be treated, exceptionally, as confidential and immune from disclosure on an order of the court. In my opinion, public policy does not so demand.

I agree with the judgment of Graham J², and would accordingly allow this appeal. I also agree with the order as to costs proposed by my noble and learned friend on the Woolsack.

Appeal allowed. Cause remitted to the Chancery Division with a direction to order that the respondents do set forth and disclose to the appellants in the case of the last importation referred to in para 2 of the amended particulars of breaches served by the appellants in action 1969 N 230, and in the case of each importation referred to in para 2 of the particulars of infringements served by the appellants in action 1970 N 1809, the name and address of any person appearing from the customs entry in respect of such importation to be an importer.

Solicitors: Allen & Overy (for the appellants); Solicitor, Customs and Excise.

S A Hatteea Esq Barrister.

¹ [1937] 3 All ER 660, [1938] AC 101

² [1972] 1 All ER 972, [1972] Ch 566

Wilover Nominees Ltd v Inland Revenue Commissioners

CHANCERY DIVISION

GOULDING J

6th, 7th JUNE 1973

Surtax – Settlement – Revocable settlements – Information – Power of commissioners by notice to require information – Power to require such information as commissioners think necessary for specified purposes – Burden on taxpayer of proving that commissioners do not think information necessary – Premature requirement of information – Notice requiring information which could not be necessary for specified purposes in light of other information given by taxpayer in response to same notice – Validity of notice – Income and Corporation Taxes Act 1970, s 453.

In the course of a protracted correspondence the Revenue learnt that the plaintiff company claimed itself to be a trustee of a declaration of trust stated to have been made by one Marita Seigal. On 8th January 1971 the inspector of taxes required the plaintiff company to send him a copy of that instrument. Further correspondence followed and on 15th August 1972 the Inland Revenue Commissioners served on the plaintiff company a notice, pursuant to s 453^a of the Income and Corporation Taxes Act 1970, requiring the plaintiff company to furnish to them on or before 27th September 1972 the following particulars: 'i. The full terms of the Marita Seigal Declaration of Trust of which the company is trustee, including a copy of the said Declaration if and so far as it was made in writing. ii. The address (or last known address) of Marita Seigal. iii. The name and address (or last known address) of every person who has provided any assets (including any interest under any other trust) to be held on the trusts of the said Declaration, giving in each case details of the assets so provided. iv. So far as not disclosed under iii. above, details of all acquisitions and disposals of assets (including any interest under any other trust) by the company as trustee of the said Declaration. v. A copy of all Board minutes of the company relating to the company's appointment as, or to anything done by the company as, trustee of the said Declaration.' By a letter dated 12th September 1972, the plaintiff company gave the commissioners the particulars required under paras i, ii and iii of the notice, but declined to give the further particulars specified in paras iv and v of the notice on the ground that they were not necessary for the purposes of any of the provisions of the Income and Corporation Taxes Act 1970, Part XVI, Chapter III (ss 445-456). The plaintiff company thereupon issued a writ claiming a declaration that it was under no obligation to furnish the particulars demanded by paras iv and v of the notice. At the trial of the action, it was contended for the plaintiff company (a) that the particulars required under paras iv and v of the notice were at best premature since the answers to paras i, ii and iii of the notice might well have shown that Chapter III of Part XVI of the 1970 Act could not possibly apply and (b) that on any view of the facts and of the scope of that Chapter the particulars required under paras iv and v were far too wide, oppressive and fishing.

Held – The plaintiff company was not entitled to the declaration sought for the following reasons—

(i) The power conferred by s 453 of the 1970 Act was intended by Parliament to

^a Section 453 is set out at p 979 e f, post

be effectively exercised for practical objects. Since on the evidence it was clear that there could be unjustifiable delay in the collection of tax if the court required the commissioners to proceed gradatim, the commissioners were justified in giving a comprehensive notice in a single document (see p 982 f and g, post). a

(ii) By providing that the commissioners might require such particulars 'as they think necessary' Parliament had conferred on them a very wide discretion, with the result that a taxpayer could not refuse the particulars demanded by the commissioners pursuant to s 453 unless he could establish on a balance of probabilities that the commissioners did not in fact think that such particulars were necessary for the purposes of Chapter III; the word 'think' in the context of s 453 meant forming an opinion in the exercise of a proper legal discretion. The plaintiff company had failed to establish that the commissioners had exceeded their powers in forming the opinion that the particulars required under paras iv and v of the notice were necessary for the purposes of Chapter III of Part XVI of the 1970 Act. Furthermore, although the particulars required appeared very wide, it was not possible to restrict them without omitting anything that on a reasonable view might be necessary for a full examination of the plaintiff company's position in relation to all the provisions of Chapter III of Part XVI of the Act. Consequently the presumption that statutory duties had been duly and properly performed prevailed despite the language of the notice coupled with the commissioners' unwillingness to adduce affirmative evidence of their opinion (see p 979 h, p 980 a b and p 983 a to c, post); *Clinch v Inland Revenue Comrs* [1973] 1 All ER 977 applied. b
c
d

Notes

For the power of the Commissioners of Inland Revenue to require information in relation to revocable settlements, see 20 Halsbury's Laws (3rd Edn) 580, para 1130. e

For the Income and Corporation Taxes Act 1970, s 453, see 33 Halsbury's Statutes (3rd Edn) 583.

Cases referred to in judgment

Associated Provincial Picture Houses Ltd v Wednesbury Corp'n [1947] 2 All ER 680, [1948] 1 KB 223, [1948] LJLR 190, 177 LT 641, 112 JP 55, 45 LGR 635, CA, 45 Digest (Repl) 215, 189. f

Clinch v Inland Revenue Comrs [1973] 1 All ER 977, [1973] 2 WLR 862, [1973] STC 155.

Fawcett Properties Ltd v Buckinghamshire County Council [1959] 2 All ER 321, [1959] Ch 543, [1959] 2 WLR 884, 123 JP 322, 57 LGR 285, 10 P & CR 240, CA; *aff'd* [1960] 3 All ER 503, [1961] AC 636, [1960] 3 WLR 831, 125 JP 8, 59 LGR 69, 12 P & CR 1, HL, 45 Digest (Repl) 342, 60. g

Secretary of State for Employment v Associated Society of Locomotive Engineers and Firemen (No 2) [1972] 2 All ER 949, [1972] 2 QB 455, [1972] 2 WLR 1370, [1972] ICR 19, 13 KIR 1, NIRC and CA.

Action

By a writ issued on 12th October 1972, the plaintiff company, Wilover Nominees Ltd, brought an action against the defendants, the Inland Revenue Commissioners, seeking a declaration that the plaintiff company was under no obligation to furnish to the commissioners particulars specified in paras iv and v of a notice¹ served on the plaintiff company by the commissioners in the exercise of their powers under s 453 of the Income and Corporation Taxes Act 1970, on the ground, inter alia, that they were unnecessary for the purposes of Chapter III (ss 445-456) of Part XVI of that Act. By their defence, the commissioners denied that the particulars specified in paras iv and v were unnecessary for the purposes of Chapter III of Part XVI of the 1970 Act and counterclaimed 'A declaration that the Plaintiff has failed to comply h
i

¹ See p 981 c to f, post

a with so much of the . . . notice as required the Plaintiff to furnish to the [commissioners] the particulars specified in paragraphs (iv) and (v) . . . of the . . . notice' and a penalty of £50. The facts are set out in the judgment.

*B L Bathurst QC, J H R Newey QC and Michael Miller for the plaintiff company.
Patrick Medd QC and P L Gibson for the commissioners.*

b **GOULDING J.** For more than 50 years past taxpayers in the United Kingdom have been accustomed to enter into settlements, dispositions, trusts, covenants, agreements and arrangements with a view to minimising their liability to taxation. Such transactions are in general perfectly lawful. They are also in general artificial in the sense that they would not have been entered into except with the hope of reducing liability to taxation. In order to check the diminution of public revenues
c by reason of the execution of such settlements, dispositions, trusts, covenants, agreements and arrangements, Parliament has repeatedly enacted special provisions to counteract their effect. Some of the provisions in force as regards income tax, including surtax, are now contained in Chapter III of Part XVI of the Income and Corporation Taxes Act 1970 (ss 445-456). That Chapter contains provisions which are elaborate and complex. There is often room for legitimate argument whether
d particular provisions of the Chapter catch a particular transaction or not. It is only possible to form a proper view on such a question in the light of full information. Accordingly, the Chapter contains a provision enabling the Inland Revenue Commissioners to demand information of the taxpayer or potential taxpayer. That is s 453 of the Act, which is in these terms:

e 'The Board or, for the purpose of charging tax at the standard rate, an inspector may by notice in writing require any person, being a party to a settlement, to furnish them within such time as they may direct (not being less than twenty-eight days) with such particulars as they think necessary for the purposes of any of the provisions of this Chapter.'

I should add that in that section the word 'settlement' by statutory definition includes any disposition, trust, covenant, agreement or arrangement.

f The phrase in s 453 'as they think necessary' does not require the commissioners to meet and form a personal opinion on each particular case. By virtue of s 4A of the Inland Revenue Regulation Act 1890, as amended¹, the functions conferred on the commissioners may be delegated to their officers. In the present case the commissioners say that they acted through Mr R F Bailey, an assistant secretary to the commissioners, and accordingly it is his thinking which is material in relation to
g s 453 of the 1970 Act.

I say at once that in my judgment Parliament clearly intended by s 453 to leave a very wide discretion to the commissioners. If Parliament had wished otherwise it would have been easy to say that the particulars which may be demanded are those that are necessary for the purposes of Chapter III or those that may reasonably be required for the purposes of Chapter III. But, on the contrary, Parliament has
h said that the commissioners may exact such particulars as *they think* necessary for the statutory purposes.

It is, of course, possible that when the commissioners say that they think certain particulars are necessary, they are not telling the truth. That might happen in various possible ways. The commissioners might act in bad faith and say that they thought certain particulars were necessary for the purposes of Chapter III when
i they truly and consciously thought they were unnecessary. Or they might be honest but careless and express their view as to what is necessary without having given their minds to the matter at all. Or again, either from bad faith or from muddled thinking, the commissioners might say they thought certain particulars necessary for the purposes of Chapter III when they really wanted them for other purposes

x Section 4A was inserted in the 1890 Act by the Finance Act 1969

because they had taken irrelevant and collateral matters into account when forming their opinion. a

The examples that I have given may not be exhaustive, but the taxpayer cannot, in my judgment, refuse particulars demanded by the commissioners in purported pursuance of s 453 unless he can show that the commissioners do not think such particulars necessary for the purposes of the Chapter, the word 'think' being treated as requiring the commissioners to form an opinion in the exercise of a proper legal discretion. Parliament, in my view, deliberately left it to the commissioners and not to the court to judge what disclosure is requisite in each case. b

It seems clear that in such a matter as this the burden of proof as to the reality of the commissioners' thinking is cast on the taxpayer, and secondly that the taxpayer can discharge such a burden either by direct evidence or by proper inference from the circumstances, including the terms of the commissioners' notice itself: see the observations of Lord Greene MR in *Associated Provincial Picture Houses Ltd v Wednesbury Corpn*¹ and those of Pearce LJ in *Fawcett Properties Ltd v Buckinghamshire County Council*². Moreover, it is enacted by s 24 (4) of the Inland Revenue Regulation Act 1890, as amended, that: c

'Any notice or other document purporting to be issued in exercise of any function conferred on the Commissioners shall, until the contrary is proved, be deemed to be so issued.' d

I shall not examine further the burden of proof to be discharged by the taxpayer, for it has recently been fully discussed by Ackner J in *Clinch v Inland Revenue Comrs*³. That decision related to s 481 of the Income and Corporation Taxes Act 1970, which bears a close analogy to s 453. I would only add two observations of my own to Ackner J's reported judgment. First, it seems to me that in the nature of the case it must generally be more difficult for the court to set aside a public officer's assertion that he thinks certain information necessary for the performance of a statutory duty than to interfere with a condition attached to a licence given in the discretion of a public authority, as in the two decisions I have cited of *Associated Provincial Picture Houses Ltd v Wednesbury Corpn*⁴ and *Fawcett Properties Ltd v Buckinghamshire County Council*⁵. The former matter, that is the opinion as to what information is necessary, is generally less susceptible of objective criticism than the latter. It seems to me more akin to the question of the Minister's opinion recently discussed by Buckley LJ in *Secretary of State for Employment v Associated Society of Locomotive Engineers and Firemen (No 2)*⁶. e

Secondly, I would refer to one of Ackner J's remarks in his reported judgment⁷. Having discussed the proper scope of s 481, Ackner J continued⁸: f

'Accordingly, if the particulars sought went substantially beyond that which was required for this purpose, so that they could be properly described as unduly oppressive or burdensome, I have no doubt that a court would be entitled to intervene, and declare that notice invalid. One of the vital functions of the courts is to protect the individual from any abuse of power by the executive, a function which nowadays grows more and more important as governmental interference increases.' g

1 [1947] 2 All ER 680 at 682, [1948] 1 KB 223 at 228

2 [1959] 2 All ER 321 at 333, 334, [1959] Ch 543 at 575

3 [1973] 1 All ER 977, [1973] 2 WLR 862, [1973] STC 155 j

4 [1947] 2 All ER 680, [1948] 1 KB 223

5 [1959] 2 All ER 321, [1959] Ch 543; *aff'd* HL [1960] 3 All ER 503, [1961] AC 636

6 [1972] 2 All ER 949 at 970, 971, [1972] 2 QB 455 at 496, 497

7 *Clinch v Inland Revenue Comrs* [1973] 1 All ER 977, [1973] 2 WLR 862, [1973] STC 155

8 [1973] 1 All ER at 989, [1973] 2 WLR at 873, 874, [1973] STC at 167

a I agree with every word of that; but in my view it is an equally vital function of the court, as indeed is shown by Ackner J's own decision in the case that I have cited, to ensure that the officers of the Revenue are able to exercise the full powers (though nothing more than the full powers) with which Parliament has armed them for the performance of their difficult and often thankless duty under the law.

b I need not recite the facts in the present case at length, for no viva voce evidence was given and the agreed documents speak for themselves. In the course of protracted correspondence regarding the affairs of the plaintiff company, the Revenue learned that it claimed to be the trustee of a declaration of trust stated to have been made by one Marita Seigal. The inspector of taxes first asked, I think, for a copy of that instrument on 8th January 1971.

c After further correspondence, a notice was served on the plaintiff company on 15th August 1972. That is the notice which is challenged in the present proceedings. It is addressed to the secretary to the plaintiff company. It bears the cross-heading 'Notice under section 453 of the Income and Corporation Taxes Act 1970'. It continues as follows:

d 'The Commissioners of Inland Revenue in exercise of their powers under section 453 of the Income and Corporation Taxes Act 1970 hereby require [the plaintiff company] (hereinafter called "the company") to furnish to them on or before Wednesday, 27 September 1972 at the address given above the following particulars:—i. The full terms of the Marita Seigal Declaration of Trust of which the company is trustee, including a copy of the said Declaration if and so far as it was made in writing. ii. The address (or last known address) of Marita Seigal. iii. The name and address (or last known address) of every e person who has provided any assets (including any interest under any other trust) to be held on the trusts of the said Declaration, giving in each case details of the assets so provided. iv. So far as not disclosed under iii. above, details of all acquisitions and disposals of assets (including any interest under any other trust) by the company as trustee of the said Declaration. v. A copy of all Board f minutes of the company relating to the company's appointment as, or to anything done by the company as, trustee of the said Declaration.'

The notice was signed by Mr Bailey, to whose position I have already referred.

On 12th September 1972 the solicitors acting for the plaintiff company answered the notice. After referring to that document, they continued:

g 'We enclose a copy of the Declaration of Trust referred to, from which you will learn also Marita Seigal's address. No other person has, we are instructed, provided any assets to be held on the trusts of the Declaration of Trust and the assets so provided by Marita Seigal consist of the property settled by the Declaration of Trust. We are further instructed that no sums have been paid by the Trustees to Marita Seigal in any year of assessment, so that s. 451 of the Act you rely on has no application. From your perusal of the Declaration of Trust h you will see that its terms are not such as to attract the operation of s. 445, 446, 447 or 448 of the Act. We understand that Mrs. Seigal did not claim any sum settled by her as a deduction in computing her total income. Accordingly s. 450 has no application. It follows that there can be no question of the application of Chapter III of Part XVI of the Act to this Declaration of Trust. In the circumstances we are advising [the plaintiff company] to decline to give any further information under paragraphs iv and v of your letter, and look forward to j hearing from you at your earliest convenience that those paragraphs need not be answered.'

Mr Bailey, for the commissioners, replied on 27th September, and after acknowledging the solicitors' letter of 12th September, said:

'The Commissioners cannot accept that the advice referred to in your final paragraph is justified and must ask you to inform [the plaintiff company] that answers to paragraphs (iv) and (v) of the notice of 15th August are still required. The Declaration of Trust enclosed with your letter is on its face merely part of a larger arrangement which may itself be a "settlement" within the definition in section 454 (3), to which one or more of the provisions of Part XVI, Chapter III of the Income and Corporation Taxes Act 1970 applies.'

To that the solicitors rejoined on 12th October 1972:

'We agree that the Declaration of Trust we have sent you was "on its face merely part of a larger arrangement" as you state in one of your letters of 27th September. We are however instructed that Mrs. Seigal was the settlor in respect of the Settlement referred to in paragraph (A) of the Declaration of Trust [I interpose to say that that was a settlement intended to be executed on the same date as the Declaration of Trust], and was the only person who provided any assets to be held on the trusts of that Settlement, and of the wider "arrangement" constituted by the Settlement and Declaration of Trust taken together. We are therefore convinced that there can be no question of the application of Chapter III of Part XVI of [the Income and Corporation Taxes Act 1970] to the Declaration of Trust, and have advised [the plaintiff company] that questions iv and v raised in your letter of 15th August cannot be supposed to be necessary for any of the purposes mentioned in Section 453. Further, the questions are oppressive.'

The present action followed, in which the plaintiff company claims a declaration that it is under no obligation to furnish the particulars demanded by paras iv and v of the statutory notice.

Counsel for the plaintiff company makes two principal submissions. First he says that questions iv and v in the notice were at best premature, since the answers to questions i, ii and iii might well have shown that Chapter III of Part XVI of the 1970 Act could not possibly be applicable. I reject that argument. Section 453 contains a power conferred by Parliament and intended to be effectively exercised for practical objects. The correspondence which preceded the service of the notice showed in my judgment that the plaintiff company or its advisers were either obstructive or grossly dilatory. It would impose unjustifiable delay in the collection of tax if the court required the commissioners in such circumstances to proceed gradatim. In my judgment they were well justified in giving a comprehensive notice in a single document on 15th August 1972.

Secondly, counsel for the plaintiff company says, that, on any view of the facts and of the scope of Chapter III, questions iv and v are far too wide; they are fishing, oppressive and, in his own words, quite preposterous. It is here that I hesitate. The two questions certainly look very wide, and it is difficult to see with any confidence that in totality they are necessary for the purposes of Chapter III. On the other hand, the commissioners are concerned to investigate not only the settlement effected by the declaration of trust but any wider arrangement of which it may be part. I cannot accept counsel's argument in opening, somewhat qualified in reply, that inspection of the written declaration of trust is of itself conclusive that Chapter III is inapplicable.

I know from experience at the Bar and from reading reported cases how protean in form and cimmerian in obscurity tax saving arrangements can be; and I have asked myself in vain how I could restrict questions iv and v to confine their great extension without omitting anything that on a reasonable view might be necessary for a full examination of the position in relation to all the provisions of Chapter III.

The matter to my mind stands thus: if Mr Bailey had given evidence and had told me that from his experience in the public service he thought that questions

iv and v were at the date of the notice necessary for the purposes of Chapter III, I should have been very ready to accept his assurance. And I cannot help asking myself why that assurance is not forthcoming.

Again, if I had to apply a criminal standard of proof, I certainly could not say I felt sure that the commissioners had exceeded their statutory powers. But that is not, in my judgment, the right test. I have to decide the case on the civil standard of the balance of probabilities. In the one scale are my misgivings arising from the language of the notice itself, reinforced by the commissioners' unwillingness to adduce affirmative evidence of their opinion. In the other scale is the clearly established presumption that statutory duties are duly and properly performed. In my judgment the presumption is weightier than my misgivings, and I therefore dismiss the action.

It is not to be inferred from my decision that the questionnaire employed in the present case can properly be administered to the parties to every settlement, disposition, trust, covenant, agreement or arrangement or to the parties to any particular class of such transactions. The Commissioners of Inland Revenue have, in my view, to consider what is necessary in the circumstances of each particular case for the purposes of Chapter III of Part XVI of the 1970 Act and to frame their notice accordingly.

Declaration sought by plaintiff company refused. Declaration that the plaintiff company had failed to comply with the notice. Plaintiff company to pay penalty of £5 for failing to give particulars under paras iv and v of the notice.

Solicitors: George & William Webb (for the plaintiff company); Solicitor of Inland Revenue.

Rengan Krishnan Esq Barrister.

Practice Direction

FAMILY DIVISION

Divorce – Adultery – Proof – Undefended cases – Procedure.

1. In undefended proceedings for divorce in which it is alleged that the respondent had committed adultery a statement in writing signed by the respondent admitting the adultery can be put in at the hearing, the respondent's signature being identified by the petitioner: see the Civil Evidence Act 1968, s 9 (1) and (2)¹. Where this is done it should normally be unnecessary either to call as a witness, or to put in affidavit evidence from, an enquiry agent or other person who merely took the statement from the respondent.

2. An admission of adultery by the respondent is not evidence against a co-respondent, but a statement by the latter admitting adultery is admissible as evidence against him if its authenticity is established. This applies also to a respondent other than the respondent spouse.

3. Where for some special reason the evidence of an enquiry agent is necessary in an undefended cause it should normally be given on affidavit. Leave to give such evidence on affidavit may be sought from the judge at the hearing without any prior application to the registrar for such leave.

Issued by the President with the concurrence of the Lord Chancellor.

D NEWTON

Senior Registrar

26th June 1973

L Lucas Ltd and another v Export Credits Guarantee Department ^a

COURT OF APPEAL, CIVIL DIVISION
DAVIES, MEGAW LJJ AND SIR GORDON WILLMER
6th, 7th MARCH, 4th APRIL 1973 ^b

Insurance – Indemnity – Loss – Recovery – Right of insurer to sums recovered – Relevance of principle of subrogation – Express terms of policy – Insurers entitled to 90 per cent to sums recovered ‘in respect of a loss to which [policy] applies’ – Insurance relating to export contract between merchant and foreign buyer – Risks covered including delay in payment by foreign buyer – Insurers undertaking to pay 90 per cent of loss – Amount of loss – Payment under contract in foreign currency – Rate of exchange – Loss to be calculated according to rate of exchange at date of export – Delay in payment caused by exchange control restrictions imposed by buyer’s country – Payment by insurers in respect of loss – Subsequent payment by buyers – Sterling proceeds of payment exceeding loss calculated under policy because of devaluation of sterling – Whether insurers entitled to recover sum in excess of amount paid in respect of loss. ^c

Insurance – Policy – Construction – Subrogation – Express terms of policy – Right of insurers to sums recovered in respect of loss – Principle of subrogation – Principle to be applied only when doubt or ambiguity as to express terms of policy. ^d

The guarantors issued a policy of insurance, described as a ‘guarantee’, to a company (‘the merchant’) in respect of contracts which the merchant was minded to make with a buyer in the United Arab Republic. Those contracts included a contract for the sale of flour to be exported from the United Kingdom for which the price was payable in US dollars. One of the risks covered by the policy was prevention of or delay in the transfer of payment from the buyer’s country in circumstances outside the control of both the merchant and the buyer. The guarantors undertook to pay 90 per cent of ‘the loss’, which was defined in cl 9 of the policy as being the gross invoice value of the goods the subject of the contract of sale, delivered and accepted by the buyer. Under the terms of the endorsement of the policy, where the currency of payment was other than in sterling, the amount of the loss was to be calculated in sterling by converting the foreign currency into sterling at the buying rate of exchange in the London foreign exchange market on the date when the goods were exported under the contract of sale. By cl 17 of the policy: ‘Any sums recovered by the Merchant or the Guarantors in respect of a loss to which this Guarantee applies, after the date at which the loss is ascertained, whether from the buyer or any other source shall . . . (ii) . . . be divided between the Guarantors and the Merchant in the proportions of 90 and 10 . . .’ While the policy was in force, exchange control restrictions were imposed by the United Arab Republic which delayed the transfer of payment due by the buyer to the merchant for the goods which had been exported under the contract of sale. The payment due was US \$1,155,181.26. On 17th March 1966 the merchant made a claim under the policy in respect of the delay in payment. On 31st August the guarantors made a payment of £372,071 6s 10d, i.e. 90 per cent of £413,412 12s 10d, which was the sterling equivalent of \$1,155,181.26 converted at the current rate of exchange which was approximately \$2.80 to the £ and which had remained unchanged between the date of export and the date of ascertainment of the amount of the loss. Subsequently the currency restrictions of the United Arab Republic ceased to be operative and payments were thereafter received by the merchant. Before the final payment had been received the rate of exchange had been altered to approximately \$2.40 to the £. In consequence the total sum received by the merchant as payment, when converted into sterling, ^e
^f
^g
^h
ⁱ

a amounted to £443,032 8s 1d. The merchant contended that its liability to the guarantors in respect of the sum recovered was limited to £372,071 6s 10d, i.e. the amount in sterling which the guarantors had actually paid in respect of the loss, and that any excess of sterling above that figure received by the merchant in consequence of the new rates of exchange belonged to the merchant. Cooke J accepted that contention, holding that the correct approach was to consider first what was the general law of insurance in relation to the principle of subrogation and then to construe the policy in the light of that principle; he held that, on the general law of subrogation, the guarantors would not be entitled to recover out of the proceeds of sale more than they had actually paid to the merchant under the policy and that there was nothing in the express terms of the policy which led to a different result. The guarantors appealed.

c **Held** – The appeal would be allowed for the following reasons—

(i) The correct approach to the question was to consider the policy of insurance by reference to its terms and only if there still emerged some real doubt or ambiguity in the construction of the policy was it right to invoke the general principles of subrogation as a guide or controlling authority (see p 989 b, p 991 d to f and p 993 a, post).

d (ii) The sterling proceeds of the dollar payments were properly to be regarded as sums which had been ‘recovered by the Merchant . . . in respect of a loss to which this Guarantee applies’, within cl 17 of the policy, for those proceeds could not have been recovered in respect of anything different from that in respect of which the dollars had been recovered, i.e. the loss to which the policy applied. There was no reason for treating a part of the sterling proceeds as not having been ‘recovered’, or as not having been ‘recovered . . . in respect of a loss to which this Guarantee applies’ merely because the sterling proceeds of the recovered dollars, as a result of the subsequent change in the rate of exchange, exceeded the ‘amount of the loss’ as computed under cl 9 by reference to a provision which had no application to cl 17. It followed therefore that there was no doubt or ambiguity in the terms of the policy; under those terms the guarantors were entitled to be paid by the merchant 90 per cent of the total sterling proceeds, i.e. £398,729 3s 3d (see p 989 j to p 990 d, p 991 c g and h and p 992 a to c and e h to p 993 a, post).

f *Castellain v Preston* [1881-85] All ER Rep 493, *Yorkshire Insurance Co Ltd v Nisbet Shipping Co Ltd* [1961] 2 All ER 487 considered.

Notes

g For export credit guarantee insurance, see 22 Halsbury’s Laws (3rd Edn) 399, para 815. For the rights of subrogation in contract, see 22 Halsbury’s Laws (3rd Edn) 262, para 515, and for cases on the subject, see 29 Digest (Repl) 339-341, 2580-2592.

For subrogation generally in relation to contracts of insurance, see 22 Halsbury’s Laws (3rd Edn) 260, 261, paras 512, 513, and for cases on the subject, see 29 Digest (Repl) 337-339, 2564-2579.

h Cases referred to in judgments

Castellain v Preston (1883) 11 QBD 380, [1881-85] All ER Rep 493, 52 LJQB 366, 49 LT 29, CA, 29 Digest (Repl) 451, 3298.

United Railways of Havana and Regla Warehouses Ltd, Re [1960] 2 All ER 332, [1961] AC 1007, [1960] 2 WLR 969, HL, Digest (Cont Vol A) 231, 862a.

j *Yorkshire Insurance Co Ltd v Nisbet Shipping Co Ltd* [1961] 2 All ER 487, [1962] 2 QB 330, [1961] 2 WLR 1043, [1961] 1 Lloyd’s Rep 479, 29 Digest (Repl) 339, 2583.

Cases and authorities also cited

Burnand v Rodocanachi Sons & Co (1882) 7 App Cas 333, HL.

Compania Colombiana de Seguros v Pacific Steam Navigation Co, Empresa de Telefonos de Bogota v Pacific Steam Navigation Co [1964] 1 All ER 216, [1965] 1 QB 101.

- Cousins (H) & Co Ltd v D & C Carriers Ltd* [1971] 1 All ER 55, [1971] 2 QB 230, CA. a
Glen Line Ltd v Attorney-General (1930) 36 Com Cas 1, HL.
Miller, Gibb & Co Ltd, Re [1957] 2 All ER 266, [1957] 1 WLR 703.
North of England Iron Steamship Insurance Association v Armstrong (1870) LR 5 QB 244, [1861-73] All ER Rep 286.
 Arnould, *The Law of Marine Insurance and Average* (15th Edn, 1961), vol 2 (10 British Shipping Laws), p 1194. b
 22 Halsbury's Laws (3rd Edn) 265, 398, 399, paras 522, 813, 815.

Appeal

By an originating summons dated 26th March 1971 the plaintiffs, L Lucas Ltd and Lamet Trading Ltd, sought the determination of the court on the question whether the first plaintiff was obliged to pay the sum of £26,651.57 claimed by the defendants, Export Credits Guarantee Department, which at the relevant dates was part of the Board of Trade, as a sum recovered in respect of a loss paid by the defendants under a policy of insurance dated 15th April 1964. On 23rd June 1972 Cooke J determined the question in the plaintiffs' favour and the defendants appealed. The facts are set out in the judgment of Megaw LJ. c

Andrew J Bateson QC and Brian Davenport for the defendants. d
R A MacCrimdale QC and Stewart Boyd for the plaintiffs.

Cur adv vult

4th April. **MEGAW LJ** read the first judgment at the request of Davies LJ. This is an appeal by Export Credits Guarantee Department against a judgment of Cooke J delivered on 23rd June 1972, in which he decided in favour of L Lucas Ltd and Lamet Trading Ltd, who were the plaintiffs in an originating summons issued on 26th March 1971. e

The Export Credits Guarantee Department ('ECGD') was at the relevant dates a part of the Board of Trade. Its function is to assist exporters from the United Kingdom by providing, for an appropriate premium, insurance against certain types of financial risk arising in export contracts, whether from the insolvency of a foreign buyer or from certain other causes such as the introduction by foreign countries of exchange control restrictions. f

By a policy dated 15th April 1964, with an endorsement and schedule dated 27th November 1964 (the policy being described in its opening words as a 'Guarantee'), the Board of Trade through ECGD covered defined risks of the plaintiffs, L Lucas Ltd and Lamet Trading Ltd, in respect of contracts for the sale of goods which they were minded to make with buyers in the United Arab Republic. Those contracts consisted of (or included, it matters not which) a contract for the sale of flour, to be exported from the United Kingdom, for which the price was payable in United States dollars. Apparently it was the first plaintiff, L Lucas Ltd, which was concerned with the relevant contract. Lamet Trading Ltd were presumably joined as plaintiffs solely for the technical reason that the policy was issued to them jointly with Lucas; but Lamet were not parties to the sale contract which gives rise to the relevant loss. There were various extensions of time and other amendments to the policy which are not relevant for present purposes. g

By the policy ECGD is described as 'the guarantors'. The exporters, Lucas and Lamet, are described as 'the merchant'. The buyers in the United Arab Republic are called 'the buyer'. I shall use those terms. h

Under cl 1 (ii) of the policy one of the risks covered (the relevant risk for present purposes) was prevention of or delay in the transfer of payment from the buyer's country in circumstances outside the control of both the merchant and the buyer. The amount of loss, by cl 7 of the policy, fell to be ascertained and paid four months after the due date of payment by the buyer. By cl 8 the percentage of any loss which the guarantors undertook to pay, as regards a loss caused by the risk which is here i

a relevant, was 90 per cent. Clause 9 defined 'the amount of loss' as being the gross invoice value of the goods, the subject of the contract of sale, delivered to and accepted by the buyers. This was subject to certain potential deductions which are not relevant in the present case. Under the terms of the endorsement of the policy, where the currency of payment was other than sterling, the amount of loss was to be calculated in sterling by converting the foreign currency into sterling at the buying rate of exchange in the London foreign exchange market on the date when the goods were
b exported under the contract of sale. The schedule accompanying the endorsement declared that the currency payment in this contract of sale was to be United States dollars. I shall come back later to other provisions of the policy, relevant to recoveries after a loss has been paid.

The relevant facts and figures are all agreed between the parties in the agreed statement of facts. Hence it is not necessary to go into much detail with regard to them.
c The issue is an issue of principle, with no controversy on fact or detail.

While the policy was in force, exchange control restrictions were imposed by the United Arab Republic which delayed the transfer of payment due by the buyer to the merchant (Lucas) for goods which the merchant had exported under the contract of sale. The payment due was US \$1,155,181.26. As has already been mentioned, the policy contemplated that payments under the sale contract would be in United
d States dollars. Six drafts, to that total, had been received by the merchant, but they were not paid on maturity because of the restrictions which had by then been imposed.

On 17th March 1966 the merchant 'made a claim under the said policy . . . in respect of the unpaid drafts'. The words in quotation marks are taken from para 7 of the agreed statement of facts. On 31st August 1966 the guarantors made to the merchant
e a payment of £372,071 6s 10d. That figure is 90 per cent of £413,412 12s 10d. £413,412 12s 10d is \$1,155,181.26, converted, as is required by the endorsement for the purposes of calculating the amount of loss under cl 9, at the rate of exchange on the date of export. The rate was approximately \$2.80 to the £. It had remained unchanged between the date of export and the date of ascertainment of the amount of the loss.

The currency restrictions of the United Arab Republic ceased to be operative at
f some date after the guarantors had made their payment of £372,071 6s 10d in respect of the loss. Accordingly payments were thereafter received by the merchant's bankers in respect of all the unpaid drafts, in respect of which the claim has been made and accepted. The first three of these payments were received on 12th May 1967. They totalled \$661,710. At that date the rate of exchange between dollars and sterling was still approximately \$2.80 to the £. Thereafter three further drafts were paid,
g on 20th June 1968, 22nd July 1968, and 23rd July 1968. They totalled, in dollars, \$493,471.26, so that, with the payment of 12th May 1967, the buyer had now made payment to the merchant of the total amount, in dollars, originally unpaid because of currency restrictions: that is \$1,155,181.26. But when these last payments were received the rate of exchange had altered to approximately \$2.40 to the £. That
h alteration had taken place in November 1967. The total sterling sum received by the merchant in respect of the six drafts was £443,032 8s 1d. The amount of the merchant's loss, as calculated in accordance with cl 9 of the policy coupled with the application of the conversion rate stipulated by the endorsement to the policy, was the sum previously mentioned, £413,412 12s 10d. The amount which the guarantors had paid under the policy—the 90 per cent of the loss, as provided by cl 8—was
i £372,071 6s 10d. What, on the true construction of the policy, were the rights of the guarantors and the merchant respectively as to this extra sterling amount which resulted from the devaluation of sterling in the period before the last three drafts were paid? That is the issue in this case.

Clauses 15, 16 and 17 of the policy constitute a section headed 'Prevention and Notice of Loss and Recoveries'. Clause 16 has a sidenote 'Action after Payment of Claim'. The clause places on the merchant, when he has been paid by the guarantors,

the obligation to do what he can to effect recoveries. The clause also gives the guarantors certain rights which they may, if they wish, exercise after they have made payment. They could, amongst other things, have required the merchant to assign his rights to receive moneys under the contract and to assign unpaid drafts. The guarantors did not in fact make any such requirement.

Clause 17, so far as is relevant, reads:

'Any sums recovered by the Merchant or the Guarantors in respect of a loss to which this Guarantee applies, after the date at which the loss is ascertained, whether from the buyer or any other source shall:— ... (ii) ... be divided between the Guarantors and the Merchant in the proportions of 90 and 10; The Merchant shall pay all sums recovered to the Guarantors forthwith upon their being received by him or any person on his behalf, the Merchant hereby acknowledging and declaring that until such payment is made to the Guarantors, he receives and holds such sums in trust for the Guarantors.'

The merchant's contention is that its liability to the guarantors is £372,071 6s 10d, being the amount in sterling which the guarantors actually paid in respect of the loss. The guarantors, they say, have no valid claim to any more. Any excess of sterling above that figure, derived from the conversion of the proceeds of some of the drafts from the dollars in which they were received by the merchant, into sterling at the new rates of exchange, belongs to the merchant. Once the guarantors have received in sterling the full amount of their sterling payment to the merchant ('the amount of loss' as defined in cl 9), they are not entitled to any more. The guarantors, on the other hand, say that, on the terms of the policy, the whole of the amount received, as mentioned above, totalling in sterling £443,032 8s 1d, falls be divided between the guarantors and the merchant in the proportions of 90 to 10.

It has been suggested in argument that considerations as to the fairness or unfairness of the financial consequences of the respective contentions may be of some relevance. I see no substance in any such suggestion. It is unnecessary therefore to set out those financial consequences in detail. It is enough to say that the amount at stake, according to which of the two contentions is right, is £26,657 16s 5d. That is the difference between the figure of £398,729 3s 3d which the guarantors say they should receive and keep, and the figure of £372,071 6s 10d which the merchant says is the guarantors' entitlement out of the sterling proceeds of the drafts. There are, in fact, minor adjustments to the figures which are now agreed between the parties, including an adjustment resulting from an agreed division of interest received in respect of delay in the payment of the drafts. These are set out in the agreed statement of facts and they in no way affect the question of principle.

Cooke J accepted the merchant's contention. The guarantors say he was wrong so to do, both in respect to his approach to the decision of a question of construction of the policy and also, whether or not his approach was right, in respect of the decision itself.

The learned judge agreed with the merchant's submission that the correct approach was, in the first instance, to consider what the general law of insurance is in relation to the principle of subrogation, disregarding for the moment any question of the particular terms of the particular policy of insurance: and then to construe this policy in the light of that principle. He arrived at the conclusion, based largely on the judgment of Diplock J in *Yorkshire Insurance Co Ltd v Nisbet Shipping Co Ltd*¹ that, subject to the effect of any express provisions of this particular policy, the guarantors would not, on the general law of subrogation, be entitled to receive back, out of the sterling proceeds of the six drafts, more pounds sterling than the insurers, the guarantors, had actually paid to the merchant under the terms

¹ [1961] 2 All ER 487, [1962] 2 QB 330

a of the policy. He then took into consideration the relevant express terms of the policy, and in particular cl 17, and decided that there was nothing in those terms which led to a different result.

With all respect to the learned judge, I think that that approach was wrong. It is not disputed that in a contract of insurance the parties may introduce express terms which are at variance from, or in conflict with, the ordinary principles of subrogation, whatever they may be. Hence it seems to be that the correct approach is to consider this contract—the policy of insurance, for that is its nature—
b by reference to its terms. If, but only if, there should emerge some real doubt or ambiguity in the construction of the policy, would it be right to invoke the general principles of subrogation as a guide or a controlling authority.

Accordingly, I propose to do as counsel for the guarantors invited us to do: that is, to consider first whether or not this policy on its own express terms provides for the allocation of the moneys here in question and, if so, in what way.

It is, I believe, a long-established principle of English law—whether it is a good principle in modern conditions may be a matter for argument—that a pound is always a pound: so that whatever the exchange rates between the pound and any or all other currencies, and whatever may happen between one date and another to the internal purchasing power of the pound, in the eye of the law a pound today
d is the same as it was yesterday or a year ago or ten years ago. This long-established doctrine is expressed in many decided cases. I quote from Lord Denning's speech in *Re United Railways of Havana and Regla Warehouses Ltd*¹:

'Our courts here must still treat sterling as if it were of the same value as before: for it is the basis on which all our monetary transactions are founded.'

e If it were otherwise, I could see strong ground for the argument that the guarantors were not fully indemnified by receiving in 1968 the same number of pounds as they had paid out in 1966. But as the law stands they must be regarded as having been fully indemnified.

It is also a firmly established principle of English law (though, again, it has been subjected to much criticism of recent years) that if a debt in a foreign currency is
f sued for in an English court the judgment must be in the terms of sterling and the rate of exchange (subject, of course, to express contractual provision to the contrary) is the rate of exchange between sterling and the foreign currency prevailing at the date when the debt became due: see, again, *Re United Railways of Havana and Regla Warehouses Ltd*².

g The policy contains no express provisions for the conversion into sterling of recoveries which may be made in dollars. The provisions of the endorsement which apply to the conversion of a dollar sum for the purposes of ascertaining the amount of the loss have no application, express or implied, to recoveries. I think, nevertheless, that the 'sums' referred to in cl 17 are, strictly, the pounds sterling which are the proceeds of conversion of the dollars in the drafts. If legal proceedings had
h been required to enforce a payment by the merchant to the guarantors, the judgment would have been in terms of sterling, with the conversion rate at the date when the payment was due: that is, immediately on the dollars having been received in this country—\$2.40 to the £. But I do not think it makes any difference for the purposes of cl 17 whether one regards the 'sums' as the dollars or the sterling proceeds.

j The crucial question, to my mind, is: are the sterling proceeds of the drafts—the whole of them—properly to be regarded as sums which have been 'recovered by the Merchant in respect of a loss to which this Guarantee applies'; or, on the other hand, are the sums falling within that description to be limited to that part of the

1 [1960] 2 All ER 332 at 356, [1961] AC 1007 at 1069, 1070

2 [1960] 2 All ER 332, [1961] AC 1007

sterling proceeds of the drafts which equals the amount (expressed, of course, in sterling) of the loss as computed under cl 9 of the policy? a

It seems to me that the dollars in the drafts were recovered in respect of the loss to which the policy applied, namely, the delay in the payment of \$1,155,181.26. It seems to me that the sterling proceeds of those dollars cannot have been recovered in respect of anything different from that in respect of which the dollars were recovered. Hence the sterling proceeds were recovered in respect of the loss to which the policy applied. Hence they are within cl 17. I see no reason for treating a part of the proceeds of the dollars as not having been 'recovered', or as not having been 'recovered in respect of a loss to which the Guarantee applies', merely because the sterling proceeds of the recovered dollars, as a result of a subsequent change in the rate of exchange, exceed the 'amount of loss' as computed under cl 9 by reference to a provision which has no application to cl 17. b

In my judgment, in the ordinary use of language the dollars paid belatedly on the drafts would certainly be properly described, in their totality, as having been 'recovered in respect of a loss to which this Guarantee applies', and not, in whole or in part, in respect of anything other than such a loss. The whole of the sterling proceeds are equally 'recovered', and are equally recovered in precisely the same 'respect'. c

In my judgment, there is no such doubt or ambiguity in the words of cl 17, in the context of the policy as a whole, as would justify the introduction of a consideration of the difficult and obscure questions as to the principles of subrogation. I would make these comments only, in deference to the arguments which were addressed to us. d

First, I do not find any great assistance in a consideration of the wording of s 79 (1) of the Marine Insurance Act 1906, particularly when one bears in mind that where there is, in marine insurance, an accepted abandonment, the insurer is entitled to keep unto himself any amount which he may realise even though it may far exceed the amount which he has paid to the assured. I do not find it a satisfactory explanation of the difference which is said to exist between such a case and a s 79 (1) case that in the former the insurer takes over as a 'recovery' a physical object of which he becomes owner, whereas in the latter he takes over legal rights which are not the rights of ownership of a chattel. (Incidentally cl 16 (c) of this policy does, indeed, appear to contemplate that the guarantors have the option of having transferred to them the rights of ownership of chattels.) e

Secondly, while I must not be taken as suggesting that the decision in *Yorkshire Insurance Co Ltd v Nisbet Shipping Co Ltd*¹ is wrong, I should respectfully wish to reserve consideration of certain aspects. Thus, for example, counsel for the merchant, while relying on the decision, indicated that he felt certain difficulties in supporting the view stated in the judgment as to implied terms. f

Further, there is, I believe, a difficulty—it may turn out to be no more than a verbal difficulty—in the reliance which is there placed on the judgment of Brett LJ in *Castellain v Preston*². Diplock J referred in the *Yorkshire Insurance Co* case³ to Brett LJ's judgment as 'his classic judgment'. The learned judge, reflecting, if I may say so, accurately that which had been expressed by Brett LJ more than once with emphasis in that classic judgment, said⁴: g

'... the assured shall not be entitled to retain, as against the insurer, a greater sum than what is ultimately shown to be his actual loss.'

(The emphasis is mine.) Now if the assured is not entitled to retain an excess against h

¹ [1961] 2 All ER 487, [1962] 2 QB 330

² (1883) 11 QBD 380, [1881-85] All ER Rep 493

³ [1961] 2 All ER at 490, [1962] 2 QB at 339

⁴ [1961] 2 All ER at 491, [1962] 2 QB at 340, 341 j

a the insurer, and the insurer, as is the decision in *Yorkshire Insurance Co*¹, is not entitled to receive the excess from the assured, what happens to the excess? Is the explanation, as counsel for the merchant suggested, that some special meaning must be given to the words 'actual loss'? Or is the explanation that in *Castellain v Preston*² Brett LJ was dealing with a case in which there was, on the facts, no question of the insurer receiving or retaining an excess? So that Brett LJ's emphatic remarks about the insured not being entitled to receive more than a full indemnity are perhaps to be read as though they were qualified by some such words as 'unless and until the insurer has been fully indemnified'? But that explanation is reached only by reading into that judgment what I may, perhaps loosely but not I hope irreverently, describe as an implied term. I do not think we are required to face those problems in this appeal.

c I would allow the appeal, holding that the guarantors were entitled to be paid by the merchant 90 per cent of the total sterling proceeds of the six dollar drafts, calculated in sterling as at the dates when the proceeds of the drafts first became available to the merchant or his banker.

d **SIR GORDON WILLMER.** In my judgment the decision of this case must depend on the true construction of the specific terms of this particular contract. It is called a 'Guarantee', and I will continue to use this word, although I agree with the learned judge that it amounts in substance to a contract of insurance. Much of the argument before the learned judge and before this court was devoted to the question what the result would have been if the contract had not contained special terms, so that the ordinary rules relating to subrogation had to be applied. In my judgment this is a dangerous and misleading approach to the problem which has to be solved, and I fear that the learned judge's judgment was very much coloured by his adoption of this approach. As I see it, the parties here have by their contract made precise provision for what is to happen in the event of sums being recovered after payment of a loss by the defendants, and in my judgment it is nihil ad rem to discuss how such recoveries might have been dealt with in the absence of such special provision. I do not, therefore, find it necessary to express any opinion on the question adumbrated before us, namely whether or not *Yorkshire Insurance Co Ltd v Nisbet Shipping Co Ltd*¹ was rightly decided.

The relevant clauses in the guarantee have been fully set out in the judgment of the learned judge, and I do not find it necessary to quote them again. The particular words which have to be construed are those contained in cl 17, that is: g 'Any sums recovered . . . in respect of a loss to which this Guarantee applies.' In my judgment the word 'loss' must be clearly distinguished from the 'amount of loss' as that phrase is defined elsewhere in the contract. In the particular circumstances of this case the 'loss' against which the defendants guaranteed the plaintiffs was a loss resulting from 'The prevention of or delay in the transfer of payment from the buyer's country to the United Kingdom', as provided by cl 1. Since the purchase price of the goods sold was quoted in United States dollars, this loss was a loss of dollars. h But the 'amount of loss', in respect of which the defendants had to pay 90 per cent, was an artificial sum, to be ascertained four months after the due date of payment by the buyer (cl 7), consisting of the gross invoice value of the goods, that is the dollar price, less certain deductions (cl 9), which by the endorsement subsequently attached to the policy had to be converted into sterling at the rate of exchange prevailing on the date when the goods were exported. i The agreed figure for the 'loss' was \$1,155,181.26, and the 'amount of loss' calculated as above was agreed to be £413,412 12s 0d, 90 per cent of which, namely £372,071 6s 10d, was duly paid by the defendants to the plaintiffs.

¹ [1961] 2 All ER 487, [1962] 2 QB 330

² (1883) 11 QBD 380, [1881-85] All ER Rep 493

In due course, when the exchange restrictions were lifted, the buyers in fact paid the full purchase price, that is \$1,155,181.26, thereby wiping out the whole of the loss in respect of which the defendants had paid. According to the ordinary meaning of words this was a sum recovered in respect of the loss to which the guarantee applied. But owing to the depreciation in the value of sterling, which had meanwhile taken place, the amount recovered, when converted into sterling, came to £443,032 8s 1d. How is this sum to be dealt with as between the plaintiffs and the defendants? The plaintiffs say that when they have accounted for 90 per cent of the agreed 'amount of loss'—that is the £372,071 6s 10d which the defendants had paid—the defendants are entitled to no more, since they will then be fully reimbursed for what they had to pay. This is the conclusion at which the learned judge arrived. a b

In my judgment this result offends against both the letter and the spirit of cl 17 of the contract. The clause specifically provides that sums recovered are to be divided between the guarantors (the defendants) and the merchant (the plaintiffs) in the proportion of 90 and 10. Seeing that by the terms of the guarantee the defendants had accepted 90 per cent of the risk of loss, it would seem only fair and reasonable that they should be entitled to 90 per cent of any sums recovered, whatever these might be. I agree with the submission put forward on behalf of the defendants that it is necessary, when construing cl 17, to look at it in futuro. At the date of the guarantee, and indeed at the date when the defendants paid under it, it could not be known what sums might be subsequently recovered. Apart from other unknown quantities, there might be fluctuations in the rate of exchange, as the result of which the sums recovered, when converted into sterling, might be appreciably less or appreciably more than the artificial figure representing the 'amount of loss', calculated as described above. If the amount recovered were less, the defendants would have to accept 90 per cent of the loss. So equally, if the amount is greater, they should have the benefit of recovering 90 per cent thereof. c d e

This construction seems to me to be in accordance with the plain meaning of the first sentence of cl 17. But I am fortified in my view by consideration of the second sentence of the clause. This provides that the merchant shall pay to the guarantor forthwith all sums recovered, apparently regardless of amount. On the assumption that the defendants are entitled to retain 90 per cent of the sums recovered, this would seem to be a reasonable and sensible provision. But it would be difficult, in my view, to find a sensible reason for it if the plaintiffs are right in asserting that they are entitled in the end to retain everything in excess of 90 per cent of the artificially calculated 'amount of loss'. I find it impossible to accede to the learned judge's view that this second sentence of cl 17 is no more than machinery. f g

As I understand the argument on the other side, what is said is that once there has been a recovery of the agreed 'amount of loss', that is £413,412 12s 0d, and the defendants have been paid back 90 per cent thereof, there is no longer any 'loss to which this Guarantee applies'. Therefore cl 17 no longer applies, and the plaintiffs are entitled to retain the whole of the excess above the agreed figure, since the defendants have already recovered the whole of what they are entitled to under the ordinary rules governing subrogation. In my judgment this contention is not only unrealistic, having regard to the terms of the contract as a whole, but it is also unsound in that it is founded on a confusion between the 'loss' (that is the loss of the dollar price of the goods sold) and the 'amount of loss' as artificially calculated in accordance with cll 7 and 9 and the endorsement attached to the policy. If this had been the real intention of the parties, I feel quite sure that cl 17 of the contract would have been expressed in quite different terms. h i

For these reasons, agreeing with Megaw LJ, I have reached a conclusion contrary to that of the learned judge. I would allow the appeal and answer the question posed by the originating summons in the affirmative, with such consequential results as may flow therefrom.

a **DAVIES LJ.** I agree with both judgments and do not wish to add anything of my own.

Appeal allowed. Judgment for defendants for £18,017.08 and interest thereon at the rate of 1 per cent over bank rate from 1st October 1968 to 4th April 1973. Leave to appeal to the House of Lords granted.

b Solicitors: Treasury Solicitor (for the defendants); Coward, Chance & Co (for the plaintiffs).

Mary Rose Plummer Barrister.

c Re D (minors) (wardship: jurisdiction)

FAMILY DIVISION

BAGNALL J

14th, 15th, 16th, 20th FEBRUARY 1973

d *Ward of court – Jurisdiction – Custody – Previous order of magistrates – Previous order made under jurisdiction conferred by guardianship of minors legislation – Circumstances in which High Court will make different order under wardship jurisdiction – Exceptional circumstances – Magistrates' court unable to give relief sought – Difficulty of enforcing order where parent having custody living outside jurisdiction of magistrates' court – Refusal of legal aid to parent to prosecute appeal against magistrates' order – Doubts as to validity of order made by magistrates' court.*

e *Infant – Guardianship – Custody – Welfare of infant as first and paramount consideration – Relevance of other considerations – Mother's conduct – Weight to be attached to other considerations dependent on how they affect children's welfare – Guardianship of Minors Act 1971, ss 1, 9 (1).*

f The father and the mother were married in December 1966 and had two children, a girl born in October 1967 and a boy born in October 1969. They lived in a flat in north London. In October 1971 the mother told the father that she was in love with another man, J. The father left for his parents' home in Scotland with the boy and the mother followed with the girl. A reconciliation was attempted and plans made for setting up a new home in Scotland. The mother went back to London with the children with the intention of returning to Scotland. Shortly after, however, the mother telephoned the father to say that, as far as she was concerned, the marriage was at an end and that she was about to start living with J. The mother and J thereafter began to live together as man and wife with the children, to whom the father enjoyed frequent access. At the end of 1971 the mother issued a complaint in the local metropolitan stipendiary magistrates' court under the Guardianship of Minors Act 1971 in which she sought an order for the custody of the children. The complaint was served on the father in Scotland. The complaint was heard by a single stipendiary magistrate and was adjourned. At the adjourned hearing the magistrate sat with a lady justice of the peace who had not been present at the earlier hearing. At the conclusion of the adjourned hearing custody of the children was awarded to the father. The children returned with the father to the father's parents' home in Scotland where they planned to live. The mother applied for legal aid to prosecute an appeal against the order but her application was turned down. Two months later a legal aid certificate was granted to her to issue a summons by which she sought an order that the children be made wards of court and that their care and control be committed to her.

Held – (i) On principle the court in wardship proceedings ought not to make a determination on the merits when there was a subsisting and effective order of a magistrates' court unless some relief was sought which was unobtainable in that court or there were exceptional circumstances. In the instant case the difficulties attendant on the enforcement of orders owing to the absence of the father and children from the jurisdiction of the magistrates' court, the refusal of legal aid to the mother to prosecute her appeal and the possible invalidity of the magistrates' court order in consequence of the change in composition of the court at the adjourned hearing, constituted exceptional circumstances which justified the court in considering and determining the summons on its merits (see p 1005 b and p 1006 c d and h to p 1007 a, post); *Re H (G J) (an infant)* [1966] 1 All ER 952, *Re K (K J S) (an infant)* [1966] 3 All ER 154, *Re P (infants)* [1967] 2 All ER 229, *Re P (A J) (an infant)* [1968] 1 WLR 1976 applied.

(ii) As a matter of authority and construction, the welfare of the minor was not the only relevant consideration under ss 1^a and 9 (1)^b of the Guardianship of Minors Act 1971. The court had to take into account all relevant considerations, but the weight to be attached to any one in particular depended on the extent to which that consideration, if at all, affected the welfare of the minor. In the circumstances, despite the fact that the mother was living with J, whom she was not at that time able to marry, the true welfare of the children would be secured if they were to be brought up by her with frequent and generous access to the father. Accordingly joint custody would be committed to both parents with care and control to the mother and access to the father (see p 1008 d and f and p 1009 e and g h, post); *Re L (infants)* [1962] 3 All ER 1 explained.

Notes

For wardship jurisdiction of the court, see 21 Halsbury's Laws (3rd Edn) 216, 217, paras 478, 479, and for cases on the subject, see 28 (2) Digest (Reissue) 914-916, 2240-2247

For applications to the court in guardianship proceedings, see 21 Halsbury's Laws (3rd Edn) 213-215, paras 473, 474.

For the Guardianship of Minors Act 1971, ss 1 and 9, see 41 Halsbury's Statutes (3rd Edn) 762, 766.

Cases referred to in judgment

Andrews (Infants), *Re* [1958] 2 All ER 308, [1958] Ch 665, [1958] 2 WLR 946, 28 (2) Digest (Reissue) 914, 2240.

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F (an infant), *Re* [1969] 2 All ER 766, sub nom *Re F (infant)*, *F v F* [1969] 2 Ch 238, [1969] 3 WLR 162, 28 (2) Digest (Reissue) 802, 1239.

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G (infants), *Re* [1963] 3 All ER 370, [1963] 1 WLR 1169, 127 JP 549, 61 LGR 530, 28 (2) Digest (Reissue) 943, 2441.

H (infants), *Re* [1966] 1 All ER 886, [1966] 1 WLR 381, CA, Digest (Cont Vol B) 132, 1185b.

H (G J) (an infant), *Re* [1966] 1 All ER 952, [1966] 1 WLR 706, 28 (2) Digest (Reissue) 921, 2300.

Hall v Hall [1963] 2 All ER 140, [1963] P 378, [1963] 2 WLR 1054, CA, 27 (2) Digest (Reissue) 669, 5080.

^a Section 1, so far as material, provides: 'Where in any proceedings before any court . . . (a) the custody or upbringing of a minor; or (b) . . . is in question, the court . . . shall regard the welfare of the minor as the first and paramount consideration . . .'

^b Section 9 (1) is set out at p 997 j, post

- a* *K (KJS) (an infant)*, Re [1966] 3 All ER 154, [1966] 1 WLR 1241, 27 (2) Digest (Reissue) 987, 7906.
- L (infants)*, Re [1962] 3 All ER 1, [1962] 1 WLR 886, CA, 28 (2) Digest (Reissue) 813, 1290.
- M (an infant)*, Re [1961] 1 All ER 788, [1961] Ch 328, [1961] 2 WLR 350, 125 JP 278, 59 LGR 146, CA, 28 (2) Digest (Reissue) 940, 2433.
- b* *McKee v McKee* [1951] 1 All ER 942, [1951] AC 352, PC, 28 (2) Digest (Reissue) 801, 1235.
- Munday v Munday* [1954] 2 All ER 667, [1954] 1 WLR 1078, 118 JP 434, DC, 33 Digest (Repl) 216, 520.
- Official Solicitor v K* [1963] 3 All ER 191, [1965] AC 201, [1963] 3 WLR 408, HL, 28 (2) Digest (Reissue) 912, 2233.
- P (infants)*, Re [1967] 2 All ER 229, [1967] 1 WLR 818, 65 LGR 572, 28 (2) Digest (Reissue) 915, 2246.
- c* *P (A J) (an infant)*, Re [1968] 1 WLR 1976, 28 (2) Digest (Reissue) 915, 2247.
- S (an infant)*, Re [1965] 1 All ER 865, [1965] 1 WLR 483, 129 JP 228, 63 LGR 229, CA, 28 (2) Digest (Reissue) 942 2439.
- Vigon v Vigon and Kuttner* [1929] P 157, [1928] All ER Rep 755, 98 LJP 63, 140 LT 407, 27 LGR 147; *on appeal* [1929] P 245, 99 LJP 9, 141 LT 293, 93 JP 112, CA, 27 (2) Digest (Reissue) 903, 7246.
- d* *W (J C) (an infant)*, Re [1963] 2 All ER 706, [1963] Ch 556, [1963] 2 WLR 1471; *rvsd* [1963] 3 All ER 459, [1964] Ch 202, [1963] 3 WLR 789, CA, 28 (2) Digest (Reissue) 791, 1182.

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- B (an infant)*, Re [1962] 1 All ER 872, [1962] 1 WLR 550, CA.
- e* *C (A) (an infant)*, Re, *C v C* [1970] 1 All ER 309, [1970] 1 WLR 288, CA.
- Fulker v Fulker* [1936] 3 All ER 636, 155 LT 541.
- G (an infant)*, Re [1969] 2 All ER 1135, [1969] 1 WLR 1001.
- H v H and C* [1969] 1 All ER 262, [1969] 1 WLR 208, CA.
- Joseph v Joseph* [1948] LJR 513, DC.
- Pratt v Pratt* [1927] All ER Rep 234, 96 LJP 123.
- f* *R v Middlesex Justices, ex parte Bond* [1933] 2 KB 1, [1933] All ER Rep 394, CA.
- S (M) (an infant)*, Re [1971] 1 All ER 459, [1971] Ch 621.
- Turner v Turner* [1961] 3 All ER 944, [1962] P 283, CA.
- W v W and C* [1968] 3 All ER 408, [1968] 1 WLR 1310, CA.

Originating summons

- By summons dated 31st July 1972 the mother asked that the children of the family, *g* Samantha and Jake, be made wards of court and that their care and control be committed to her. The metropolitan stipendiary court serving the mother's area had on 4th April 1972 dismissed a complaint by the mother for the custody of the children and made an order awarding custody to the father who was residing in Scotland. The mother was unable to obtain legal aid to appeal against the magistrates' order but obtained a legal aid certificate to issue the present summons. The facts are *h* set out in the judgment which was delivered in open court.

K Bruce Campbell QC and *Elaine Jones* for the mother.

S Seuffert QC and *K E Cox* for the father. *Cur adv vult*

- 20th February. **BAGNALL J** read the following judgment. In this judgment *i* I propose to refer to the plaintiff and the defendant as 'the mother' and 'the father' respectively; to the gentleman with whom the mother is living by his Christian name, James; to the father's parents as 'the grandmother' and 'the grandfather' respectively; and to the father's brothers also by their Christian names; and to take other steps so that if this is published it will not be possible to identify any of the parties, and I make the normal request made in these circumstances that that wish shall be observed. I am confident that that will be so.

The mother and the father were married on 3rd December 1966. The mother came from Yorkshire where her parents still live. Before she was married she was a children's nanny and was only 19 on the date of the wedding. The father also had his origins in the north-east of England, but his parents now live in a village in Midlothian. They occupy a three bedroomed house with a garden. The grandfather and the grandmother are both 49 years of age and have had and brought up, or are bringing up, six sons. Of those, two are still at home; Christopher, aged 15 and Martin aged 11. There is another son, Stephen, who is at Oxford University, and is at home at times during the year on vacation.

The father was the second of those six sons and at the time of the marriage was even younger than the mother, not quite 18. The father had been brought up as a Roman Catholic; the mother as a Protestant. I state those last facts, but it is common ground in this case that nothing turns on them.

After a short time in furnished rooms the mother and father established a matrimonial home in a flat in north London. In the flat there were at all times four potential bedrooms, a kitchen with a bath in it, a living room and lavatory accommodation. The flat is situated over premises owned by the company which was the mother's employer, and was held by the mother on a service tenancy at a rent of £2.75 a week. The rent book has at all material times been in the mother's name, and though the relevant service tenancy was, for reasons into which I need not go, signed by both the spouses, there is no doubt that the mother was the tenant. Though her work has now ended the tenancy has been continued and no indication has been given of any intention to terminate it.

In due course the two children with whom I am concerned were born; a daughter, Samantha, on 19th October 1967, and a son, Jake, two years later on 23rd October 1969.

In April 1970 the father, who was then just 21, had an operation known as vasectomy, which I am told is irreversible. That step was taken because the mother was having difficulty with various contraceptive devices that were tried. The step was proposed with the agreement of the mother, but, though at a later stage I think she had some change of heart and sought to persuade the father not to have the operation, he was determined to do so. In the events that have happened that operation was indeed a tragedy, and I think it should be said that now that both legislation and modern mores have rendered the bonds of matrimony so fragile, a very heavy burden of responsibility lies on those who are called to give advice in such matters, particularly to those who are only just out of infancy.

The father's trade was that of a chef. During the greater part of the marriage he carried on two jobs in that trade, which involved working from early morning to mid or late afternoon; and then after a break of an hour or two again until very late at night. He did this five days every week with the laudable object of earning money which he could save, primarily for a house, though I think that at times the possibility of buying a motor car entered his mind. The mother knew the reasons why the father was working so hard, but, as I find, never knew the amount of his savings, which, by the end of 1971, had reached at least £250 and as events proved the father was able to lay his hands on a further sum at that stage of about £150 out of his own money.

I have referred to one tragedy in the married life of this young couple. I think that the second tragedy was that the father never really appreciated the dangers that were inherent in the course that he had decided to take, and in particular in leaving his young wife alone so many days every week and for such long hours. There was some criticism, apart from that misfortune, of the father's behaviour as a husband, but, apart from a propensity to gambling on horses which he admitted, those criticisms were not pursued.

During this period the mother busied herself in local affairs and was particularly interested in a local community play centre where, in accordance with a not infrequent modern habit, she took the children—first Samantha, and then later Jake.

a At the play centre she met in May 1971 James, a young man who is now 24 years of age. James had left school at the age of 17 with the modest educational attainment of two 'O' Levels and a burning desire to become a schoolteacher. He found himself employment successively in two departments of the Civil Service, and at the same time lived and worked at the community play centre where he earned a small remuneration and was given time and opportunity to pursue his studies in search of further 'O' Levels. He hoped by that means eventually to qualify for admission to a suitable teachers' training college and to obtain for the purposes of his further studies a government grant.

b James became a friend of the mother and also of the father, and was a frequent visitor to the matrimonial home. In due course his feelings for the mother and hers for him progressed beyond friendship to affection, and eventually to love.

c In October 1971 the mother told the father that she and James were in love with one another. I accept the mother's evidence that on at least one occasion, probably after she had met James, she had remonstrated with the father for the long hours which he was working and leaving her alone; but I am satisfied also that she did not bring home to him, and he never appreciated, the danger to the marriage that was inherent in the situation. After the mother's revelation there was a scene or scenes, during the course of which the father struck the mother at least once, and also came to blows with James, who however did not retaliate.

d The father set off for Scotland, and the grandfather's home, with Jake. The mother followed shortly after with Samantha. In Scotland there were discussions from which it appeared that the past would be forgotten and that a reconciliation would be achieved. The father set out to buy accommodation in Edinburgh while the mother returned to London with the two children, the intention being that if all went well she should return later and they would continue their marriage in Scotland. The father was able to acquire a flat with a sum of £650 borrowed from the grandfather, a £500 bank loan and the savings that he had accumulated; and he also obtained employment in Edinburgh in his trade as a chef. He visited the children during this period every two weeks, and so maintained contact with them.

e However, a reconciliation was not to be achieved, because on 15th November 1971 by means of a telephone conversation the mother made it clear to the father that so far as she was concerned the marriage was at an end and that she was living, or was about to start living, with James. I accept the evidence of the mother and James, if indeed this be relevant, that they had not committed adultery until this stage in the history of events. But immediately they began to live together as man and wife with Samantha and Jake in the flat which had been the matrimonial home.

g There they all remained until 4th April 1972. Again during that period there was frequent access enjoyed by the father, who maintained again close contact with the children.

h At the end of 1971 the mother caused to be issued in the appropriate metropolitan stipendiary court for the district in which she lived a complaint under the Guardianship of Minors Act 1971 seeking an order that the custody of the children be committed to her. The complaint was served on the father in Scotland by an official who would have been the appropriate person to effect such service in Scottish proceedings.

j Before I turn to the further progress of those proceedings I must recite some of the statutory provisions that are applicable. First, the Guardianship of Minors Act 1971, s 9 (1):

'The court may, on the application of the mother or father of a minor (who may apply without next friend), make such order regarding—(a) the custody of the minor; and (b) the right of access to the minor of his mother or father, as the court thinks fit having regard to the welfare of the minor and to the conduct and wishes of the mother and father.'

Section 15, so far as material, provides:

'(1) Subject to the provisions of this section, "the court" for the purposes of this Act means . . . (c) a magistrates' court having jurisdiction in the place in which any of the said persons resides . . .

'(3) A county court or magistrates' court shall not have jurisdiction under this Act in any case where the respondent or any of the respondents resides in Scotland or Northern Ireland—(a) except in so far as such jurisdiction may be exercisable by virtue of the following provisions of this section; or (b) unless a summons or other originating process can be served and is served on the respondent or, as the case may be, on the respondents in England or Wales.

'(4) An order under this Act giving the custody of a minor to the mother, whether with or without an order requiring the father to make payments to the mother towards the minor's maintenance, may be made, if the father resides in Scotland or Northern Ireland and the mother and the minor in England or Wales, by a magistrates' court having jurisdiction in the place in which the mother resides.

'(5) It is hereby declared that a magistrates' court has jurisdiction—(a) in proceedings under this Act by a person residing in Scotland or Northern Ireland against a person residing in England or Wales for an order relating to the custody of a minor (including, in the case of proceedings by the mother, an order requiring the father to make payments to the mother towards the minor's maintenance) . . .

Section 16, so far as material, provides:

'(3) Subject to subsection (4) of this section, where on an application to a magistrates' court under this Act the court makes or refuses to make an order, an appeal shall lie to the High Court.

'(4) Where an application is made to a magistrates' court under this Act, and the court considers that the matter is one which would more conveniently be dealt with by the High Court, the magistrates' court may refuse to make an order, and in that case no appeal shall lie to the High Court.'

I interpose that the appeal so described was formerly to a judge of the Chancery Division specifically assigned for the purpose, but is now to a Divisional Court of the Family Division.

The Magistrates' Courts Act 1952, s 56 (2), provides:

'A magistrates' court when hearing domestic proceedings shall be composed of not more than three justices of the peace, including, so far as practicable, both a man and a woman.'

Section 98 (6) of that Act provides:

'Subject to the provisions of the next following subsection, the justices composing the court before which any proceedings take place shall be present during the whole of the proceedings: Provided that, if during the course of the proceedings any justice absents himself, he shall cease to act further therein and, if the remaining justices are enough to satisfy the requirements of the preceding provisions of this section, the proceedings may continue before a court composed of those justices.'

Section 98 (7) is not material; s 98 (8) provides:

'This section shall have effect subject to the provisions of this Act relating to domestic proceedings.'

The Administration of Justice Act 1964, s 11, so far as material, provides:

'(1) For the purpose of exercising jurisdiction to hear domestic proceedings a

- a* magistrates' court for an inner London petty sessions area shall be composed of—(a) a metropolitan stipendiary magistrate as chairman and one or two lay justices; or (b) two or three lay justices; or, if it is not practicable for such a court to be so composed, the court shall for that purpose be composed of a metropolitan stipendiary magistrate sitting alone; and section 56 (2) of the Magistrates' Courts Act 1952 (composition of magistrates' courts for hearing domestic proceedings) shall not apply to a magistrates' court for any such area.
- b* '(2) A domestic court for an inner London petty sessions area which includes lay justices shall, so far as practicable, include both a man and a woman.'

Domestic proceedings for the purposes of those sections plainly include proceedings under the Guardianship of Minors Act 1971.

- The first appointment for the hearing of the mother's complaint was a date in January 1972. On that date both the mother and the father were present and were represented by a solicitor or counsel. There were discussions between, at any rate, the professional advisers outside the court, and the father frankly said in his evidence that he was apprehensive lest an order should be made giving custody to the mother and was anxious in those circumstances to conclude an agreement as to the access that he should be allowed in that event on the most favourable terms. What he was seeking, apart from ordinary access, was to have the children to stay with him in Scotland for a week after Christmas, for a week after Easter and for four weeks during the summer holiday. The mother took the view that perhaps four weeks would be too long and hoped that agreement would be reached at two weeks, but otherwise acceded to the father's requests.

- e* At this stage undoubtedly a misunderstanding occurred, but I am not, I think, concerned with its causation. The father was concerned to resist the application, and indeed had himself consulted solicitors in Edinburgh at an earlier stage with a view to obtaining an order in an appropriate court that custody should be committed to him. The mother equally sincerely believed that the father was conceding that custody should be granted to her, and that all that was in issue was the amount of access that should be ordered.

- f* The hearing of the complaint was not started, but arrangements were made for a welfare officer to report, in particular on conditions at the matrimonial home where the children were then living. I anticipate by saying that at a later stage a welfare report was also obtained from an appropriate officer in Scotland on conditions at the grandparents' home in Midlothian, and I wish to record my indebtedness to both those reports.

- g* The next hearing of the complaint took place on 17th February 1972 before the metropolitan stipendiary magistrate sitting alone. Evidence was taken from the mother, James and the father, and the matter was then adjourned to 4th April. On that date the hearing was resumed, but this time before the same metropolitan stipendiary magistrate and a lady justice of the peace. The father gave further evidence under cross-examination, and two other witnesses, friends of the parties
- h* in London, also gave evidence.

In the result, at the conclusion of the evidence, the magistrates ordered the custody of both the children to be committed to the father, and ordered reasonable access to be allowed to the mother. The reasons, as set out in the note of evidence that is before me, suitably edited to avoid identification, read as follows:

- i* '(1) Adulterer should not take place of husband as father. (2) Environmental grounds [Midlothian] compared with [the district in London where the matrimonial home was situated]. (3) Possibility of [James] leaving—and doubt about his ability to pass teachers exams. (4) More in interest of children. (5) Husband behaved responsibly—impressed as truthful person.'

It is apparent from those reasons, and from a note taken by counsel—a copy of which was put before me—and from the evidence filed on this application, that the

magistrates took the view that the area of the matrimonial home was a bad place for any children to be brought up; that they took a wholly critical view of James; and thirdly, I think, that the magistrates, adopting perhaps the philosophy of an earlier generation, regarded the break up of the marriage as a confrontation between a wholly innocent and a wholly guilty spouse, rather than the misfortune shared by, and contributed to by both, which on recent high authority it is now recognised to be.

An application was made to the magistrates for a stay of execution pending an appeal, but was refused. In announcing that refusal the magistrates expressed the view that if their decision should turn out to be wrong, the sojourn of the children in Scotland pursuant to the order would be in no way materially different from a normal period of access. On the same day the children went to Scotland with the father and the grandmother, where they have lived ever since.

On 5th May 1972 a notice of appeal in proper form was issued on behalf of the mother and served on the father. But on 23rd May 1972 the mother's application for a legal aid certificate to enable her to prosecute the appeal was refused. In the face of that refusal it was for all practical purposes impossible for the mother to go on with the proposed appeal, and no further steps were taken in it. Two months later, on 21st July 1972, the mother was granted a legal aid certificate to pursue these proceedings, and either then or at a later stage the certificate permitted her, and the father's corresponding legal aid certificate permitted him, to have the assistance of leading counsel. I have not investigated, nor would it be right for me to investigate, the reasons behind this apparent inconsistency in the attitudes of those concerned with the administration of the Legal Aid and Advice Act 1940. That being so, it would not be right for me to make further comment.

On 31st July 1972 this originating summons was issued by the mother, claiming that the children should be made wards of court and that care and control of them be committed to her. At the time of the issue and service of the originating summons the children were in London and the father was visiting them for the purpose of taking them back to Scotland. That being so, a summons was issued to obtain interlocutory relief designed to ensure that the children should remain in England pending the hearing of the application. On 10th August 1972 Watkins J ordered that the mother should return the children to the father, who should have leave to keep them outside England and Wales on the usual undertaking to return them within the jurisdiction when called on to do so, and a direction for access was given. Finally, on 22nd September 1972 an order was made by the learned registrar for the filing of evidence and other ancillary matters, and directions were given that this application be referred to a judge for hearing on oral evidence.

I interpose here a statement of the great indebtedness I have felt to all counsel for the assistance which has been given to me on a number of difficult topics, and I would wish to go further. I have found that the conduct of this case has in every way been exemplary, not only on the part of counsel and solicitors—that after all is to be expected—but also by the mother and the father and all other persons closely involved. I am satisfied, and it is gratifying to record, that everyone concerned has been throughout moved by a single-minded desire to do what is best for these children.

A number of preliminary questions of law arise; the first of which is to what extent is the order of the magistrates valid and effective under the statutory provisions I have read, having regard to the change in the composition of the Bench between 17th February 1972 and 4th April 1972, and the method of service of the complaint on the father.

Such a change in composition has been described as a gross irregularity in a number of reported cases. I cite one by way of example. In *Munday v Munday*¹ the justices

a had made a financial order against a husband in these circumstances. The application was first heard by three justices; an adjournment was ordered, and at the second hearing there were present the three previous justices and two additional justices. Further evidence was given and a further adjournment ordered. At the final hearing the two justices who had been added at the intermediate hearing, and one who had not attended either of the previous hearings, were present. The three justices who had been present on the first occasion and on the second occasion, were all absent. Their decision was brought on appeal to a Divisional Court and Lord Merriman P said¹:

c 'It is right to say that no objection was taken to the change in the composition of the court by the addition of these two extra justices. It is also right to point out that owing to the definition of "domestic proceedings", an application for the variation of an order under the summary jurisdiction (separation and maintenance) code does not come within the definition, and, therefore, there was nothing vitally wrong in the fact that five justices were sitting. Nor is it necessary, I think, to consider what would have been the position if the matter had ended there, with the original three justices sitting with two additional justices and a certain amount of the evidence, no doubt, being taken again. It is true that there was a quorum on the last occasion, but it seems to me to be impossible by any process of reasoning to say of the order arrived at by this curious procedure that the justices composing the court before which any proceedings took place were present during the whole of the proceedings. I am unable to accept the argument that in substance there was a hearing de novo before the tribunal of three on the last occasion. It is not the fact, and I do not propose to go through an analysis of the findings. Suffice it to say that it is plain beyond a doubt that a great deal of what these justices have set out as findings of fact was derived from evidence appearing on the notes of the first hearing, at which not one of them was present, and I repeat that one of the three sitting on the last occasion had not been present on any previous hearing of *this application* at all. Apart from the consideration that section 98 (6) of the Act of 1952 is mandatory, and contains no dispensing power which is remotely relevant to these proceedings, I think there are wider considerations still, for it seems to me that this is pre-eminently a case in which the principle that justice must not merely be done, but must manifestly be seen to be done, has been infringed.'

Davies J agreed and adopted the reasoning of the learned President and the appeal was allowed.

g On the other hand it is plain that in a case in which it is clear on the merits that the order of the justices was right, it is open to a Divisional Court to affirm their decision notwithstanding the irregularities. That is established in *Bolton v Bolton*². In that case there was a similar irregularity, but after reviewing the authorities and holding that the irregularity was manifestly established, Lord Merriman P said³:

h 'Having said that, I am bound to say that I think this case is so clear that we should be in danger of doing a grave wrong if we were to send it back, as the husband asked us to do, for a re-hearing, and I, therefore—but with the general protest which I have uttered—propose that we should follow the course taken by the Court of Appeal in *Coleshill v. Manchester Corporation*⁴ and decide that it is unnecessary to take objection to what happened on this occasion.'

j The situation with which I am faced was that which Lord Merriman P forbore to

1 [1954] 1 WLR at 1081, cf [1954] 2 All ER at 669

2 [1949] 2 All ER 908

3 [1949] 2 All ER at 911

4 [1928] 1 KB 776

consider in *Munday v Munday*¹. Nevertheless, on principle and on authority I have no doubt that it was an irregularity on which, if an appeal had been prosecuted, the case would have been sent back to be determined by a freshly constituted Bench, unless the Divisional Court, on a consideration of all the facts, had concluded that the order was clearly right. a

The defect of service is in a different category and is the merest technicality. Maybe it was in any event remedied by the attendance of the father, both in person and by counsel; or could have been remedied either by reservice on the father in England, or by the issue of a cross-complaint on his behalf. But I am not sitting, and could not sit, on appeal from the magistrates. The order therefore in my judgment is a valid and effective order, unless it should be, after leave given, reversed by the Divisional Court. On the other hand, in common with all orders relating to infants, it is an order having effect until further order, so that any order of any court of competent jurisdiction inconsistent with the order of the magistrates would effectively determine it. b

The second question of law is whether I should hear and determine this originating summons on its merits, or leave the mother to make a further application in the magistrates' court based on such changes in circumstances as she can establish. On this question I was referred to a number of cases recently decided in the Chancery Division. c

The first is *Re H (G J) (an infant)*². In that case the magistrates had made an order giving custody of an infant to the mother, and the mother applied by originating summons for the child to be made a ward of court and for an injunction restraining the father from taking the child out of the jurisdiction. In the course of his judgment Stamp J said³: d

'Counsel for the mother has taken me through the provisions conferring on magistrates powers in relation to the custody of infant children. I am quite satisfied from the terms of the Guardianship of Infants Acts, 1886 and 1925, and more particularly from the decision of BATESON, J., in *Vigon v. Vigon and Kuttner*⁴, and the remarks of members of the Court of Appeal in *Re M. (an infant)*⁵, which are set out in *Re G. (infants)*⁶, that the prerogative powers of the Queen as *parens patriae* in relation to infants are not destroyed, but at most limited, as a result of the exercise of powers in relation to infants in magistrates' courts. In my judgment the order of the Bury magistrates' court granting custody of the child to the mother in no way precludes this court from making orders, in the exercise of prerogative powers of the Queen in relation to infants, not inconsistent with the orders made by the magistrates' court. What I am asked to do today is merely to make an order which will supplement the order which has already been made in relation to the infant by the magistrates' court and this I will do.'

e

In *Re K (K J S) (an infant)*⁷, magistrates had made an order giving custody of an infant to the mother, and the father issued an appropriate originating summons asking for the child to be made a ward and for directions for his care and control. Buckley J said⁸: f

'In these proceedings the only relief which the court is asked to grant is with regard to access, apart from formal relief in the sense that the court is asked to

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1 [1954] 2 All ER 667, [1954] 1 WLR 1078

2 [1966] 1 All ER 952, [1966] 1 WLR 706

3 [1966] 1 All ER at 953, [1966] 1 WLR at 708

4 [1929] P 157, [1928] All ER Rep 755

5 [1961] 1 All ER 788 at 795, [1961] Ch 328 at 345

6 [1963] 3 All ER 370 at 373, [1963] 1 WLR 1169 at 1173, 1174

7 [1966] 3 All ER 154, [1966] 1 WLR 1241

8 [1966] 3 All ER at 154, 155, [1966] 1 WLR at 1242

j

- a continue the wardship of the infant, and it is suggested that the court should give the care and control of the infant to the mother, in whose care and control he already is under the order of the justices. The father, who is the plaintiff, complains that the access which is offered by the mother is unsatisfactory and unsuitable; and the mother takes the view that the kind of access demanded by the father is equally unsatisfactory and unsuitable, although for different reasons.
- b This is a matter which could perfectly well have been raised in proceedings before the justices, who already have been seized of the matter. They have already made an order according the father reasonable access and his proper course, if he considered he was not getting reasonable access, was to go back to the magistrates and ask that they should make a more specific order as to the kind of access which he should have. It is undesirable, in my judgment, when the magistrates have made a custody order and an order relating to access, that
- c the party who is dissatisfied with the way in which effect is being given to that order should seek to meet that state of affairs by instituting proceedings under the Law Reform (Miscellaneous Provisions) Act, 1949, instead of going back to the magistrates who have dealt with the matter. It would be another state of affairs altogether if some kind of relief were sought which the magistrates could not provide, as for instance, an injunction; but there is nothing of that kind here and, in my judgment, these proceedings are really quite wrong.'
- d

And the learned judge directed that the child should cease to be a ward of court.

- In *Re P (infants)*¹ the father had custody of two infant children under an order of the competent justices. The mother appealed to the High Court against that order and the appeal was dismissed by the assigned judge of the Chancery Division.
- e In due course the mother issued an originating summons invoking the wardship jurisdiction and asking for directions as to the care and control of the children. Stamp J said²:

- 'Two questions arise: first, has this court, in the exercise of its parental jurisdiction over children, jurisdiction to make an order which may conflict with an order made by a magistrates' court in exercise of the statutory jurisdiction under the Guardianship of Infants Acts, 1886 and 1925; second, assuming the answer to the first question to be in the affirmative, ought that jurisdiction to be exercised or ought the court to make an order simply de-warding the children. In my judgment, the answer to the first question must clearly be in the affirmative: that the exercise of a limited statutory jurisdiction over children does not, in the absence of express words in the statute, fetter the powers of the Chancery Division in exercising the jurisdiction of the Crown as *parens patriae* over wards of court.'
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- The learned judge then referred to a number of authorities some of which I have cited, and also referred to *Re S (an infant)*³, and distinguished that case; and went on as follows⁴:
- h

- 'Parliament has conferred on magistrates powers under the Guardianship of Infants Acts, 1886 and 1925, and, applying the decision of BUCKLEY, J., in *Re K. (K. J. S.) (an infant)*⁵, I hold that when magistrates have made an order for custody, then unless some relief is sought which the magistrates cannot give, the forum conveniens for a reconsideration of that order is *prima facie* the magistrates' court. For the purpose of deciding whether to entertain a wardship application
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1 [1967] 2 All ER 229, [1967] 1 WLR 818

2 [1967] 2 All ER at 234, [1967] 1 WLR at 824

3 [1965] 1 All ER 865, [1965] 1 WLR 483

4 [1967] 2 All ER at 236, 237, [1967] 1 WLR at 827

5 [1966] 3 All ER 154, [1966] 1 WLR 1241

where a magistrates' court has already made a custody order, the judge before whom the matter comes must enquire into the case to the extent necessary to determine whether relief is genuinely sought which the magistrates are not empowered to give, or whether there is some very special reason for invoking the wardship jurisdiction.' a

It is to be observed that the whole of the judgment of the learned judge in that case was strictly speaking obiter dictum, because by the time he gave his judgment it had been announced that the parties had resolved their differences by agreement. The learned judge gave a judgment in view of the questions of public importance that were raised. b

Lastly, in *Re P (A J) (An Infant)*¹ custody had been awarded to the mother of the infant by the appropriate justices, but the father had neither complied with the order nor appealed against it. In due course the father issued an originating summons invoking the wardship jurisdiction and the mother moved the court for an order terminating the wardship and in substance terminating the proceedings in limine. Four submissions were put before Cooke J, sitting as an additional judge of the Chancery Division, why the wardship proceedings should be allowed to go on. First, that relief was sought which the justices were not competent to afford. The learned judge held that no such relief was genuinely sought. Secondly, that there were special considerations applicable, such as had been adumbrated or referred to by Stamp J in the previous case. Thirdly, that there had been a change in circumstances since the decision of the justices. On that the learned judge said²: c

'As to that, it appears to me that if there has been a material change in circumstances there is nothing to prevent the father from applying to the magistrates to vary their order. In *In re Andrews (Infants)*³, Upjohn J. pointed out that where the infant has been the subject-matter of orders as to custody, care and control in the Divorce Division of the High Court it might become necessary for the Chancery judge to entertain applications relating to the infant "at any rate where there has been a change of circumstances since the Order of the Divorce Division, or some wholly new question arises." It is plain, from the examples which Upjohn J. gives, that he is speaking of cases where the jurisdiction of the Chancery Division is more extensive, or more efficacious, or more convenient, than that of the other court. Following the principles enunciated by Upjohn J. I should not regard such a change of circumstances, as is here referred to, as a ground for interposing the wardship jurisdiction.' d

Lastly, it was submitted that the case involved complex issues, and reliance was placed on some observations of Pennycuik J in *Re W (J C) (an infant)*⁴. On that submission Cooke J said⁵: e

'When Pennycuik J. referred to cases of complexity, I do not think he intended to embrace all cases under the Guardianship of Infants Acts where the decision might involve difficult questions. The case with which he was concerned was one in which the magistrates had awarded custody to one parent, and care and control to the other. The view which Pennycuik J. took⁶, and from which the Court of Appeal subsequently differed⁷, was that the magistrates had no power to do that. It was in that context that Pennycuik J. referred to cases of f

1 [1968] 1 WLR 1976

2 [1968] 1 WLR at 1982

3 [1958] 2 All ER 308 at 310, [1958] Ch 665 at 669

4 [1963] 2 All ER 706, [1963] Ch 556

5 [1968] 1 WLR at 1983

6 [1963] 2 All ER at 710, [1963] Ch at 562

7 [1963] 3 All ER 459, [1964] Ch 202 g

a complexity, and I think it is fair to conclude that he was thinking primarily of cases where the magistrates did not have power to make the order appropriate to the circumstances of the case.'

That is a formidable body of authority which propounds as a principle that the court in wardship proceedings will not make a determination on the merits where there is a subsisting and effective order of the magistrates' court, unless either some relief is sought which cannot be obtained in that court, or there are some other wholly exceptional circumstances; and that neither changes in the relevant facts, nor mere complexity in the issues involved, constitute exceptional circumstances.

b Though the authorities are not binding on me, I should follow them unless I were plainly and beyond doubt convinced that they were wrong. Counsel for the mother submitted that they were wrongly decided and that I should not follow them.

c Alternatively, he submitted that even if they were rightly decided when wardship cases and appeals from magistrates on questions of custody were heard in the Chancery Division, a wholly different situation exists now in that those matters and suits for dissolution of marriage are brought together in the Family Division, and that henceforth the practice formerly established in the Probate, Divorce and Admiralty Division should be followed in wardship cases. Counsel for the mother bases his

d submissions on the principle, which he says is of general application, that the courts are open to all, so that if a litigant has something to litigate he is entitled as of right to litigate it in the court of competent jurisdiction of his choice. In particular he submits that the High Court is a superior court which exercises a general control over the proceedings and orders of a court of petty session. Quite apart from this general principle, he points to a number of instances in which, he submits, the High Court in wardship matters is not debarred from determining cases on their merits e by the existence of an order even of a court of co-ordinate jurisdiction.

There were four classes of case. First, counsel for the mother pointed to the principle established in relation to orders of a foreign court in cases such as *McKee v McKee*¹, that the court in this country should exercise an independent judgment, simply giving such weight as it might think fit to the foreign judgment. But counsel was f constrained to admit an exception to this principle in the so-called kidnapping cases, exemplified by *Re H (infants)*².

The second class of cases are those in which the wardship jurisdiction was invoked where there were already proceedings relating to the same question in what was formerly the Probate, Divorce and Admiralty Division, and counsel referred me to three cases, *Re Andrews (Infants)*³, to which reference has already been made in the g cases I have cited; and its corresponding case, *Andrews v Andrews and Sullivan*⁴; and the decision of the Court of Appeal in *Hall v Hall*⁵. It is plain from the principles enunciated and applied in those cases that the existence of proceedings in, or even orders of, the former Probate, Divorce and Admiralty Division could not prevent the court exercising its wardship jurisdiction on the merits, and that, due regard being paid to the principles of comity referred to by Donovan LJ in *Hall v Hall*⁵, the h wardship jurisdiction might well prevail and curtail the jurisdiction in matrimonial suits. Now that the Family Division has been constituted, it seems to me that in practice there will be very few, if any, cases in which a potential conflict of this nature will arise.

Thirdly, counsel for the mother submits that in matrimonial suits the High Court has always assumed an unfettered power to deal with questions of custody on their j merits, despite the existence of orders of a magistrates' court; and he relies on

1 [1951] 1 All ER 942, [1951] AC 332

2 [1966] 1 All ER 886, [1966] 1 WLR 381

3 [1958] 2 All ER 308, [1958] Ch 665

4 [1958] 2 All ER 305, [1958] P 217

5 [1963] 2 All ER 140, [1963] P 378

*Vigon v Vigon and Kuttner*¹ where, in dealing with ancillary matters on a husband's petition for dissolution of marriage, Bateson J made an order giving custody to the husband notwithstanding an existing order in favour of the wife of a competent magistrates' court. Apart from this authority, my own limited experience, and the longer experience of all counsel, confirmed that this was established practice.

Lastly, I was referred to *Official Solicitor v K*² in which the ratio decidendi of the decision of the House of Lords was that the principle that the welfare of infants was the first and paramount consideration applied not only to substantive decisions but also to decisions on matters of procedure.

Notwithstanding those instances and authorities, and counsel for the mother's cogent and persuasive arguments, I do not accept either his principal or his alternative submission. The control which the High Court exercises over courts of inferior jurisdiction can, it seems to me, only be exercised in accordance with established law. This necessarily includes legislation and rules of court, but in my judgment it goes further. Just as in the field of substantive law the principles of the common law and equity are established and developed by decisions and precedents, so also in adjectival law; and in that field it is open to the courts by decision and the principle of stare decisis to establish as a matter of law those cases in which its jurisdiction may or may not be invoked. This the authorities which counsel for the mother attacks have done, and in my judgment have rightly done. Moreover, in my view, they are not inconsistent with the authorities on which he relies.

The existence of an order of a foreign court is itself an exceptional circumstance which raises a number of special problems, notably of enforcement. As to a potential conflict with an order in a matrimonial suit, and the practice of the court in matrimonial suits, there is always an actual or projected dissolution of marriage and a change of status of the persons principally involved. And in its matrimonial jurisdiction the High Court is concerned with other ancillary matters separate from, but often closely concerned with, the welfare of children of the family which may make it desirable for that court to deal at the same time with all those questions. This is an exceptional circumstance, absent where there are only wardship proceedings.

Lastly, though it is true that the welfare of infants is paramount, even in relation to procedural matters, in my judgment it is open to the court to determine that in the absence of special circumstances that welfare is achieved by avoiding a multiplicity of proceedings in different courts. In my opinion, to change the practice simply because now all infant matters in the High Court have been brought together in one Division would be a retrograde step. In particular, I should regard it as lamentable to cast any doubt on the efficacy and usefulness of the jurisdiction of magistrates' courts throughout the country in securing the welfare of children.

I must next consider whether there are in this case any such exceptional circumstances as, on the authorities, will justify my considering and determining this application on its merits. Counsel for the mother relies on three. First, the husband and, at present, the children are in Scotland and difficulties may arise on matters of enforcement of orders and the giving and seeking of undertakings with which the magistrates' court cannot effectively deal. Secondly, the mother was for all practical purposes precluded from seeking the determination of the High Court on the decision of the magistrates in this case by the refusal to her of legal aid for the purposes of her appeal. Thirdly, or perhaps a subsidiary part of the second ground, counsel points to the manifest objections that can be taken to the validity of the order of the magistrates.

I can deal with this submission shortly, because the contrary argument was but faintly urged by counsel for the father. I simply state that in my judgment they do together constitute special circumstances within the meaning of that expression as

¹ [1929] P 157, 245, [1928] All ER Rep 755

² [1963] 3 All ER 191, [1965] AC 201

a used in the cases to which I have referred. I only add that in my judgment it is established by the recent decision in the Court of Appeal in *Fakes v Taylor Woodrow Construction Ltd*¹ that I am not precluded by the legislation relating to legal aid from so regarding the second circumstance on which counsel for the mother relies.

b Since the order of the magistrates on 4th April 1972 there have been a number of changes. The children, of course, have been living with the grandparents in Scotland. The flat which the father acquired has been sub-let by him to university students on terms under which it is available for use by him, or others with his consent, during university vacations. The father now lives with the grandparents and has changed his employment. He is now employed on night shifts, which last from 10 p.m. to 6 a.m. Making due allowance for his need for sleep, he has greater opportunity of spending time with the children. The present living arrangements in Scotland are that the grandparents occupy one bedroom; Christopher, Martin and the father c another bedroom; and the two children with whom I am concerned the third bedroom. When Stephen is at home from university temporary arrangements have to be made for his sleeping, though he is, and can be, accommodated in the father's flat in Edinburgh.

d In London a third bedroom has been decorated, and the damp which was referred to in evidence before the magistrates has been eradicated. There will thus be a bedroom for the mother and James, and if it was thought desirable a bedroom for each of the children during times which they spend in London. James has attained his target of six 'O' Levels and has been accepted at a suitable teachers' training college, forming part of the administrative organisation of London University. If he pursues his studies successfully he could expect to qualify as a teacher in 1975, or e 1976 if his ambition takes him in pursuit of a degree. Contact has been made with the mother's parents in Yorkshire, who, perhaps understandably, though retaining their love for the mother, were at first loth to accept James. As I understand it, he has now been accepted as a quasi son-in-law by them and has paid visits to them. James has been awarded a grant of £895 a year to pursue his studies. He also continues f to work at the community play centre where he earns £35 a month. I understand that if the care and control of the children were to be awarded to the mother and they lived with her and James, the grant would be appropriately increased. The union of the mother and James has remained stable, and indeed on 29th December 1972 the mother gave birth to a daughter, Victoria, of whom James is the father.

g There has been very frequent access, both for long and short periods, during which the mother has seen the children in London and in Scotland; and the children have been in close contact by that means, and by telephone calls, with the mother. They have of course been in close contact with the father. The welfare officer on 17th February 1972 reported that James was a responsible person, who appeared to have a satisfactory relationship with both the mother and the children, and I think that relationship has been confirmed.

h In addition to the affidavit evidence, I have heard oral evidence from the mother and father, and from James, and the grandmother, and I have had an opportunity of talking to them myself and forming my own opinion of their respective characters and dispositions. The father, though he may have proved himself at least an unwise husband, is undoubtedly a devoted and responsible father, and it is accepted on all sides that in this capacity no criticism can be made of him. The mother has taken a lover and is susceptible of criticism as a wife, and in some respects as a mother, because where young children are involved the two capacities cannot be wholly i distinguished. That apart, it is accepted that nothing can be said against her as a mother. She is competent, responsible and devoted to the children. The grandmother seemed to me to be a wholly admirable character, though I think that she may, in her sympathy for, and eagerness to help, the father have underestimated the burden

that may rest on her over the next ten to 15 years if she undertakes the task of being the woman primarily responsible for the upbringing of these two children. James of course was the other man in the triangle and was the ultimate cause of the breakdown of the marriage, though I think not the only cause. In particular I suspect that had the marriage gone on in the pattern that had been established, if James had not been cast in that role another man would. Apart from those considerations, I was impressed with James. He seemed to me to be ambitious, determined and single-minded in his efforts to qualify himself for the post of a schoolteacher. He was sensible of his responsibilities as the father of Victoria, and I think would be equally sensible of the similar, but not identical, responsibilities if care of these children were committed to the mother. a

Section 9 of the Guardianship of Minors Act 1971, on an application to the justices or to this court invoking the statute, requires the court to have regard to the welfare of the minor and to the conduct and the wishes of the mother and the father. Section 1, which applies not only to wardship proceedings but also to statutory proceedings, contains the well-known requirement that the court shall regard the welfare of the minor as the first and paramount consideration. b

In my view there is no inconsistency between the two sections. It is plain as a matter of construction, and established by authority, that the welfare of the children is not the only relevant consideration. On the other hand, in my view, as a matter of semantics a paramount consideration must be a consideration to which all other considerations are to be subordinated. A special consideration that has been ventilated in this case is the conduct of the mother, and I was referred to *Re L (infants)*¹. In that case the Court of Appeal took the view that the conduct of the mother had been reprehensible in that she had been responsible for the break-up of the matrimonial home, and reversed the decision of the trial judge committing care and control to her because he ought to have, but had not, taken that conduct into consideration. However, in my view an analysis of the ratio decidendi of that case indicates that the Court of Appeal was not treating the conduct of the mother as an extraneous consideration lying outside the paramount consideration, but treated that conduct as part of its assessment of where the welfare of the children really lay. On any view there are logical problems in applying the statute and reconciling the authorities. In my judgment, the court must take into account all relevant considerations, but the weight to be attached to any particular consideration must depend on the extent to which, and the manner in which, if at all, that consideration affects the welfare of the child or children concerned. I think that this conclusion accords with the views expressed by Megarry J in *Re F (an infant)*². c

The choices are between life in Scotland with a loving father and grandparents and substantially older, though still young, uncles, and life in London with an equally loving mother and her lover, whose child she has borne, and whom she wishes (a wish shared by him) to marry if she should be free to do so. Scotland has advantages in environment both immediate, in the house itself, and in the general neighbourhood, though accommodation in the house will be more cramped than in London, at any rate so far as sleeping space is concerned, so long as the father's brothers are there with the family. It is, of course, a long established family home, though that situation would change if the father no longer lived there, and the prospects would depend on when and why he left, and in particular whether he remarried. He has no present intention of doing either, though the possibility must be borne in mind. d

London has the advantage of close and constant contact with a loving mother in a normal, in the sense of a two-generation, family with a younger half-sister and possibly a further half-sister or half-brother. This substantial and undoubted advantage must e

1 [1962] 3 All ER 1, [1962] 1 WLR 886

2 [1969] 2 All ER 766 at 767, 768, [1969] 2 Ch 238 at 241 f

a be discounted for the fact that the mother played a large part in the break-up of the marriage, a fact which must cast some doubt on the stability of the present ménage.

Counsel for the father prays in aid a further disadvantage of life in London. James, he said, will gradually supplant the father in the children's mind to their disadvantage. It seems to me that if this argument were sound it would prevail wherever, after a broken marriage, a mother took a new partner, whether within or outside marriage, who was of an age with the father. Put in that way the argument is in my view unsound, but in any event I am satisfied that having regard to the frequent opportunities there would be for access to the father if the children were in London, and perhaps later in Yorkshire, where ultimately James hopes to obtain an appointment as a teacher, and having regard to my assessment of James, it is not a consideration which should influence me in this case.

c In the end I have to decide how far to discount the advantage of living with the mother for the considerations personal to her and James that I have mentioned; and whether that advantage, so discounted, is outweighed by the net advantage of life in Scotland. I was referred to a number of cases in which a similar problem had been solved, and these have of course afforded me assistance in seeing how other judges have approached the problem and found a solution to it. On the other hand, a close analysis of the facts in those cases, and a process of seeking to compare those facts with the facts before me, seem to me to be more likely to cloud than assist judgment. Though the discretion I have to exercise is a judicial discretion, in the end the decision must be made as an individual and perhaps even as a parent.

e I have reached the conclusion, not without considerable hesitation, that the true welfare of these two children will be secured if they are allowed to be brought up by their mother, with frequent and generous access to the father. I add only two matters. I should have reached that conclusion with less hesitation if the mother had been alone and able, as she is now, to give her full time to bringing up the children; or if she had remarried. I do not think that I should be deterred from reaching the same conclusion simply because her union with James is not that of a married couple. In any event, it is to be borne in mind that if that be a disadvantage to the children it is one that can be removed by the father almost at the stroke of a pen. Secondly, it should not be taken to be a corollary to the conclusion I have reached that in April 1972 I should have reached a different decision from that which commended itself to the magistrates. The circumstances are now, in many important respects, different from those that obtained then. I think that the interest which the father has properly taken, and will throughout their lives continue to take, in these children should be recognised by the formal authority of one who has custody, and I think that the proper order to make would be to commit custody jointly to the mother and the father, directing that these proceedings be amended to enable that to be done by entitling them in the matter of the Guardianship of Minors Act 1971 as well as the Law Reform (Miscellaneous Provisions) Act 1949. I shall simply direct reasonable access, confident that as they have in the past so in the future these parents will arrange that matter with generosity, consideration and benefit to the children.

h It follows from what I have said that as from the date of this order the effectiveness of the order of the magistrates will cease.

Order for joint custody with care and control to the mother and access to the father.

j Solicitors: *Bard & Keith Joseph* (for the mother); *T V Edwards & Co* (for the father).

R C T Habesch Esq Barrister.

McGinley v Burke

QUEEN'S BENCH DIVISION

BEAN J

3rd, 17th MAY 1973

Practice – Stay of proceedings – Jurisdiction – Medical examination of plaintiff – Examination at defendant's request – Exchange of medical reports – Reciprocity – Plaintiff agreeing to submit to examination on condition defendant supplies copy of report – Plaintiff only entitled to insist on condition if willing to supply copies of own medical reports in exchange.

The plaintiff brought an action claiming damages for personal injuries. The defendant's insurers asked for a medical examination. The plaintiff's solicitors agreed on condition that, inter alia, after the examination 'you will let us have a copy of the report'. The defendant's insurers agreed 'provided . . . that there is a full exchange of medical reports and that you are willing to furnish us with copies of all your medical evidence in return'. The plaintiffs' solicitors, however, insisted on unqualified acceptance of their terms and the defendant applied for a stay of proceedings.

Held – The defendant was entitled to the order sought. Although a plaintiff could make it a condition of submitting to a medical examination that the defendant should provide him with a copy of the report, he could only do so where he was willing to offer in exchange, on a basis of reciprocity, his own equivalent report on which he proposed to rely (see p 1012 f to h, post).

Clarke v Martlew [1972] 3 All ER 764 applied.

Notes

For the circumstances in which actions may be stayed, see 30 Halsbury's Laws (3rd Edn) 407-409, para 768, and for cases on the subject, see 51 Digest (Repl) 998-1008, 5347-5404.

Cases referred to in judgment

Clarke v Martlew [1972] 3 All ER 764, [1973] 1 QB 58, [1972] 3 WLR 653, CA.

Edmeades v Thames Board Mills Ltd [1969] 2 All ER 127, [1969] 2 QB 67, [1969] 2 WLR 668, [1969] 1 Lloyd's Rep 221, CA, Digest (Cont Vol C) 1102, 53714.

Lane v Willis, Lane v Beach (Executor of Estate of George William Willis (deceased)) [1972] 1 All ER 430, [1972] 1 WLR 326, CA.

McGuinness v Fairbairn Lawson Ltd (1966) 110 Sol Jo 870, CA, Digest (Cont Vol B) 261, 4106a.

Worrall v Reich [1955] 1 All ER 363, [1955] 1 QB 296, [1955] 2 WLR 338, CA, 51 Digest (Repl) 607, 2283.

Interlocutory appeal

The defendant, Frank Burke, appealed against an order of Master Jacob made on 5th March 1973 whereby he dismissed an application by the defendant that all further proceedings in the action by the plaintiff, David Anthony McGinley, against the defendant for damages for personal injuries be stayed until the plaintiff submitted himself to a medical examination on behalf of the defendant. The facts are set out in the judgment.

Patrick Phillips for the defendant.

Christopher Sumner for the plaintiff.

Cur adv vult

17th May. **BEAN J** read the following judgment. This is an appeal from a refusal by Master Jacob to make an order staying all further proceedings in the

a action on the ground that the plaintiff had unreasonably refused to submit himself to a medical examination on behalf of the defendant. The point raised is an interesting one on which there is no direct authority.

b The plaintiff's claim is for damages for serious personal injuries which he sustained on 29th March 1972 and which resulted in a fracture of the skull and a fracture of the spine. On 13th July 1972, before the statement of claim was served, the defendant's insurers asked for a medical examination. The plaintiff's solicitors agreed to afford facilities for a joint medical examination on four terms: (1) that it took place in the presence of their consultant; (2) that the defendant's insurers pay all costs; (3) that the name of the proposed doctor be submitted for agreement; (4) that after the examination 'you will let us have a copy of the report you have obtained in accordance with the recent direction of the Court of Appeal'.

c The defendant's insurers agreed to these terms, 'provided . . . that there is a full exchange [of medical reports] and that you are willing to furnish us with copies of all your medical evidence in return'. The plaintiff's solicitors insisted on unqualified acceptance of their four terms, with the result that the defendant took out a summons to stay the proceedings, but the master made no order. The defendant now appeals.

d It is both helpful and instructive to note the quite marked development that has taken place in recent years on the question of medical reports in personal injury actions. Provision was made in the Civil Evidence Act 1972, s 2 (3), for rules of court to enable the court in any civil proceedings to direct that one party shall disclose to the other party medical reports that it is proposed to adduce as part of his case at trial, but no rules under this section have yet been published. Until such rules are made a report which a doctor gives to a solicitor is a document protected by legal professional privilege and the other side is not entitled as of right to see it: *Worrall v Reich*², *McGuinness v Fairbairn Lawson Ltd*³. It is to be noted that in *Worrall v Reich*⁴ Morris LJ said:

' . . . in cases of personal injuries it is proper and desirable that medical reports should be exchanged to the greatest possible extent.'

f In *Edmeades v Thames Board Mills Ltd*⁵ the Court of Appeal exercised its inherent jurisdiction to grant a stay of proceedings unless and until the plaintiff submitted himself to an examination by one of six named doctors. Lord Denning MR⁶ referred to the report by Winn LJ's Committee on Personal Injuries Litigation⁷, which said:

g ' . . . we entertain no doubt that every claimant of damages for personal injuries must be bound to submit himself or herself to medical examination of a reasonable character which is reasonably required, subject, of course, to proper safeguards and to the claimant's right to object to any particular doctor. In case of need, we consider that the Court must have a power if necessary by legislation to stay the action pending the plaintiff submitting to such an examination.'

h And Lord Denning MR said⁶:

'I do not think legislation is necessary. This court has ample jurisdiction to grant a stay whenever it is just and reasonable so to do. It can, therefore, order a stay if the conduct of the plaintiff in refusing a reasonable request is such as to prevent the just determination of the cause.'

j 1 *I e Clarke v Martlew* [1972] 3 All ER 764, [1973] 1 QB 58

2 [1955] 1 All ER 363, [1955] 1 QB 296

3 (1966) 110 Sol Jo 870

4 [1955] 1 All ER at 366, [1955] 1 QB at 300

5 [1969] 2 All ER 127, [1969] 2 QB 67

6 [1969] 2 All ER at 129, [1969] 2 QB at 71

7 (1968) Cmnd 3691, para 312

These observations by Lord Denning MR were expressly approved by the Court of Appeal in *Lane v Willis*¹. There, in the course of his judgment, Sachs LJ said²:

'An order for a medical examination of any party to an action has been well said to be an "invasion of personal liberty". Accordingly, it should only be granted when it is reasonable in the interests of justice so to order. When the refusal of a medical examination is alleged to be unreasonable, the onus lies on the party who says that it is unreasonable and who applies for the order to show, on the particular facts of the case, that he is unable properly to prepare his claim (or defence) without that examination.'

The most recent case dealing with medical reports is *Clarke v Martlew*³, where it was held that fairness required that if a defendant sought to have a plaintiff medically examined any report obtained should be disclosed and accordingly the court would only order the action to be stayed for the medical examination of the plaintiff on the condition that the plaintiff was supplied with a copy of the report. But it is to be noted that the plaintiff there was willing to give the other side copies of all her own medical reports. Lord Denning MR said⁴:

'I know that, as a result of our decision today, it will mean that in practice medical reports will have to be exchanged with a view to agreement. That seems to me altogether desirable in the search for justice and the saving of expense.'

It will be seen from this review of recent authority that a defendant can now, in proper cases, require a medical examination of the plaintiff provided that he is willing to exchange medical reports with the plaintiff's advisers. What has not been the subject of a direct decision is the extent of the duty on the plaintiff's advisers where they seek a copy of the defendant's medical report as a condition of permitting the examination.

Clearly, on the present state of the law, the plaintiff's advisers are not obliged to disclose *all* the medical reports they have obtained. The court is only concerned with those medical reports on which the plaintiff intends to rely at trial. It seems to me that the plaintiff must at least offer reciprocity. If his advisers require to see a copy of the defendant's medical reports as a condition of a particular examination, they must be prepared to offer in exchange their own equivalent report on which they propose to rely.

In this instant appeal the plaintiff's advisers felt that they could insist on seeing the defendant's medical report immediately and then, in due course, near to the hearing date, disclose their own reports. In my judgment there must be fairness between the parties. The plaintiff can insist on seeing a medical report sought by the defendant only by offering his own report in exchange. Alternatively, the parties can agree to eventual exchange of reports before trial. Or, of course, until rules to the contrary are made, parties can refuse to disclose their reports. It follows that the fourth term sought to be imposed by the plaintiff's solicitors in this appeal was unreasonable and arose from a misunderstanding of the recent directions of the Court of Appeal. I note that the statement of claim has not yet been delivered in this action, but the injuries described in a letter before action are capable of being very grave ones or might prove to be comparatively minor. I think the defendant's advisers are entitled to assess the true nature of the injuries, even at this early stage,

1 [1972] 1 All ER 430, [1972] 1 WLR 326

2 [1972] 1 All ER at 435, 436, [1972] 1 WLR at 333

3 [1972] 3 All ER 764, [1973] 1 QB 58

4 [1972] 3 All ER at 767, [1973] 1 QB at 64

a and accordingly, in my view, the onus referred to by Sachs LJ in *Lane v Willis*¹ has been discharged. I would allow this appeal and make the order sought. The plaintiff is now legally aided.

Appeal allowed but order not to be enforced without further order of the court; leave to appeal.

b Solicitors: Lawrence, Graham & Co (for the defendant); Myers, Ebner & Deaner (for the plaintiff).

E H Hunter Esq Barrister.

c Westward Circuits Ltd v Read

NATIONAL INDUSTRIAL RELATIONS COURT

SIR JOHN DONALDSON P, SIR REGINALD GRIFFITHS AND MR ROBERT ROBERTS

13th, 28th MARCH 1973

d *Industrial relations – Unfair industrial practice – Complaint – Procedure – Time limit – Not practicable in circumstances for complaint to be presented before end of limitation period – Employee unaware of right to make complaint to industrial tribunal until after expiry of time limit – Whether ‘practicable’ for employee to have made complaint within limitation period – Industrial Tribunals (Industrial Relations, etc) Regulations 1972 (SI 1972 No 38), Sch, r 2 (1).*

e *Industrial relations – Unfair industrial practice – Complaint – Procedure – Time limit – Industrial tribunal having jurisdiction to entertain complaint made out of time – Tribunal having discretion whether or not to entertain complaint – Principles on which discretion to be exercised – Industrial Tribunals (Industrial Relations, etc) Regulations 1972 (SI 1972 No 38), Sch, r 2 (1).*

f *Industrial relations – Unfair industrial practice – Complaint – Procedure – Time limit – Complaint made out of time – Whether tribunal having jurisdiction to hear complaint – Industrial Relations Act 1971, Sch 6, para 5 (1).*

g An employee was summarily dismissed by his employers with the result that his employment was effectively terminated on 29th September 1972. Until he visited his employment exchange in early November 1972 and received advice the employee was unaware of his right to present a complaint of unfair dismissal to an industrial tribunal. On 22nd November 1972 the employee presented a complaint to an industrial tribunal. The employers claimed that the tribunal had no jurisdiction to entertain the complaint because it had not been presented before the end of the period of four weeks beginning with the effective date of the termination of his contract as required by r 2 (1)^a of the Schedule to the Industrial Tribunals (Industrial Relations, etc) Regulations 1972. The tribunal held, however, that the time limit did not apply since it had not been ‘practicable’, within r 2 (1), for the employee to present his complaint within the four week period and awarded the employee compensation. The employers appealed.

j **Held** – (i) Industrial tribunals, when considering whether it was ‘practicable’ for a complaint to be presented within the time limit, should take account of when the complainant first knew that he might make a claim for compensation for unfair

1 [1972] 1 All ER at 435, 436, [1972] 1 WLR at 333

a Rule 2 (1), so far as material, is set out at p 1015c, post

dismissal. Unless and until he had been put on enquiry it was clearly impracticable for a dismissed employee to present a claim. However, once he had been put on enquiry, the tribunal should decide whether, starting from that point of time, it was practicable for the particular complaint to be presented before the expiry of the time limit. In the instant case the employee was unaware of his right to claim compensation before the beginning of November 1972 and, in the absence of any evidence that he was put on enquiry at an earlier date, the tribunal was right in concluding that it was not practicable for his complaint to be presented within the four week period (see p 1016 h and p 1017 d, post).

(ii) It did not follow that, because it had not been practicable to present the complaint within the four week period, the tribunal was bound to entertain the claim. If the circumstances were such that a tribunal had jurisdiction to entertain a late claim, it then had a discretion whether or not to do so; in exercising that discretion, regard should be had to the intention of Parliament that claims generally should be presented within a four week period and the tribunal should consider whether the complainant had acted as swiftly as practicable in all the circumstances. On the facts, however, the tribunal could only have exercised its discretion in favour of entertaining the complaint and the appeal would be dismissed (see p 1017 e to g, post).

Per Curiam. By virtue of Sch 6, para 5 (1)^b to the Industrial Relations Act 1971, r 2 (1) of the Schedule to the Industrial Tribunals (Industrial Relations, etc) Regulations 1972 goes to the jurisdiction of the tribunal and is not merely a procedural bar, the benefit of which can be waived by the employer (see p 1015 f and j, post).

Notes

For complaints to industrial tribunals of unfair industrial practice, see Supplement to 38 Halsbury's Laws (3rd Edn) para 677F, 10.

For the Industrial Relations Act 1971, Sch 6, see 41 Halsbury's Statutes (3rd Edn) 2204.

Cases referred to in judgment

Albison v Newroyd Mill Ltd (1925) 95 LJKB 667, 134 LT 171, CA, 34 Digest (Repl) 633, 4345.

Evans v Bartlam [1937] 2 All ER 646, [1937] AC 473, 106 LJKB 568, sub nom *Bartlam v Evans* 157 LT 311, HL, 50 Digest (Repl) 169, 1458.

Hammond v Haigh Castle & Co Ltd p 289, ante, [1973] ICR 148, NIRC.

Case also cited

Knight v Demolition & Construction Co Ltd [1953] 2 All ER 508, [1953] 1 WLR 981; *affd* [1954] 1 All ER 711, [1954] 1 WLR 563, CA.

Appeal

This was an appeal by Westward Circuits Ltd against the decision of an industrial tribunal (chairman John M Shaw Esq QC) sitting in Exeter, dated 5th January 1973, that the respondent, Colin William Steward Read, had been unfairly dismissed. The appellants' ground of appeal was that by virtue of r 2 (1) of the Schedule to the Industrial Tribunals (Industrial Relations, etc) Regulations 1972 the respondent's complaint to the tribunal had been presented out of time. The facts are set out in the judgment of the court.

R Neville Thomas for the appellants.

J Melville Williams for the respondent.

Cur adv vult

28th March. **SIR JOHN DONALDSON P** read the following judgment of the court. This is an appeal by the employers against the unanimous decision of the industrial tribunal sitting in Exeter that the respondent was entitled to £600 by way

^b Paragraph 5 (1), so far as material, is set out at p 1015 h, post

a of compensation for unfair dismissal. The only ground of appeal is that the claim was out of time and that accordingly the tribunal had no jurisdiction.

The respondent was employed by the appellants from 1st June 1970 as a production manager. The effective date of the termination of his employment was 29th September 1972, on which day he was summarily dismissed with four weeks' wages in lieu of notice. He presented his claim to the tribunal on 22nd November 1972 at the end of a period of 55 days beginning on the effective date of termination.

b The Industrial Tribunals (Industrial Relations, etc) Regulations 1972¹ provide in r 2 (1) of the Schedule:

'In relation to proceedings on complaints under section 106 of the [Industrial Relations Act 1971], a tribunal shall not entertain such a complaint unless it is presented before the end of the period of four weeks beginning—(a) in the case of a complaint relating to dismissal, with the effective date of termination, or (b) . . . unless the tribunal is satisfied that in the circumstances it was not practicable for the complaint to be presented before the end of that period.'

The tribunal was so satisfied. It held:

d '[The respondent], on being dismissed, was most anxious to find out what the grounds were on which he had been dismissed, and for what reason it was alleged he was inefficient. He wished to clear his name of this slur. He pressed the company by telephone and letter for an explanation, which produced no result. During the first four weeks after 29th September he was not able to claim unemployment benefit because he had been given four weeks money in lieu of notice and consequently was not visiting the employment exchange where he could have obtained advice. He was not aware of his right to apply to the tribunal under the Industrial Relations Act and it was not until the beginning of November that he was advised as to his rights at the employment exchange. Consequently the delay over 28 days was really attributable to the ignorance by [the respondent] of his rights under the Act'

f The tribunal also held that r 2 (1) of the Schedule to the 1972 regulations went to its jurisdiction and was not a bar the benefit of which could be waived by the employer. This was not material either to its decision or to this appeal, since the employers at all times consistently maintained that the claim was made too late. However, it may be helpful if we say that we agree with the tribunal. The rules of procedure in the Schedule to the 1972 regulations were made under the power contained in Sch 6 to the 1971 Act, para 5 (1) of which provides:

g 'In relation to proceedings on complaints under section 106 of this Act the regulations shall also include provision precluding an industrial tribunal from entertaining such a complaint unless it is presented before the end of the period of four weeks beginning—(a) in the case of a complaint relating to dismissal, with the effective date of termination, or (b) . . . unless the tribunal is satisfied that in the circumstances it was not practicable for the complaint to be presented before the end of that period.'

A construction of the rules which treats them as procedural rather than jurisdictional would conflict with Sch 6, since it would result in the tribunal only being precluded from entertaining a late complaint if the employer took the point.

j Counsel for the appellants submitted that the tribunal had applied a subjective test of practicability and that this was wrong. In his submission the law leant against a construction which involved deciding what was a man's state of mind, for it was easy for someone to assert that he was ignorant of the law and difficult to disprove such an assertion. Counsel for the appellants submitted that practicability had to

be judged in the light of factors which were objectively assessable such as physical or mental illness or absence overseas. a

Counsel for the respondent submitted that the rule expressly required the tribunal to assess practicability 'in the circumstances' and that such circumstances must include the state of the complainant's knowledge of the law. He pointed out that in the related field of workmen's compensation s 2 (1) of the Workmen's Compensation Act 1906 provided that, 'Proceedings... shall not be maintainable unless notice of the accident has been given as soon as practicable after the happening thereof...' In *Albison v Newroyd Mill Ltd*¹ the Court of Appeal, following earlier cases, had held that in applying this section the court had to answer the question 'At what time did the workman realise that he had suffered an injury by accident entitling him to compensation under the Act'. b

In *Evans v Bartlam*² Lord Atkin said: c

'For my part, I am not prepared to accept the view that there is in law any presumption that anyone, even a judge, knows all the rules and orders of the Supreme Court. The fact is that there is not, and never has been, a presumption that everyone knows the law. There is the rule that ignorance of the law does not excuse, a maxim of very different scope and application.'

The rule that ignorance of the law is no excuse is part of the criminal law of Great Britain. It means no more and no less than that a man is guilty of an offence if he does something which is prohibited by law, whether or not he knows that it is prohibited. But, although it does not excuse, ignorance of the law is a powerful mitigating factor and in appropriate circumstances may well lead to the court finding the offence proved but ordering an absolute discharge. Outside the field of the criminal law, knowledge or ignorance of the law is usually irrelevant, but in no case is there any presumption that every or any citizen knows all the law. Thus ignorance that the law imposes a duty of care does not provide any answer to a claim for damages for breach of that duty, i.e. for negligence. There are, however, exceptional cases in which knowledge of the law is relevant. The decision of the House of Lords in *Evans v Bartlam*³ shows that it may be relevant in deciding whether a man has made an election. *Albison v Newroyd Mill Ltd*¹ shows that it used to be relevant in the context of workmen's compensation claims. d

In *Hammond v Haigh Castle & Co Ltd* we said⁴ that members of tribunals should ask themselves: e

' "Would a jury composed of ordinary men and women employed in industry consider that in all the circumstances it was practicable for the complaint to have been presented within the time limit?" ' f

In answering this question we have no doubt that an industrial jury would take account, and rightly take account, of when the complainant first knew that he *might* be entitled to make a claim for compensation for unfair dismissal. We stress the word 'might' because a complainant may be put on enquiry by visits to the employment exchange, reading newspapers, gossip in the 'local' and in many other ways without actually knowing that he has such a right. Unless and until he is put on enquiry, it is clearly impracticable for a dismissed employee to present a claim. However, once he is put on enquiry the situation is changed and the tribunal has to ask itself whether, starting from that point of time, it was practicable for that particular complainant's complaint to be presented before the expiry of the 28 day period which began with the effective date of termination of the contract of employment. Clearly, the sooner g

¹ (1925) 95 LJKB 667

² [1937] 2 All ER 646 at 649, [1937] AC 473 at 479

³ [1937] 2 All ER 646, [1937] AC 473

⁴ Page 293, ante, [1973] ICR 148 at 152 h

a the complainant is put on enquiry and the greater the degree of information which he then acquires, the sooner it will be practicable to present the complaint. Thus, if the employment exchange tells him of his right and gives him the appropriate form, it will be practicable to present the complaint sooner than if he merely reads in the newspapers that some other person in different circumstances has been awarded compensation for unfair dismissal.

b Let no one regard this judgment as a licence to complainants to sleep on their rights. Time is of the essence in all matters concerning industrial relations. There can be few, if any, workers who have not heard of the Industrial Relations Act 1971, but there have been times when the members of the court have wondered how many people had any idea of what it provided. However, that situation is changing and the time will come when it will be difficult, if not impossible, for a complainant to persuade any tribunal that he or she was unaware in a general way of the rights conferred c by the 1971 Act in relation to unfair dismissal. In the meantime, if any employers are worried at the prospect of being faced by late claims, the remedy is in their own hands. They need only tell dismissed employees that if they consider that they have been unfairly dismissed within the meaning of the 1971 Act, they are entitled to apply to an industrial tribunal for compensation and must do so within the specified period.

d In the light of the tribunal's conclusion of fact that the respondent was unaware of his right to claim compensation before the beginning of November 1972, and in the absence of any evidence that he was put on enquiry at some earlier date, we consider that the tribunal was right to conclude that it was not practicable for the respondent's complaint to be presented within the 28 day period. But it does not follow from this that the tribunal were bound to entertain the claim. True it is that on a literal e reading of the rule, if once the tribunal is satisfied that it was impracticable to present the claim within the limited period, it might appear that the claim could be entertained however late it was presented. We do not consider that that is the true construction of the rule. The intention both of the 1971 Act and of the rule is that claims for compensation shall be presented promptly. In our judgment, if the circumstances are such that the tribunal has jurisdiction to entertain a late claim, it then has a discretion whether or not to do so. In exercising that discretion it should have regard f to the fact that Parliament expected that claims could generally be presented within a four week period and should consider whether the complainant has acted as swiftly as practicable in all the circumstances.

In the present case the tribunal has made no reference to its ability to exercise any such discretion. However, the evidence which was accepted by the tribunal shows g that the respondent first learnt of his rights on 3rd or more probably on 9th or 10th November 1972. The claim was presented on 22nd November 1972 and the tribunal could only have exercised their discretion in favour of entertaining the claim.

Accordingly the appeal will be dismissed.

Appeal dismissed.

h Solicitors: *Cochranes* (for the appellants); *Harold Bell & Co*, Honiton (for the respondent).

Gordon H Scott Esq Barrister.

Aldus and another v Watson

QUEEN'S BENCH DIVISION

LORD WIDGERY CJ, ASHWORTH AND WILLIS JJ

2nd APRIL 1973

Magistrates – Information – Hearing two or more together – Consent of defendant – Separate informations against two or more defendants – Whether court having power to hear informations together without consent of defendants.

Where separate informations are preferred against two or more defendants a magistrates' court has no power to try the informations together without the defendants' consent even though each defendant is charged with an identical offence arising out of the same set of facts (see p 1021 d to g and j, post).

Brangwynne v Evans [1962] 1 All ER 446 applied.

Notes

For scope of informations, see 25 Halsbury's Laws (3rd Edn) 187, para 339, and for cases on the subject, see 33 Digest (Repl) 233, 641-647.

Case referred to in judgment

Brangwynne v Evans [1962] 1 All ER 446, [1962] 1 WLR 267, 126 JP 173, DC, 33 Digest (Repl) 233, 644.

Cases also cited

Brighton Stipendiary Magistrate, Re (1893) 9 TLR 522, DC.

R v Ashbourne Justices, ex parte Naden (1950) 48 LGR 268, DC.

R v Littlechild, R v Heslop (1871) LR 6 QB 293.

Taylor's Central Garages (Exeter) Ltd v Roper (1951) 115 JP 445, DC.

Case stated

These were appeals by the defendants, Malcolm Aldus and William John Straw, by way of a case stated by justices for the county of Durham acting in and for the petty sessional division of Barnard Castle in respect of their adjudication as a magistrates' court sitting at Barnard Castle on 30th August 1972.

On 30th June 1972 a separate information was preferred by Barry David Watson, against each of the defendants, Ronald Frank Worsley, John Moffatt, Malcolm Aldus and William John Straw, that they 'on 14th May 1972 at the parish of Winston in the county of Durham did drive a certain motor vehicle, namely, a motor cycle on a certain road called the A67 Barnard Castle to Gainford Road, in a manner which was dangerous to the public, having regard to all the circumstances of the case, including the nature, condition and use of the road, and the amount of traffic which was actually at the time or which might reasonably have been expected to be on the road, contrary to s 2 of the Road Traffic Act 1960'.

The justices heard the informations on 30th August 1972 when all the defendants and the prosecutor were legally represented. On the charge being put to the defendants each of them asked for summary trial and pleaded not guilty. Application for each of the defendants to be tried separately was made by the defendants' solicitor who cited in support the following cases: *Brangwynne v Evans*¹, *R v Ashbourne Justices, ex parte Naden*², *R v Hadwen*³ and *Taylor's Central Garages v Roper*⁴. That

1 [1962] 1 All ER 446, [1962] 1 WLR 267

2 (1950) 48 LGR 268

3 [1902] 1 KB 882

4 (1951) 115 JP 445

a application was resisted by the prosecutor's solicitor who outlined the case against the defendants and stated that what was complained of was not so much what the defendants had done as individuals, but what they had done collectively, emphasising that it was the joint action of the defendants which had caused the danger. In support he cited the following authorities: *R v Lipscombe, ex parte Biggins*¹, *Wells v Cheyney*², *R v Gridland*³ and *Paul v Summerhayes*⁴. The justices rejected the application for separate trials.

b The justices found as facts the evidence given by various witnesses, who had been driving cars on the road from Barnard Castle to Gainford on 14th May 1972, to the effect that four motor cyclists had been travelling along the road in the same direction at a slow speed, sometimes abreast, sometimes wandering across the road and thereby preventing motorists from overtaking or making it difficult for them to do so. One of the witnesses complained to a police officer and gave him the registration numbers of the motor cycles. Shortly afterwards the defendants were stopped and interviewed by police officers who informed them that they would be reported for consideration of the question whether they should be prosecuted for dangerous driving.

c Each of the defendants gave evidence on oath; each denied that they had driven dangerously and each denied that they had deliberately prevented anyone from overtaking; they stated that they had never driven two abreast and none of them could remember any untoward event whilst they were driving on the Barnard Castle to Gainford Road on 14th May 1972.

d After retiring the justices returned and announced that the information against each of the defendants for driving in a dangerous manner was dismissed, but they directed that an information be preferred forthwith against each of the defendants for driving without reasonable consideration in accordance with s 3 (2) of the Road Traffic Act 1960.

e The defendants were thereupon each charged separately that on 14th May 1972 at the parish of Winston, in the county of Durham he drove a certain motor vehicle, namely, a motor cycle, on a certain road called the A67 Barnard Castle to Gainford Road, without reasonable consideration for other road users, contrary to s 3 of the Road Traffic Act 1960. Each of the defendants pleaded not guilty.

f The justice then retired to give the defendants' solicitor time to take instructions. They returned and the defendants' solicitor announced that he did not wish to seek an adjournment, that he did not wish to re-examine any of the witnesses, and that the defendants did not wish to give evidence. He made no application for separate trials but further addressed the court, stating that there was no evidence on which the court could convict each defendant as an individual and that as they were separately charged the case against each of them should be dismissed.

g The justices found each of the defendants guilty of driving without reasonable consideration for other road users. They fined each defendant £15 and ordered that each of them pay £10.04 costs and that their licences should be endorsed.

h The question for the opinion of the High Court was: having regard to the fact that each of the defendants was charged separately with an identical offence arising out of the same set of facts and that it was the joint action of the defendants which caused the offences were the justices right to refuse the defendants separate trials and to find each of them guilty of driving without reasonable consideration for other road users?

j William Gage for the appellants.
P J M Kennedy for the prosecutor.

1 (1862) 26 JP 244

2 (1871) 36 JP 198

3 (1857) 21 JP 404

4 (1878) 4 QBD 9

LORD WIDGERY CJ. This is an appeal by case stated by justices for the county of Durham sitting at Barnard Castle in respect of their adjudication on 30th August 1972. Initially on that day they had before them four separate informations preferred against four individuals, two of whom are appellants before this court today, and each of those informations alleged that on 14th May 1972 at a place there stated the defendant in question drove a motor vehicle on a road in a manner which was dangerous to the public. a

The story unfolded by the evidence, of which there was a good deal, was that these four defendants responding on separate summonses to separate informations, had been together on this road on their motor bicycles, and they had been a very considerable annoyance to the other road users, because they would drive along in a loose formation, sometimes manoeuvring slowly, sometimes speeding up, they would sway from one side to the other, although emphasis is laid by counsel for the appellants on the fact that they never crossed the white line. In short, other traffic coming up behind wishing to pass at a faster speed was prevented from doing so by the tactics of these four defendants on their motor bicycles. b

When the matter first came before the justices there was an application for separate trials, and that application was rejected, so initially the evidence was heard, with the four defendants having their respective informations tried together. The justices retired, and after considering the matter they returned into court, and they said that the information in each case for dangerous driving was dismissed. However, they directed that an information against each of the defendants for driving without reasonable consideration be preferred forthwith in accordance with s 3 of the Road Traffic Act 1960. That seems an exceedingly sensible idea for the justices to have had, because on the face of it, it might have been difficult to sustain an allegation of dangerous driving, but anything which more accurately fitted the offence of driving without due consideration, it is difficult to describe. So I would respectfully commend the justices for having given that direction, but they directed there should be four informations as there had been on the first charge of dangerous driving. Having so directed they retired to give the defendants and their solicitor an opportunity to consider the matter. c

When the justices came back into court again, they were told by the defendants' solicitor that he did not want an adjournment, he did not want to re-examine any of the witnesses, that the defendants did not wish to give evidence, and there was no application for separate trials, but the solicitor, perhaps not without skill, sought to save something from what then must have appeared a wreck of a case by submitting to the justices that they could not convict any defendant as an individual, and as they were separately charged the informations should be dismissed against each one; the basis of that submission was that there was no evidence on which any one as an individual could have been charged with this behaviour. d

The justices did not accept that submission, so they convicted on the lesser charge of driving without due consideration for other road users. The only point which is taken before us, which counsel for the appellants accepts without any hesitation as being a highly technical point, is that there was no jurisdiction to try together the four informations which were directed to be laid by the justices in the absence of consent of the defendants. He concedes that it would be possible for the justices to have ordered a single information charging the four defendants jointly, and that if they had done so, of course, the four individuals could have been tried jointly and together. But he says, as a matter of technicality, four informations having been preferred and no consent having been obtained from the defendants to try those four informations together, then the conviction was an irregular and unlawful conviction. e

Strangely enough, there is far less authority on this point than I for my part would have expected to find; indeed, there is really very little. One looks first at *Brangwynne v Evans*¹ which dealt with a different though allied point where two f

¹ [1962] 1 All ER 446, [1962] 1 WLR 267 g

a informations were laid against the same individual. The headnote accurately states the view of this court when the trial of two informations against an individual was being challenged. It says¹:

b 'It has always been a principle of law that a defendant in a magistrates' court can only be called on to answer one charge at a time unless he consents, either expressly or impliedly, to informations being heard together; accordingly, a magistrates' court should never proceed to hear two or more informations at the same time without expressly asking the defendant whether he consents to that course.'

c That remains authority for the proposition that if one is considering two informations against the same person it is necessary to have his consent before they are tried together. It does not in itself answer our problem, which is whether you can try together two individuals against whom separate informations have been laid, the informations alleging the same offence committed in the same circumstances.

d We have been referred to a number of other cases which cast such light as there is to be cast on this problem, but nowhere is there any authority cited to us which authorises justices to do as was done in this case. I would not readily assume that the *Brangwynne v Evans*² rule necessarily applies when you have two separate defendants, but there is nothing else in the authorities to which we have been referred which I can find in any sense to be a reliable authority for the proposition that two or more defendants can be tried together without their consent. If I may say so, the point was made at its clearest to me in argument when Ashworth J asked counsel to say where the authority came from that one could try two or more people together. After all, on the face of it, it seems a thing which would require authority. e One thinks from first principles that two defendants would normally be tried separately, and if they are to be tried together one would expect to find some authority justifying it to be done.

f I shall not take time to refer to the relatively restricted references which we have found in the books on this subject, and I am left at the end of the argument facing the fact that I can find no authority for what was done, and accepting that there ought to be authority if indeed it is to be done. Accordingly, it seems to me that the justices, although I have every sympathy with them, were wrong in the first instance, that as they had separate informations they were wrong in trying to deal with the matter jointly without the consent of the parties from the beginning.

g Of course, it may be that on the special facts of this case when the matter came up the second time, that is to say when the matter had to be considered on revised informations, that it may be said in the circumstances of this case that the defendants had in fact assented to the joint disposal of their cases. I have thought about this, and can see that there are at any rate the germs of an argument that in the particular circumstances of this case assent by the defendants might be implied. It is to counsel for the prosecutor's credit, I think, that he does not really press us to adopt that view, and on reflection I do not think it would be a fair and proper view to take h on the facts of this case. Accordingly, although the grounds are highly technical I have come to the conclusion that counsel for the appellants' submission is right, that these convictions are irregular, and that they will have to be quashed.

ASHWORTH J. I agree.

j WILLIS J. I agree.

Appeals allowed. Convictions quashed.

Solicitors: Wedlake Bell, agents for Marquis, Penna & Sutton, Crook (for the appellants); A J Olson, Durham (for the prosecutor).

N P Metcalfe Esq Barrister.

Hauxwell and another v Barton-upon-Humber^a Urban District Council and others

CHANCERY DIVISION

BRIGHTMAN J

30th, 31st JANUARY, 22nd FEBRUARY, 8th MARCH 1973

Charity – Proceedings – Parties – Attorney-General – Local charity – Local inhabitants – Action against trustees – Action to establish existence of charitable trust – Local authority – Park held by local authority – Action by local inhabitants for declaration that park held by local authority subject to charitable trust – Whether action ‘charity proceedings’ – Whether local inhabitants proper plaintiffs – Charities Act 1960, s 28.

Practice – Parties – Substitution – Charity – Attorney-General – Local charity – Action by local inhabitants – Action for declaration that park held by local authority subject to charitable trust – Plaintiffs having no locus standi – Whether power to substitute Attorney-General as plaintiff – RSC Ord 15, r 6.

Local authority – Land – Power to sell land – Land subject to charitable trust – Statutory power – Whether power to dispose of land subject to charitable trust – Local Government Act 1933, s 165.

In 1930 the owner of a mansion house and park decided to make the property over to the local urban district council as a memorial to members of her family. The conveyance recited her desire to give the property to the urban district council ‘for the purposes and upon the trusts hereinafter mentioned as a memorial . . .’ The deed described in some detail the purposes for which the property was to be used; the parkland was ‘to be used as a Public Park or Pleasure Grounds’. In 1968 the county council embarked on plans for widening a road adjoining the park and in 1970 the urban district council entered into a deed of conveyance whereby, as beneficial owners, they conveyed to the county council a strip of land adjacent to the road forming part of the park. The plaintiffs, who were inhabitants of the urban district, issued an originating summons seeking a declaration that the park was subject to a charitable trust, a declaration that the part of the park conveyed to the county council was still subject to that trust and an injunction to restrain the use thereof as a public highway. The defendants to the summons were the urban district council and the county council (‘the local authorities’); the Attorney-General was subsequently added as a defendant. The local authorities issued a notice of motion seeking an order, under RSC Ord 18, r 19, that the summons be struck out, contending, inter alia, that on its true construction the 1930 conveyance did not create a charitable trust and that, in any event, the plaintiffs had no locus standi to bring the proceedings. Counsel for the Attorney-General indicated that, if it were held that the plaintiffs had no locus standi, he would apply for the Attorney-General to be substituted as plaintiff under RSC Ord 15, r 6 (2).

Held – (i) There was at least a strong prima facie case for asserting the existence of a charitable trust (see p 1028 c to e, post).

(ii) The Local Government Act 1933, s 165^a, did not empower a local authority to dispose of land held on charitable trusts. It followed that the strip of land conveyed

^a Section 165, so far as material, provides: ‘A local authority may . . . (a) sell any land which they may possess and which is not required for the purpose for which it was acquired or is being used . . .’

a to the county council prima facie remained subject to the charitable trust affecting the park (see p 1028 j, and p 1029 b, post).

(iii) The plaintiffs, however, had no locus standi to bring the proceedings. No one, save the Attorney-General, was entitled to maintain an action against supposed trustees to establish the existence of a charitable trust; nor could anyone except the trustees of the charity or the Attorney-General bring proceedings to recover charity property from a third person. Furthermore it was not possible to maintain b such a suit on the ground that the charity was a local one and that the persons seeking to maintain the suit were persons of that locality and thus potential recipients of benefits under the trust. The only case where inhabitants of a locality could bring proceedings in respect of a local charity was in cases where the proceedings were 'charity proceedings' within s 28^b of the Charities Act 1960; such proceedings did not, however, include proceedings which had as one of their objects the construction c of a conveyance for the purpose of determining whether the conveyance was effective to create a charitable trust (see p 1031 f and p 1032 e to g, post); *Re Belling (deceased)*, *London Borough of Enfield v Public Trustee* [1967] 1 All ER 105 applied.

(iv) It was, however, open to the court to substitute the Attorney-General as d plaintiff. It was no objection that the application by the Attorney-General should have been made at an earlier stage of the proceedings for it could not really have been made before the decision that the plaintiffs had no cause of action. Furthermore it was immaterial that the substitution would mean replacing two incompetent plaintiffs by another person who was sustaining a character entirely different from that which the plaintiffs had sought to sustain. Accordingly the Attorney-General would be substituted as plaintiff and the motion to strike out the summons would e be dismissed (see p 1034 a b and d, post); *Hughes v Pump House Hotel Co Ltd (No 2)* [1902] 2 KB 485 applied.

Notes

For the power of local authorities to dispose of land, see 24 Halsbury's Laws (3rd Edn) 599, 600, para 1104.

f For parties other than the Attorney-General in charity proceedings, see 4 Halsbury's Laws (3rd Edn) 449-451, paras 935-937, and for cases on the subject, see 8 Digest (Repl) 519, 520, 2495-2525.

For substitution or addition of plaintiffs, see 30 Halsbury's Laws (3rd Edn) 394-396, paras 735-740, and for cases on the subject, see 50 Digest (Repl) 454-460, 1496-1549.

g b Section 28, so far as material, provides:

'(1) Charity proceedings may be taken with reference to a charity either by the charity, or by any of the charity trustees, or by any person interested in the charity, or by any two or more inhabitants of the area of the charity, if it is a local charity, but not by any other person.

h '(2) Subject to the following provisions of this section, no charity proceedings relating to a charity (other than an exempt charity) shall be entertained or proceeded with in any court unless the taking of the proceedings is authorised by orders of the Commissioners . . .

'(5) Where the foregoing provisions of this section require the taking of charity proceedings to be authorised by an order of the Commissioners, the proceedings may nevertheless be entertained or proceeded with if after the order had been applied for and refused leave to take the proceedings was obtained from one of the judges of the High Court attached j to the Chancery Division.

'(6) Nothing in the foregoing subsections shall apply to the taking of proceedings by the Attorney General, with or without a relator . . .

'(8) In this section "charity proceedings" means proceedings in any court in England or Wales brought under the court's jurisdiction with respect to charities, or brought under the court's jurisdiction with respect to trusts in relation to the administration of a trust for charitable purposes . . .'

For the Local Government Act 1933, s 165, see 19 Halsbury's Statutes (3rd Edn) 494. a

For the Charities Act 1960, s 28, see 3 Halsbury's Statutes (3rd Edn) 627.

Cases referred to in judgment

Attorney-General v Magdalen College, Oxford (1854) 18 Beav 223, 23 LJCh 844, 24 LTOS 7, 18 Jur 363, 52 ER 88; *rvsd sub nom St Mary Magdalen, Oxford v Attorney-General* (1857) 6 HL Cas 189, HL, 17 Digest (Repl) 251, 559. b

Attorney-General (on the relation of the Rhondda Urban District Council) and the Rhondda Urban District Council v Pontypridd Waterworks Co [1908] 1 Ch 388, 77 LJCh 237, 98 LT 275, 72 JP 48, 6 LGR 39, 16 Digest (Repl) 545, 3862.

Attorney-General (on the relation of McWhirter) v Independent Broadcasting Authority [1973] 1 All ER 689, [1973] 2 WLR 344, CA.

Bedford Charity (Masters, etc), Re (1819) 2 Swan 470, 36 ER 696, LC, 8 Digest (Repl) 517, 2460. c

Belling (decd), Re, London Borough of Enfield v Public Trustee [1967] 1 All ER 105, [1967] Ch 425, [1967] 2 WLR 382, Digest (Cont Vol C) 73, 2513a.

Hughes v Pump House Hotel Co Ltd (No 2) [1902] 2 KB 485, 71 LJKB 803, 87 LT 359, CA, 50 Digest (Repl) 454, 1498.

Laverstock Property Co Ltd v Peterborough Corpn [1972] 3 All ER 678, 70 LGR 550, sub nom *Laverstoke Property Co Ltd v Peterborough Corpn* [1972] 1 WLR 1400, 24 P & CR 181. d

Strickland v Weldon (1885) 28 Ch D 426, 54 LJCh 452, 52 LT 247, 8 Digest (Repl) 518, 2483.

Cases and authorities also cited

Attorney-General v Bolton (1796) 3 Anst 820, 145 ER 1050. e

Attorney-General (at the relation of the Overseers of Islington) v Brewers' Co (1717) 1 P Wms 376, 24 ER 432, LC.

Baldry v Feintuck [1972] 2 All ER 81, [1972] 1 WLR 552.

Braund v Earl of Devon (1868) 3 Ch App 800.

Inland Revenue Comrs v Baddeley [1955] 1 All ER 525, [1955] AC 572, HL. f

Morgan, Re, Cecil-Williams v Attorney-General [1955] 2 All ER 632, [1955] 1 WLR 738.

Rendall v Blair (1890) 45 Ch D 139, CA.

Rhyl Urban District Council v Rhyl Amusements Ltd [1959] 1 All ER 257, [1959] 1 WLR 465.

Rooke v Dawson [1895] 1 Ch 480.

Shanmugam v Comr for the Registration of Indian and Pakistani Residents [1962] 2 All ER 609, [1962] AC 515, PC. g

Gareth Jones' *History of the Law of Charity 1532-1827*, pp 162 and 164-167.

Maurice's *The Charities Act 1960*, pp 28, 29.

Nathan's *The Charities Act 1960*, p 136.

Tudor on *Charities* (5th Edn, 1929) pp 361, 523, 524.

Motion

On 13th October 1972 the plaintiffs, Rosalie Hauxwell and Iris Marion Naylor, inhabitants of Barton-upon-Humber, applied to the Charity Commissioners under the Charities Act 1960, s 28, for an order authorising proceedings against the defendants, Barton-upon-Humber Urban District Council and the County Council of Lincoln, Parts of Lindsey ('the local authorities'); the commissioners, although of opinion that the material property was held on a charitable trust, refused a certificate under s 28 (2) of the 1960 Act because the proceedings proposed were not, in their view, 'charity proceedings' within the meaning of s 28. On 1st January 1973 the plaintiffs signed a statement under RSC Ord 108, r 3, in which they sought leave pursuant to s 28 (5) of the Charities Act 1960 and RSC Ord 108, r 3. On 3rd January 1973 the plaintiffs issued an originating summons against the local authorities; by their summons, the plaintiffs sought: (i) a declaration that a conveyance dated 17th July 1930 and made h
j

a between Clare Ermyntrude Magdalen Wright Ramsden and the district council, so far as the same related to a property known as 'Baysgarth Park', established a charitable trust (of a local nature) with a permanent endowment (namely Baysgarth Park) of which the district council was the sole trustee; (ii) a declaration that any disposition of Baysgarth Park or any part thereof made other than by the district council conveying as trustee (pursuant to the Settled Land Act 1925, s 29) and pursuant to an order of the court or of the commissioners (under the Charities Act 1960, s 29 (1)) constituted the grantee under such disposition a constructive trustee of Baysgarth Park or the part thereof comprised in the disposition as the case might be and that such constructive trustee held on all the trusts and subject to all the provisions of the 1930 conveyance so far as they affected or related to Baysgarth Park; (iii) a declaration that any part of Baysgarth Park conveyed or purportedly conveyed to the county council by the district council whether at the best price reasonably obtainable or with or without consideration and whether the district council conveyed or purported to convey as trustee or beneficial owner or otherwise was in the events which had happened still held on all the trusts and subject to all the obligations contained in the 1930 conveyance so far as they affected or related to Baysgarth Park; the plaintiffs further sought, as against the county council only (iv) an injunction restraining the county council by its members, officers, servants, agents or otherwise howsoever from using or threatening to use Baysgarth Park or any part thereof as or for a public highway or any other purpose other than as a public park or pleasure ground for ever open and unbuilt on except in the manner provided by the 1930 conveyance and in all respects on the trusts and subject to the obligations of the 1930 conveyance. On an ex parte motion by the plaintiffs, on 4th January 1973, May J, the vacation judge, ordered that the local authorities and each of them be restrained until after 12th January 1973 or until further order in the meantime from doing (whether by their officers or by their servants, contractors or agents or any of them or otherwise howsoever) the following acts or any of them, that is to say using or threatening to use or constructing or commencing to construct or undertaking preliminary works of any kind within that area of land in Barton-upon-Humber known as Baysgarth Park with a view to the use of such land or any part thereof as or for or as part of a public highway of any kind or for any other purpose than as a public park or pleasure ground for ever open and unbuilt on except in manner provided by the 1930 conveyance and in all respects on the trusts and subject to the obligations imposed by the conveyance. On 23rd January the originating summons was amended by adding the Attorney-General as third defendant. By notice of motion dated 23rd January 1973, the local authorities sought an order under RSC Ord 18, r 19, that the originating summons be struck out as disclosing no reasonable cause of action. The facts are set out in the judgment.

J A R Finlay for the local authorities.

W D Ainger for the plaintiffs.

Andrew Morritt for the Attorney-General.

Cur adv vult

8th March. **BRIGHTMAN J** read the following judgment. The plaintiffs in this action are Mrs Hauxwell and Mrs Naylor. They are inhabitants of the town of Barton-upon-Humber in the county of Lincoln. The first defendants are the Barton-upon-Humber Urban District Council. The second defendants go under the name of 'the County Council of Lincoln, Parts of Lindsey'. The subject-matter of the dispute is a recreation ground known as Baysgarth Park near the centre of the town. It is an attractive area of grassland and with a large number of trees. It contains a heated outdoor swimming-pool, a bowling green, children's swings and roundabouts and a miniature railway. No doubt it adds greatly to the amenities of Barton-upon-Humber, and is much valued by the townsfolk.

A public highway known as Brigg Road runs north and south. This forms the western boundary of Baysgarth Park. There is also a narrow highway running east and west known as Preston Lane, which forms the northern boundary of the park. Baysgarth Park extends over $14\frac{1}{2}$ acres of land. To the north-east of the park is a piece of land extending to $2\frac{1}{4}$ acres, which is the site of a mansion house known as Baysgarth. Another roadway cuts across the park and gives direct access from Brigg Road to the mansion house.

The park and the mansion house were originally in the ownership of a local family called Taylor. The property came into the ownership of Mrs Ramsden, a member of that family. In the year 1930 Mrs Ramsden decided to make the property over to the Barton-upon-Humber Urban District Council as a memorial to her father and mother, and to her brother George who had been killed in action in the first world war. The conveyance to the urban district council is dated 17th July 1930. It recited her desire to give the property to the urban district council 'for the purposes and upon the trusts hereinafter mentioned as a memorial', and so on. There is then a recital that the urban district council were—

'desirous of acquiring the said hereditaments for the purposes of the Public Health Acts 1875 to 1925 and have agreed to accept such gift upon the terms and conditions hereinafter contained.'

Clause 1 of the deed conveyed to the urban district council first the mansion house and grounds (the $2\frac{1}{4}$ acre site) and secondly the park (the $14\frac{1}{2}$ acres site). The property first conveyed was expressed to include a right of way for the urban district council and their licensees over the roadway between the mansion house and Brigg Road. The property secondly conveyed included that roadway as well as the park itself. The wording of the habendum is as follows: 'TO HOLD the same unto the Council in fee simple for the purposes hereinafter appearing'.

Clause 3 of the conveyance is of prime importance. It is divided into two sub-clauses. Sub-clause (1) reads:

'The premises hereinbefore firstly described are conveyed to and taken by the Council primarily for use as offices for the transaction of the business of the Council and that of their officers and servants but until such time as the Council shall require the said premises for use as offices as aforesaid the Council may use the same for the purposes of a Hospital with housing accommodation for officers or servants employed at the Hospital or for any other purpose within their powers under the Public Health Acts 1875 to 1925 or any statutory modification or amendment thereof or the Council may let the same and apply the net profits received therefrom in relief of the rates of the District And similarly if at any time it shall be unnecessary to retain the said premises for use as offices the Council may use and apply the same for any purpose within their powers and subject to such sanction or consent (if any) as may be necessary.'

Sub-clause (2) reads:

'The premises hereinbefore secondly described are conveyed to and taken by the Council to be used as a Public Park or Pleasure Grounds and they shall for ever hereafter be kept open and unbuilt upon except that buildings suitable for Park and recreation purposes may be erected thereon and provided that the Council may if they think fit set apart any portion of the said premises not exceeding in the whole one half thereof to be used for the purpose of cricket football or other game and recreations under Section 69 of the Public Health Act 1925 and the Council may accordingly as to the land so set apart exercise any of the powers of the last named section.'

a Clause 5 (6) was expressed to confer power on the council to—

‘make byelaws for the regulation of the said Mansion House and Park Land and such byelaws may apply separately to the Mansion House and the Park Land or to both in common.’

b In or about the year 1968 the second defendants, the county council, embarked on plans for widening Preston Lane. For this purpose it was considered necessary to acquire a strip of land on both the north and the south side of Preston Lane. On 18th May 1970 the urban district council entered into a deed of conveyance with the county council. By cl 1, in consideration of £10 paid to the urban district council, the urban district council as beneficial owners conveyed to the county council a strip of land adjacent to Preston Lane and forming part of Baysgarth Park and of the grounds of the mansion house.

c The townspeople got wind of the plan to slice off part of Baysgarth Park for road widening. On 24th February 1971 the plaintiffs’ solicitors wrote a polite but indignant letter to the clerk to the urban district council. The clerk to the council responded on 8th April with a letter of explanation in which he said, in relation to the 1930 conveyance:

d ‘The Deed created no trust and the Council, under the terms of the Deed and under the Public Health Acts and other legislation, are solely responsible for the administration of the property.’

The plaintiffs’ solicitors then wrote a letter of protest to the county council. The correspondence continued almost to the end of 1972, the urban district council and the county council maintaining throughout their view that the strip of land forming part of Baysgarth Park was unaffected by any trusts. On 13th October the plaintiffs applied to the Charity Commissioners under s 28 of the Charities Act 1960 for an order authorising proceedings. The secretary replied on 31st October stating that the commissioners were of the opinion that the trust declared by cl 3 (2) of the 1930 conveyance was a charitable trust, but that they considered that they had no jurisdiction because the proposed proceedings were not ‘charity proceedings’ within the meaning of s 28.

f On 3rd January 1973 the plaintiffs issued an originating summons. This seeks a declaration that Baysgarth Park is subject to a charitable trust; a declaration that the part of Baysgarth Park conveyed to the county council is still subject to such trust; and an injunction to restrain the use thereof as a public highway. No claim is made in respect of the site of the mansion house or the strip of land taken from the grounds of the mansion house for road widening. Notice of motion seeking an interim injunction was served on the first and second defendants on or about 4th January. Interim relief was granted by the vacation judge *ex parte* on that day. On 23rd January the originating summons was amended by adding Her Majesty’s Attorney-General as a defendant. On the same day the other defendants, for their part, issued a notice of motion seeking an order, under RSC Ord 18, r 19, that the originating summons be struck out as disclosing no cause of action.

g The first submission of counsel for the local authorities was that the plaintiffs have no *locus standi* since they are in effect seeking by these proceedings to have determined whether or not the park is held on a charitable trust. The plaintiffs were not, it was submitted, the proper persons to make such an application to the court. The only proper plaintiff in a case where there is a *bona fide* dispute as to the existence of a charitable trust is the Attorney-General. I will return to this submission later.

j Counsel for the local authorities also submitted that there was no *prima facie* case for concluding that the park was subject to a charitable trust. He conceded, for the purposes only of this motion, that a provision worded in the manner of cl 3 (2) of the 1930 conveyance was capable of constituting a charitable trust. He submitted,

however, that on the true construction of the 1930 conveyance as a whole no such trust was created. He pointed to the recital that the urban district council desired to acquire the property for the purposes of the Public Health Acts 1875 to 1925, and he referred me to s 164 of the former Act and s 69 of the latter Act, which deal with the acquisition, use and maintenance of recreational land by local authorities. He submitted that the recital was a clear indication that the urban district council intended to acquire the land for its general purposes under those Acts.

I do not intend to reach a firm decision on either of the motions whether there is or is not a valid charitable trust affecting Baysgarth Park. That question has not yet been fully debated, and counsel for the local authorities has indicated to me that at the trial of the action he wishes to expand the submissions which he has made on the law applicable to recreational charities. I am, however, satisfied that I ought to accept the submission of counsel for the plaintiffs, supported by counsel for the Attorney-General, and approach both motions on the basis that there is at least a strong *prima facie* case for asserting the existence of a charitable trust. My reasons are as follows. The conveyance recited the grantor's desire that the property should be conveyed 'for the purposes and upon the trusts hereinafter mentioned'. It was recited that the urban district council had 'agreed to accept such gift upon the terms and conditions hereinafter contained'. The habendum was expressed to be in favour of the urban district council 'in fee simple for the purposes hereinafter appearing'. The wording of cl 3 (2), which I have already read, is consistent with the imposition of a trust. Also, if both the park and the mansion house were to be the absolute property of the urban district council unencumbered by any trust, it is difficult to perceive the reason for granting the urban district council a right of way over the park between the mansion house and Brigg Road. A person does not need a grant of a right of way to enable him to pass over his own land.

On the basis that a charitable trust exists, it was submitted on behalf of the plaintiffs and the Attorney-General that the conveyance of 1970 to the county council was ineffective to pass the beneficial ownership of the strip required for road widening because the county council clearly had notice of the charitable trust and neither an order of the court nor of the Charity Commissioners was obtained as required by s 29 (1) of the Charities Act 1960. It would seem clear that the park is part of the 'permanent endowment' of the charity, assuming that a charitable trust exists.

Counsel for the local authorities, however, submitted that even if the park were subject to a charitable trust, the county council had acquired a good title to the strip free from any such trust. He relied on s 165 of the Local Government Act 1933. This empowers a local authority, with the consent of the Minister, to sell any land which they possess and which is not required for the purpose for which it was acquired or is being used. The strip of land was required for road widening and was not, counsel for the local authorities said, required for the park, the recreational purposes of which would remain unimpaired. This section, he submitted, applied as much to land held by a local authority for charitable purposes as to land held for other purposes of the authority. He contrasted s 170 of the Act, which uses identical language to confer comparable power on a parish council with the consent of the parish meeting, but in this case there is an express proviso against dealing with land held for charitable purposes without (as originally enacted) such consent or approval as was required by the Charitable Trusts Acts 1853 to 1925. The absence of a similar proviso in s 165 indicates, submitted counsel for the local authorities, that charity land could be dealt with under that section. Admittedly, the consent of the Minister was not obtained, but under s 29 of the Town and Country Planning Act 1959 the county council as purchasers were not concerned with the absence of such consent.

Despite the contrast between s 165 and s 170 of the Local Government Act 1933, I am not satisfied that s 165 empowers a local authority, with the consent of the Minister, to dispose of land held on charitable trusts. Such a construction would lead to a surprising result under s 166. This enacts that capital money received by a local

a authority under s 165 shall be applied in such manner as the Minister may approve towards the discharge of any debt of the local authority or otherwise for any purpose for which capital money may properly be applied—words which to my mind presuppose that the property sold was held beneficially by the local authority. Furthermore, s 179 (d) of the Act provides that nothing in Part VII of the Act (which includes s 165) shall authorise the disposal of land by a local authority in breach of any trust, covenant or agreement binding on the authority: see *Laverstock Property Co Ltd v Peterborough Corpn*¹. I accordingly reach the prima facie conclusion that the strip of land conveyed to the county council remains subject to the charitable trust affecting the park. In these circumstances I would grant the plaintiffs the interlocutory relief which they seek against both the local authorities if the plaintiffs have a locus standi in this action.

c I turn now to the submission of counsel for the local authorities that the plaintiffs have no locus standi to bring these proceedings and that the originating summons should therefore be struck out. As already mentioned, the plaintiffs applied to the Charity Commissioners under s 28 of the Charities Act 1960 for authority to bring these proceedings; this was refused for lack of jurisdiction to grant any such authority, ie s 28 of the Charities Act did not apply. Counsel for the local authorities relies on *Re Belling (decd)*, *London Borough of Enfield v Public Trustee*², and also on the recent decision of the Court of Appeal in *Attorney-General (on the relation of McWhirter) v Independent Broadcasting Authority*³.

d Section 28 of the Charities Act 1960 provides, by sub-s (1), that what are called 'charity proceedings' may be taken with reference to a charity by the following plaintiffs (additionally to the Attorney-General), namely, the charity itself, or any of the trustees of the charity, or a person interested in the charity, or any two or more inhabitants of the area of the charity if it is a local charity, but not by any other person. It is not in dispute that Baysgarth Park, if it is a charity, is a 'local charity' within the meaning of s 45 (1), and on the same hypothesis that the plaintiffs are inhabitants of the area of that charity. Subsections (2) and (5) of s 28 provide that (subject to qualifications not material for present purposes) no charity proceedings shall be entertained or proceeded with in any court unless the taking of the proceedings is authorised by the Charity Commissioners or by a judge of the High Court attached to the Chancery Division. 'Charity proceedings' are defined in s 28 (8) as—

e 'proceedings in any court in England or Wales brought under the court's jurisdiction with respect to charities, or brought under the court's jurisdiction with respect to trusts in relation to the administration of a trust for charitable purposes.'

g The facts in *Re Belling (decd)*, *London Borough of Enfield v Public Trustee*² were these. The testator had acted as his own draftsman of a document which was admitted to probate as a codicil to his will. This codicil contained observations, to use a neutral expression, relating to the use of his property known as Owls Hall Farm at Enfield in Essex for a technical training college. The Enfield London Borough Council, which was the local education authority for Enfield, took the view that it was the body designated by the testator in the codicil as a potential recipient of his bounty for charitable educational purposes. The executors communicated with the Treasury Solicitor, who indicated that the Attorney-General considered that the codicil had no dispositive effect and did not create any charitable trust. Thereupon the executors entered into a contract for the sale of Owls Hall Farm on the basis that it formed part of the testator's residuary estate. Shortly thereafter the borough council issued a writ for a declaration that on the true construction of the codicil Owls Hall Farm was held

1 [1972] 3 All ER 678, [1972] 1 WLR 1400

2 [1967] 1 All ER 105, [1967] Ch 425

3 [1973] 1 All ER 689, [1973] 2 WLR 344

on charitable trusts for the foundation and endowment of a scientific and technical college at Enfield, and moved for an interim order to restrain the executors from conveying the farm to the purchasers. For the purposes of the motion the learned judge assumed, as indeed counsel for the executors conceded, that the codicil was not so manifestly ineffective to create a charitable trust that the executors could properly deal with the property without regard to the codicil if a request to seek a decision as to the effect of the codicil were made by someone with a locus standi in the matter. The real question on the motion, said Pennycuik J, was whether the borough council had such locus standi. The learned judge concluded as follows¹:

'In this connexion the Attorney-General acts on behalf of the Sovereign and in the ordinary course the Attorney-General takes whatever steps may be necessary, including the institution or defence of proceedings by originating summons, for the construction of a will alleged to create a charitable trust. On this point I refer to *Strickland v Weldon*², where PEARSON, J., said: "The Attorney-General is the only person who can really represent a charity and sue on its behalf . . ." For a concise statement of principle I refer to 4 HALSBURY'S LAWS OF ENGLAND (3rd Edn.) 446, para. 926, where it says: "As a rule the Attorney-General is a necessary party to all actions relating to charities. It is the duty of the Queen, as *parens patriae*, to protect property devoted to charitable uses, and that duty is executed by the Attorney-General as the officer who represents the Crown for all forensic purposes. He represents the beneficial interest, in other words the objects, of the charity." No case has been cited to me in which anyone, other than the Attorney-General, has been admitted to institute proceedings of this type and it is difficult to see how, apart from some statutory provision, anyone other than the Attorney-General could so assume the mantle of the Sovereign.'

Counsel for the applicants advanced an alternative contention based on s 28 of the Charities Act 1960. It appears that the borough council had in fact applied under s 28 (2) for authority to bring proceedings, but the application had been refused. The borough council invited the judge to treat as before him an application to a High Court judge under s 28 (5) for leave to bring proceedings, notwithstanding the refusal of the Charity Commissioners. The judge decided as follows³:

'It seems to me that the definition in sub-s. (8) does not cover proceedings by way of the construction of a will in order to determine whether a provision in the will is effective to create a charitable trust. Such proceedings are brought neither under the court's jurisdiction as to charities nor under the court's jurisdiction with respect to trusts in relation to the administration of a trust for charitable purposes. This view derives support from a number of decisions under s. 17 of the Charitable Trusts Act, 1853, which was the statutory predecessor, albeit in entirely different terms, of s. 28 of the Act of 1960. It was well established under s. 17 of the Act of 1853 that the section related exclusively to administration . . .'

The learned judge continued later⁴:

'Here, it seems to me, if the council had any locus standi it could have brought these proceedings without any leave under s. 28; conversely, if it has not a locus standi the requisite authority cannot be conferred under s. 28.'

There is similarly before me an application under s 28 (5) for leave to take these present proceedings, and to extend the time allowed under RSC Ord 108, r 3 (2), for making such an application.

1 [1967] 1 All ER at 109, 110, [1967] Ch at 432, 433

2 (1885) 28 Ch D 426 at 430

3 [1967] 1 All ER at 111, [1967] Ch at 435

4 [1967] 1 All ER at 111, 112, [1967] Ch at 436

a In the *McWhirter* case¹, on which counsel for the local authorities also relied, the plaintiff brought an action against a statutory broadcasting authority to restrain the authority from broadcasting a television film on the ground that the authority would be acting in breach of its statutory obligations. The question arose whether Mr McWhirter had any locus standi to bring such action, as distinct from an action by the Attorney-General ex officio or by the Attorney-General acting ex relatione.

b It was held by the Court of Appeal that Mr McWhirter had no locus standi, since the only proper plaintiff was the Attorney-General suing on behalf of the public as a whole, and not Mr McWhirter or any other private individual. Lord Denning MR added²:

‘... in the last resort, if the Attorney-General refuses leave in a proper case, or improperly or unreasonably delays in giving leave, or his machinery works too slowly, then a member of the public, who has a sufficient interest, can himself apply to the court itself.’

c He said later³:

‘But this, I would emphasise, is only in the last resort when there is no other remedy reasonably available to secure that the law is obeyed.’

d I may add in parenthesis that on no basis could it be said that the plaintiffs in the case before me brought proceedings in their own names as a last resort.

There are, therefore, three questions before me in connection with the locus standi of the plaintiffs. First, whether the proceedings are ‘charity proceedings’ within the meaning of s 28, so that I have jurisdiction to give leave for the proceedings to be brought. If not, the second question is whether the plaintiffs can nonetheless act as

e plaintiffs in this action because the charity is a local charity and they are inhabitants of the locality. If that question is also answered in the negative, the third question is whether these proceedings should be struck out on the ground that the plaintiffs are incompetent to bring them.

As regards the first question, there is no relevant distinction between the case before me and *Re Belling (decd), London Borough of Enfield v Public Trustee*⁴. In both cases

f there was a bona fide dispute whether a charitable trust had been declared. In both cases the persons in whom the property was vested proposed to deal with that property in a manner which would be inconsistent with the charitable trust said to affect the property. I therefore conclude that the Charity Commissioners were correct in refusing leave under s 28. These are not charity proceedings within that section.

As regards the second question, counsel for the plaintiffs submitted that, in the

g case of a local charity, the inhabitants of the locality have a locus standi to sue in their own names without the intervention of the Attorney-General, or alternatively, with the Attorney-General as defendant. He referred me to two cases. *Re Bedford Charity (Masters, etc)*⁵ (the hearing of which took place in 1818 and 1819) was a case of an ancient charity that provided, inter alia, marriage portions for poor maidens of the town of Bedford. Sheba Lyon had been rejected as a potential recipient of a portion

h because she was of the Jewish persuasion. The question at issue was whether persons of the Jewish faith were eligible to benefit from the charity. A petition was presented under the Charities Procedure Act 1812 by Sheba and her father and another inhabitant of Bedford, and by a number of elders of two London synagogues. In the end, it did not become necessary for the locus standi of the petitioners to be pronounced upon because in the meantime the trustees of the charity presented their own petition

i for the construction of the trusts. In answer to that petition it was declared that Jewish

1 [1973] 1 All ER 689, [1973] 2 WLR 344

2 [1973] 1 All ER at 698, [1973] 2 WLR at 356

3 [1973] 1 All ER at 699, [1973] 2 WLR at 356

4 [1967] 1 All ER 105, [1967] Ch 425

5 (1819) 2 Swan 470

persons were not objects of the charity, having regard to numerous indications to the contrary in the terms of the charitable trust. However, in the course of argument, Lord Eldon LC said¹:

'What interest in the question have the gentlemen of the synagogue, who join in the petition? Every person possessing the character of an inhabitant of Bedford, and describing himself as an object of the charity, is entitled to apply to the Court; but how can I hear persons representing the synagogue?' a b

Counsel for the plaintiffs relied on this passage to assist his proposition that the plaintiffs as inhabitants of the locality were entitled to make application to this court in order to establish the existence of the charity and to restrain improper dealings with the charity property. Section 28 of the Charities Act 1960, which provides that the 1812 Act shall cease to have effect, to some extent replaces it. Lord Eldon LC's observations were, it was said, still appropriate. Counsel for the plaintiffs also referred me to *Attorney-General v Magdalen College, Oxford*² decided in 1854. One point which arose in that case was whether the inhabitants of a parish, without the assistance of the Attorney-General, could have maintained a suit to recover the property of a local charity which had been improperly alienated. There are certain observations³ in the earlier part of Sir John Romilly MR's judgment which might seem to suggest that the churchwardens of the parish could have sued in their capacity as inhabitants of the parish. But in the end the question was answered in the negative⁴ so that the case does not seem to assist counsel for the plaintiffs. c d

I am able to discern nothing in the cases which have been cited to me to indicate that anyone save the Attorney-General is entitled to maintain an action against supposed trustees to establish the existence of a charitable trust, or that anyone except the Attorney-General or the trustees of the charity can bring proceedings to recover charity property from a third person, or that persons are capable of maintaining such a suit on the ground that the charity is a local one and that they are persons of that locality, who are thus potential recipients of benefits under the trust. The only case, as it seems to me, where the inhabitants of a locality can bring proceedings in respect of a local charity, is where the proceedings are charity proceedings within the meaning of s 28. Such proceedings do not include proceedings which have as one of their objects the construction of a conveyance for the purpose of determining whether the conveyance was effective to create a charitable trust. I therefore conclude that the plaintiffs have no locus standi. e f

It does not, however, follow that the proceedings ought, on that account, to be now struck out. Counsel for the Attorney-General, who supported the submission of counsel for the local authorities that the plaintiffs have no locus standi, indicated that if I held in his favour on the issue of the existence of a charitable trust, and if I also decided in his favour on the issue of the plaintiffs' lack of locus standi, he would make an application that the Attorney-General be substituted for the plaintiffs under RSC Ord 15, r 6 (2). Counsel for the Attorney-General referred me to *Hughes v Pump House Hotel Co Ltd (No 2)*⁵, a decision on the former RSC Ord 16, r, 2, which is now superseded by RSC Ord 15, r 6 (2). The headnote reads as follows: g h

'Where an action has, through a bona fide mistake, been commenced in the name of the wrong person as plaintiff, the fact that the original plaintiff has no cause of action does not take away the jurisdiction of the Court to order the substitution of another person as plaintiff.' i

1 (1819) 2 Swan at 517

2 (1854) 18 Beav 223

3 (1854) 18 Beav at 248, 249

4 (1854) 18 Beav at 253

5 [1902] 2 KB 485

a It appears to me that under that rule I have jurisdiction at the instance of the Attorney-General to strike him out as a defendant and to substitute him as a plaintiff in the place of the existing plaintiffs. Indeed, counsel for the local authorities told me that he did not feel able to argue against the exercise of such a jurisdiction in a proper case. I find nothing in the decision of the Court of Appeal in the *McWhirter* case¹ which would preclude my making such an order. If, therefore, counsel for the Attorney-General now makes such an application, I will hear argument whether

b I ought or ought not to accede to it. I am conscious that if I do exercise the jurisdiction, the end result will be that persons who have no locus standi to bring proceedings to establish the existence of a charitable trust, or to protect charity property from an innocent but wrongful depredation, will nevertheless have started an action, brought interlocutory proceedings and, if an injunction is granted, gained their interim purpose. They will have been able to do this, although having no locus

c standi, because the Attorney-General is before the court as a defendant to the action and a respondent to the motion, and is willing to take over the reins. I do not think that such a result is in conflict with anything said by the Court of Appeal in the *McWhirter* case¹. Nor, if the Attorney-General applies to be and is substituted for the plaintiffs, has the process of the court been abused. It would be otherwise if the

d Attorney-General is not substituted. Then the action would be struck out, and the plaintiffs would have to bear the costs of all parties of their attempted intervention. This case should not, therefore, be read as an invitation to well-intentioned persons to intervene in matters which lie within the province of the Attorney-General.

In the foregoing circumstances I will hear further argument if the Attorney-General wishes to apply to be substituted for the plaintiffs.

e [The court then heard further argument on the Attorney-General's application.]

BRIGHTMAN J. There is now before me an application by the Attorney-General under RSC Ord 15, r 6, to be substituted for the original plaintiffs. I have already decided that the original plaintiffs have no locus standi. Counsel for the Attorney-General relies on *Hughes v Pump House Hotel Co Ltd* (No 2)², to which I referred in my judgment. The application is opposed by counsel for the local authorities. His submission falls, I think, into two parts. First, he says that he has had, in effect, a judgment in favour of his clients to the effect that the action is misconceived because the plaintiffs have no locus standi. It is now, says counsel for the local authorities, too late for the Attorney-General to make his application to be substituted. The local authorities have become entitled to have the action struck out.

g In effect, submits counsel for the local authorities, the application by the Attorney-General, if it were to be made at all, ought to have been made at an earlier stage in the proceedings.

I feel a certain natural reluctance to accept the submission of counsel for the local authorities for this reason, that if I now order that the action be struck out, it is inevitable—and counsel for the Attorney-General has already said so—that the

h Attorney-General will apply ex parte for exactly the same relief as is sought on the plaintiffs' motion, and will adopt the evidence which has already been filed on the part of the existing plaintiffs; so that the only substantial effect of my striking out the action, as it seems to me, would be to increase the paperwork with no very obvious advantage to anybody. But, however that may be, looking at this application from the point of view of its timing, I do not see any real distinction between the case before

i me and *Hughes v Pump House Hotel Co Ltd* (No 2)². In the *Hughes* case² Hughes thought he had a cause of action. He misinterpreted the effect of certain documents which, according to the decision of the Court of Appeal, left him with no cause of

1 [1973] 1 All ER 689, [1973] 2 WLR 344

2 [1902] 2 KB 485

action at all, that is to say, no interest capable of being protected by the court. Subsequent to that decision of the Court of Appeal, the person who had the cause of action applied to be substituted, and such an order was made. So, also, in the case before me the plaintiffs thought they had a cause of action. After I decided that they had no cause of action the Attorney-General makes this application to be substituted for the plaintiffs, an application, as it seems to me, which he could never really have made before my decision that the plaintiffs had no cause of action. At any earlier stage the only order could, I think, have been that the Attorney-General should be added as an additional plaintiff. I do not see why I should hold that the Attorney-General's application in this case is made too late, if the application in the *Hughes* case¹ was made in time.

The second submission of counsel for the local authorities was this, that this is not a case of substituting the right party for the wrong party in the way that the right party was substituted in the *Hughes* case¹ for the wrong party. It is a case, submitted counsel for the local authorities, of substituting, as plaintiff, a party who sustains an entirely different character from that sustained by the existing plaintiffs. It is not a case where a mistake has been made as to where an interest or a cause of action is vested, but of replacing two incompetent plaintiffs by another person who sustains not the character sought to be sustained by the plaintiffs, but an entirely different character. I appreciate that there is that distinction between this case and the *Hughes* case¹. I do not, however, think that it is a fundamental distinction which ought to cause me to reach any different conclusion from that which was reached in the *Hughes* case¹.

Counsel for the local authorities also directed my attention to *Attorney-General and the Rhondda Urban District Council v Pontypridd Waterworks Co*², where the Attorney-General was brought in as an additional plaintiff ex relatione to an action which had originally been started by the relator in its own name. I shall not refer further to that case because I do not think it really assists me on the question whether it would or would not be right to accede to the Attorney-General's application. It appears to me that that case goes more to the question of costs than to the merits of the application which is now made by the Attorney-General.

I shall accordingly direct that the Attorney-General be substituted for the plaintiffs in this action.

Order accordingly.

Solicitors: *Sharpe, Pritchard & Co*, agents for *W E Lane*, Clerk to Lincoln County Council (for the local authorities); *Batchelor, Fry, Coulson & Burder*, agents for *Brown, Hudson & Hudson*, Barton-upon-Humber (for the plaintiffs); *Treasury Solicitor*.

Susan Corbett Barrister.

¹ [1902] 2 KB 485

² [1908] 1 Ch 388

a

Hunt v Broome

QUEEN'S BENCH DIVISION

LORD WIDGERY CJ, ASHWORTH AND BRIDGE JJ

9th, 10th APRIL 1973

b

Trade dispute – Picketing – Obstruction of highway – Right of peaceful picketing – Attendance at specified place for purpose of peaceful picketing – Attendance not of itself constituting an offence – Vehicle prevented from entering building site by picketer during building workers' strike – No angry words or violent action occurring during incident – Incident lasting some nine minutes – Whether picketer entitled to obstruct highway for limited period in exercise of his statutory right to attend near the site for the purpose of peaceful picketing –

c

Highways Act 1959, s 121 – Industrial Relations Act 1971, s 134 (1), (2).

During a strike of building workers the respondent, a trade union official, held a poster on the highway in front of a lorry and urged its driver not to make a delivery to a nearby site. His persuasion failed and the driver began to manoeuvre his lorry in order to drive on to the site. The respondent then deliberately stood in front of

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the lorry to prevent the driver proceeding. The driver asked him to move but did not attempt to drive him down. The police then arrived and the respondent, having again refused to move, was arrested and charged with wilful obstruction of the highway, contrary to s 121^a of the Highways Act 1959. No angry words or violent action occurred during the episode which lasted some nine minutes. At his trial the respondent contended that he had a defence to the charge by virtue of s 134^b of the

e

Industrial Relations Act 1971 in that what he was doing was peaceful picketing. The justices dismissed the charge being of opinion that the nine minutes interspersed as it was with manoeuvring the lorry and the arrival of the police was not an unreasonably long time for the respondent to spend exercising his statutory right under s 134 of the 1971 Act to persuade the driver not to make the delivery. On appeal by the prosecutor,

f

Held – The proper approach to s 134 was not to ask whether what was done was reasonably necessary to organise peaceful persuasion but to ask whether what was done was reasonably necessary to procure attendance at or near the building site. Although it was perfectly proper for the respondent to be in attendance at the place where he was and to persuade the driver, if he could, not to enter the premises, those

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methods of persuasion were limited to the use of his voice and the exhibition of placards; s 134 did not authorise him to do acts, such as physically obstructing a vehicle or a person, which would be illegal apart from s 134. Accordingly the appeal would be allowed and the case remitted to the justices with a direction to convict (see p 1041 d and j to p 1042 b, post).

h

Dicta of Sullivan CJ in *L L Ferguson Ltd v O'Gorman* [1937] IR at 647, 648, and of Lord Parker CJ in *Tynan v Balmer* [1966] 2 All ER at 137 applied.

Notes

For peaceful picketing, see 38 Halsbury's Laws (3rd Edn) 361, para 625, and for cases on the subject, see 45 Digest (Repl) 588, *700-*704.

j

For unlawfully obstructing the highway, see 19 Halsbury's Laws (3rd Edn) 286, 287, para 455, and for cases on the subject, see 26 Digest (Repl) 468-470, 1569-1586.

For the Highways Act 1959, s 121, see 15 Halsbury's Statutes (3rd Edn) 267.

For the Industrial Relations Act 1971, s 134, see 41 Halsbury's Statutes (3rd Edn)

2157.

a Section 121, so far as material, is set out at p 1037 g, post

b Section 134, so far as material, is set out at p 1037 b to d, post

Cases referred to in judgment

Ferguson (L L) Ltd v O'Gorman [1937] IR 620, 45 Digest (Repl) 588, *704.
Larkin v Belfast Harbour Comrs [1908] 2 IR 214, 45 Digest (Repl) 588, *700.
M'Cusker (or McCusker) v Smith [1918] 2 IR 432, 52 ILT 29, 45 Digest (Repl) 588, *702.
Tynan v Balmer [1966] 2 All ER 133, [1967] 1 QB 91, [1966] 2 WLR 1181, DC, Digest (Cont Vol B) 330, 1586b.

Cases also cited

Arrowsmith v Jenkins [1963] 2 All ER 210, [1963] 2 QB 561, DC.
Burden v Rigler [1911] 1 KB 337, DC.
Churchman v Joint Shop Stewards' Committee of the Workers of the Port of London [1972] 3 All ER 603, [1972] 1 WLR 1094, CA.
Harrison v Rutland (Duke) [1893] 1 QB 142, CA.
Hickman v Maisey [1900] 1 QB 752, CA.
Lowdens v Keaveney [1903] 2 IR 82.
Nagy v Weston [1965] 1 All ER 78, [1965] 1 WLR 280, DC.

Case stated

Charles William Hunt, a police inspector, appealed by way of a case stated by the justices for the county borough of Stockport in respect of their adjudication as a magistrates' court sitting at Stockport on 3rd October 1972 whereby they dismissed an information laid by the appellant against the respondent, John Edward Broome, alleging that on 5th September 1972 without lawful authority or excuse he wilfully obstructed the free passage along Short Street, a highway, contrary to s 121 of the Highways Act 1959. The facts are set out in the judgment of Lord Widgery CJ.

Nigel Macleod for the appellant.

John Mortimer QC and *David Barnard* for the respondent.

LORD WIDGERY CJ. This is an appeal by case stated by justices for the county borough of Stockport in respect of their adjudication as a magistrates' court on 3rd October 1972. On that date the justices dismissed an information laid by the appellant against the respondent alleging that on 5th September 1972 without lawful authority or excuse the respondent wilfully did obstruct the free passage along Short Street, a highway.

The facts found are these. On 5th September 1972 there was in progress a nationwide building workers' strike. On that date one Dickinson, a lorry driver, called at a building site and was accosted by the respondent, who was a trade union official. The respondent tried to dissuade Dickinson from entering the site, but it transpired that Dickinson was at the wrong site anyway so he turned his lorry round and set off for the correct site, which was obviously nearby. The respondent, knowing his Stockport no doubt, found a short cut and got to the second site at which Dickinson was aiming, before Dickinson. When Dickinson arrived at the second site the respondent held out a poster and asked Dickinson to draw into the side of the road, which he did. There was a brief conversation in which the respondent tried to dissuade Dickinson from driving his lorry into the second site as I have called it; his persuasion failed at the first attempt, and Dickinson began to manoeuvre his lorry with a view to driving it on to the site. The respondent then stood in front of the lorry with his poster, still shouting, in an attempt to dissuade Dickinson from delivering his load. Dickinson did not attempt to drive the respondent down, but asked him to move. Then the appellant, who is a police inspector, arrived; he spoke to Dickinson, and having spoken to Dickinson he turned to the respondent, told the respondent what the respondent must obviously have known anyway, that Dickinson wanted to enter the site. The respondent responded to the police inspector that he did not want Dickinson to enter the site, and the police inspector, the appellant, then said to the respondent if he did not move out of the way and let

a Dickinson through, he would be arrested. The respondent did not move and he was immediately arrested—no angry words, no bad temper, but the assertion by the respondent of a no doubt genuinely believed right to stop Dickinson for the purpose of persuading him not to enter this site where some kind of trade dispute was in process.

b When the matter came before the justices and they had found those facts, there was cited to them s 134 of the Industrial Relations Act 1971, which they are good enough to set out in full in the case, and which I must read. It is in these terms:

c '(1) The provisions of this section shall have effect where one or more persons (in this section referred to as "pickets"), in contemplation or furtherance of an industrial dispute, attend at or near—(a) a place where a person works or carries on business, or (b) any other place where a person happens to be, not being a place where he resides, and do so only for the purpose of peacefully obtaining information from him or peacefully communicating information to him or peacefully persuading him to work or not to work.

d '(2) In the circumstances specified in the preceding subsection, the attendance of the pickets at that place for that purpose—(a) shall not of itself constitute an offence under section 7 of the Conspiracy, and Protection of Property Act 1875 (penalty for intimidation or annoyance by violence or otherwise) or under any other enactment or rule of law, and (b) shall not of itself constitute a tort.'

The justices say:

e 'We were of opinion that a period of nine minutes at most interspersed with manoeuvring of the lorry and intervention by the police was not an unreasonably long time for the respondent to spend in exercising his statutory right peacefully to seek to persuade a person not to work and that his statutory right is meaningless unless the picket places himself in such a position that the person to be persuaded is obliged to stop and listen for a reasonable length of time and accordingly we dismissed the case.'

f It is evident that the justices' approach was that s 134 gave the respondent what they described as a statutory right peacefully to seek to persuade a person not to work, and they go on to form the opinion that once that statutory right has been conferred, it must follow that the person who enjoys that right has at any rate a reasonable opportunity of exercising that right. They held that holding up Dickinson for a period not exceeding nine minutes was not an unreasonable action in performance or in exercise of the statutory right peacefully to persuade, which they regarded the respondent as having. The charge, as I have said, was laid under the Highways Act 1959, s 121, which provides:

g '(1) If a person, without lawful authority or excuse, in any way wilfully obstructs the free passage along a highway he shall be guilty of an offence . . .'

h That is the offence which the information charged in this case.

i Counsel for the respondent did say, as I understood his argument, that he was prepared to contend that the respondent's conduct would not have been an offence under s 121 quite apart from any special privileges which he enjoyed under the Industrial Relations Act 1971, but, be that as it may, for my part I should have thought it beyond argument that, leaving aside the special statutory provision affecting trade disputes, the conduct of the respondent in this case was an offence under s 121. It was a perfectly straightforward deliberate prevention of Dickinson from proceeding along the highway as he wished. Accordingly I should have thought there was no difficulty in this case at all if one for the moment leaves aside the special considerations arising out of a trade dispute.

Taking those considerations into account, the argument which has been put before us by counsel on behalf of the appellant is that the justices gave s 134 an unduly wide

interpretation; he says that properly understood the section does not give a statutory right peacefully to persuade. Instead, according to his submission, it gives a statutory right to attend at the places specified in the section for the purposes specified in the section, and does not excuse acts otherwise unlawful which are not a necessary and essential consequence of attending at the place in question. Accordingly he says that since the attendance of the respondent was effective at the place without resorting to stopping Dickinson's lorry, he cannot claim that his stopping of Dickinson's lorry was lawful merely by virtue of the terms of the section. a
b

Counsel for the respondent on the other side argues for a wider interpretation; I think really the same interpretation that the justices appear to have applied to this provision themselves. He says that although perhaps as a matter of language the act which is rendered lawful by s 134 is the act of attending, yet you must have regard, so the argument goes, to the purpose for which attendance is taking place, and since the purpose of attendance is, amongst other things, peacefully to persuade Dickinson not to work, it follows that on the proper construction of the section the cloak of legality is thrown more widely than counsel for the appellant would have it, and extends to actions taken for the purposes mentioned in this section, for example the purpose of persuasion, provided that those actions, either in duration or character, are not unreasonable. I hope I have not done an injustice to counsel for the respondent's argument in putting it in that way. If that is right, it follows, he says, that the question for the justices was really one of fact and degree, and we could not say as a matter of law that the respondent had exceeded his powers by detaining Dickinson for the period and in the manner mentioned in the case. c
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At first sight I confess that the interpretation urged on us by counsel for the appellant does seem to be a remarkably narrow one. If it is right, as he says, that the act which is rendered lawful is the act of attendance and nothing more, then it seemed to me at first that it was somewhat improbable that Parliament would have gone to all this trouble to render legal the act of attendance, an act which on its face is not likely to be an unlawful act at all. Accordingly at first impression I accepted the comment made by counsel for the respondent that the construction urged on behalf of the appellant seems to be a very narrow one. e

But further research into the section in my opinion makes it clear that counsel for the appellant is right. The first assistance I get in construing this section is to take at any rate a momentary look at s 7 of the Conspiracy, and Protection of Property Act 1875, because it will be remembered that one of the specific matters which are mentioned in s 134 is an offence under that now relatively old Act. This is what s 7 says: f

'Every person who, with a view to compel any other person to abstain from doing or to do any act which such other person has a legal right to do or abstain from doing, wrongfully and without legal authority,—1. Uses violence [and I need not read that paragraph in full] or, 2. Persistently follows such other person about from place to place; or, 3. Hides any tools, clothes, or other property owned or used by such other person, or deprives him of or hinders him in the use thereof; or, 4. Watches or besets the house or other place where such other person resides, or works, or carries on business, or happens to be, or the approach to such house or place; or, 5. Follows such other person with two or more other persons in a disorderly manner in or through any street or road [commits an offence].' g
h

When one reads that section, it becomes apparent at once that under s 7 activity which could fairly be described as 'attending' is made a criminal offence, and one appreciates at once, I think, that s 134 and its predecessors had that kind of offence very much in mind. This at once makes it more easy, to my mind at any rate, to accept counsel for the appellant's argument about the scope of the section. Section 7 itself had a provision rather like s 134 included in it, because as originally enacted it went on in these terms: j

a 'Attending at or near the house or place where a person resides, or works, or carries on business, or happens to be, or the approach to such house or place, in order merely to obtain or communicate information, shall not be deemed a watching or besetting within the meaning of this section.'

So that as far back as 1875 the idea of attending and watching and besetting as an offence was very much in the mind of Parliament.

b Those last words which I have read are repealed by s 2 of the Trade Disputes Act 1906, which substituted another provision, again very similar to the one we are considering, because s 2 (1) of the 1906 Act provided:

c 'It shall be lawful for one or more persons, acting on their own behalf or on behalf of a trade union or of an individual employer or firm in contemplation or furtherance of a trade dispute, to attend at or near a house or place where a person resides or works or carries on business or happens to be, if they so attend merely for the purpose of peacefully obtaining or communicating information, or of peacefully persuading any person to work or abstain from working.'

d That provision has in turn been repealed and replaced by s 134, but the similarity of approach amongst the three provisions is clear, and this, as I have said, to my mind lends great force to the argument that when s 134 speaks of attending as the act which is rendered lawful, it probably means what it says, because 'attending' was initially one of the activities which might well be unlawful under the 1875 Act.

e The matter does not stop there, because there are other ways which spring to mind in which 'attending' might be unlawful unless specially provided for in this context, and the way which immediately springs to mind is if pickets remain on the highway for such a time and in such numbers that independently of any statutory protection, they might be committing an act of trespass against the owner of the soil. One need not go into the old cases to remind oneself of the fact that the owner of the soil has the right to sue in trespass those people who use the highway in excess of the public power so to use it. I have little doubt that if a number of pickets stood f all day outside particular premises, it might well be that they were committing a trespass apart from any statutory protection given to them, and I can see s 134 and its predecessors having very much in mind the fact that persons attending at the place specified might thus commit an act of trespass and require to be excused by statutory provisions.

g Both those matters seem to me to point to the fact that counsel for the appellant's approach is right. There is confirmation for it when one begins to look at such authority as there is on this and kindred sections. There is a useful Irish decision which counsel for the respondent brought to our attention, *L L Ferguson Ltd v O'Gorman*¹. This again was concerned with picketing, and it is a case on s 2 of the Trade Disputes Act 1906 which I have read. It contains, if I may say so with deference, a wealth of information of value about this and allied topics. I refer to it particularly h for a passage at the end of the judgment of Sullivan CJ. Having reviewed a number of judgments and gone into the subject in detail, he says²:

i 'Counsel on behalf of the appellants relied upon these cases as establishing that sect. 2 of the Trade Disputes Act does not justify a trespass. There is no doubt that in each of those cases it was held that the section did not justify the particular trespass that was committed, as appears from the passages that I have quoted. Madden J. said that the idea of trespass upon private property was wholly absent from that of picketing, and Dodd J. stated in the most general terms that the section did not justify a trespass. But I do not think that either of these learned Judges had present to his mind a trespass on the soil of a highway by

1 [1937] IR 620

2 [1937] IR at 647, 648

the user of it in a manner that is not the reasonable and usual mode of using a highway as such, and accordingly I do not think that their judgments can be relied on as indicating their opinion that such a trespass could not be justified under the section in question. If it could not, then I find it difficult to give any reasonable interpretation to the section. When the Legislature declared it lawful for persons to attend at or near a house or place where a person resides, or works, or carries on business, it cannot reasonably have contemplated that such a house or place would be situated in a waste or no man's land. The usual approach to a residence or place of business is by a public highway and unless the right to attend at or near a residence or place of business is a right to attend on a public highway I do not see how such a right can be exercised at all, consistently with the decisions in *Larkin's Case*¹, and *McCusker's Case*² that private property may not be invaded. I am, therefore, driven to the conclusion that sect. 2 of the Trade Disputes Act authorises the user of a highway by the persons and for the purposes described in that section, and that it therefore justifies a user of the highway which would constitute a trespass at common law. Whether the user proved in any particular case is such a user as can be justified under the section will depend on the particular circumstances . . .

I find that case interesting and valuable for many reasons. First of all it confirms earlier authority that a trespass on private property is not authorised by the 1906 Act, nor, I would have thought, by the 1971 Act. Yet if counsel for the respondent's argument is to be taken any distance, it must surely in due course reach the point when he has to contend that the right of peaceful persuasion cannot be exercised without trespassing on private property, and it will then be necessary for him, or whoever argues the case, to argue that such a trespass is authorised by the section. The tone of the Irish cases is entirely to the contrary; it is accepted there that a private trespass is not authorised, and it is pointed out that the significance of s 134 may well in the main be the fact that it authorises the use of a highway in a manner which would otherwise amount to a trespass against the owner of the soil.

Coming a little nearer to the present time, and a little nearer home, there is an authority of this court in *Tynan v Balmer*³. This was a case where there was a strike at the English Electric factory on the East Lancashire Road, and the strikers were, as we would now call it, demonstrating in front of the factory. It was a well managed strike, entirely lacking in disturbance and bad temper, and friendly relations were maintained with the police. The particular device which was used in this case was that some 40 pickets formed themselves into a circle and proceeded to walk round in that circle at the entrance gate to the factory, thereby effectively preventing vehicles from leaving through the entrance gate. It seems that they walked in this way because they had been advised that they might commit obstruction if they stood still, but the obstruction was equally effective by the moving circle as it would be by a number of men standing still. They were asked by a police constable to desist and they declined, and the leader of them was charged and convicted below of the offence of obstructing a constable in the execution of his duty.

This case was the subject of a reasoned judgment by the recorder of Liverpool, and it is fair to say, as counsel for the respondent has said, that his conclusion in the end depends on the fact that the activities of the pickets were not the communication of information or the receipt of information or an act of persuasion, in other words that what they were doing was not fulfilling one of the statutory purposes, but it is perfectly clear from the judgment of Lord Parker CJ, and also from my personal recollection of the case because I was a member of the court, that the case was argued very much on the same basis as counsel for the respondent has

¹ *Larkin v Belfast Harbour Comrs* [1908] 2 IR 214

² *McCusker v Smith* [1918] 2 IR 432

³ [1966] 2 All ER 133, [1967] 1 QB 91

a argued the present case before us, namely that there was a right to persuade, and that that right must be protected by necessary and reasonable means. Lord Parker CJ in agreeing with the other judgments, referred to the argument of counsel thus¹:

b '... despite the finding here that one of the objects was to ensure that vehicles were brought to a stop, even so, that was permitted, if I may use that term, by s. 2 of the Trade Disputes Act, 1906, because the rights conferred by
c that section involved, as he would say, the stopping of a vehicle for the purpose, for instance, of communicating information. Counsel conceded that no right was conferred of stopping a pedestrian, apparently on the basis that you could communicate your information by walking alongside him, but he suggested that when you get to a vehicle the section authorised and permitted the stopping of vehicles. I am quite unable to accept that argument, and on the findings of
d the recorder in this case I am quite clear that an offence was committed.'

There is no doubt at all that the court on that occasion, even if obiter, was rejecting the suggestion that one approaches this section by asking oneself what need reasonably to be done in order that that peaceful persuasion may be organised. One approaches the section by instructing oneself that that which is rendered legal is attendance,
e and asking whether what has been done is nothing more than was necessary to procure attendance; if something was done which was more than was necessary to secure attendance, and if also what was done was in breach of the law, there is nothing
f in s 134 to protect you.

I find the matter conveniently and usefully summarised in Citrine's Trade Union Law², where the learned editor says this:

g 'Similarly, if the manner of the picketing ceases to be peaceful or becomes an obstruction or a nuisance, or endangers the public peace, the picketing will cease to be lawful. Thus, if a picket commits a private nuisance, as by violently and continually banging on the door, shouting, obstructing ingress or egress, or otherwise seriously interfering with the enjoyment of the house, or if he
h commits a public nuisance such as behaving in a manner calculated to cause a breach of the peace, or unreasonably obstructing the highway, his common law right to picket and his right to "attend" under the section will cease and neither will protect him from civil or criminal liability for any of these acts, or for any "watching or besetting" "with a view to compel", which he may also have committed. So also if the picketing is carried out in such numbers or otherwise in such a manner as to be likely to intimidate those subject to it, or to obstruct or molest them against their will, it will be unlawful. Any show
i or threat of violence, or any other unlawful threat likely to create fear in the mind of a reasonable man, will render picketing unlawful, and may make it criminal. Pickets are therefore not entitled, in order to compel people to listen to them, to obstruct them by deliberately standing in their way or catching hold of their arms. Nor are they entitled to obstruct the passage of vehicles by lying
j down in the highway in front of them, or otherwise blocking the highway. Neither may they continue to pester, i.e., "molest", those persons who do not wish to listen and who have requested them to desist. It will thus be seen that the right to picket is a very intangible one which is closely limited by the equal right of others to go about their lawful affairs free from obstruction, molestation or intimidation.'

My conclusion in this case is, as is not disputed, that it was perfectly proper for the respondent to be in attendance at the place where he was and that he was entitled there to persuade Dickinson, if he could, not to enter the premises. The methods

1 [1966] 2 All ER at 137, [1967] 1 QB at 107.

2 3rd Edn (1967), pp 563, 564.

of persuasion are limited to what counsel for the appellant calls oral or visual methods, that is to say the use of the voice and the exhibition of placards, and the section does not authorise pickets to do acts such as the physical obstruction of a vehicle or a person which would be illegal apart from s 134. a

For those reasons I think the justices applied the wrong principle and reached the wrong conclusion. I would allow the appeal and send the case back with a direction to convict. b

ASHWORTH J. I agree.

BRIDGE J. I agree.

Appeal allowed. Case remitted to the justices with a direction to convict.

Leave to appeal to the House of Lords was granted, the court having certified that the following was a point of law of general public importance: whether, if a person attends on the highway for the purposes set out in s 134 (1) of the Industrial Relations Act 1971 and deliberately stops a vehicle for the purpose of peacefully persuading the driver not to work he has a defence to a charge under s 121 of the Highways Act 1959 by reason of s 134 (2) (b) of the Industrial Relations Act 1971. c

Solicitors: *Amery-Parkes & Co*, agents for *Bell, Hough & Hamnett*, Stockport (for the appellant); *John L Williams*, agents for *Casson & Co*, Salford (for the respondent). d

N P Metcalfe Esq Barrister.

Kowalczyk v Kowalczyk

COURT OF APPEAL, CIVIL DIVISION

LORD DENNING MR, BUCKLEY AND STEPHENSON IJJ

11th, 12th APRIL 1973 f

Husband and wife – Property – Matrimonial home – Both parties contributing to purchase – Contributions by wife – Contributions in looking after home and caring for family – Contributions to cost of improving home – Imputed trust – House purchased by husband before marriage contemplated – Husband sole owner at all times – Wife's contributions in looking after home etc not sufficient to entitle her to beneficial interest in home – Contributions to cost of improving home entitling her to share – Married Women's Property Act 1882, s 17 – Matrimonial Proceedings and Property Act 1970, s 37. g

In 1955 the husband bought a house. He did not at that time contemplate marriage to his future wife. The husband and the wife were married in December 1957 and they lived in the house which the husband had bought. In 1966 the wife left the matrimonial home taking the two children of the marriage with her. The husband remained in the home, continuing to pay the mortgage instalments as he had done ever since he had bought it. By March 1970 he had paid off the mortgage completely. The parties were subsequently divorced. The wife claimed a property right in the home under s 17 of the Married Women's Property Act 1882; alternatively she claimed a transfer of the property, or a share in it, under s 4 of the Matrimonial Proceedings and Property Act 1970. The registrar dismissed the claim under s 4 of the 1970 Act and the wife did not appeal. In relation to the claim under the 1882 Act the registrar found that both parties had 'utilised their resources for their joint living and benefit . . . both in respect of the home and upkeep, the occasional mortgage payments, some of the electricity bills, tiles and fittings, some of the articles h

a and the food came from [the wife's] earnings'. On the basis of those findings the registrar held that the wife was entitled to a one-quarter share in the property. The husband appealed.

Held – In an application under s 17 of the 1882 Act the court could only hold that the wife was, in consequence of her contributions, entitled to a share in the matrimonial home, where a trust could be imputed for her benefit on the ground that the house had been acquired by the parties through their joint efforts, the wife contributing, directly or indirectly, to the discharge of the purchase price or on the ground that the wife had contributed to the cost of improving the home within s 37 of the 1970 Act. Since the house had been acquired by the husband well before the marriage and had remained his sole property throughout, the wife could only be held to be entitled to a share if her subsequent contributions were directly referable to the making of improvements to the house or (per Lord Denning MR) to the payment of the mortgage instalments; contributions in looking after the home and caring for the family were irrelevant. Accordingly the appeal would be allowed and the case remitted to the registrar to enquire whether the wife was entitled to a share by virtue of s 37 of the 1970 Act on the ground that she had made contributions to the cost of improving the home, with liberty to either party to make a further application under s 4 of the 1970 Act (see p 1045 b to g and p 1046 a d e g and h, post).

d Per Lord Denning MR. After there has been a divorce the property rights of the parties should be adjusted by means of an application under s 4 of the 1970 Act; it is unnecessary to decide the exact property rights under s 17 of the 1882 Act when all appropriate orders can be made under the 1970 Act (see p 1045 h, post).

e Notes

For the determination of rights between husband and wife, see 19 Halsbury's Laws (3rd Edn) 900, 901, para 1492, and for cases on the subject, see 27 (1) Digest (Reissue) 304-315, 2267-2330.

For the Married Women's Property Act 1882, s 17, see 17 Halsbury's Statutes (3rd Edn) 120.

f For the Matrimonial Proceedings and Property Act 1970, ss 4, 37, see 40 Halsbury's Statutes (3rd Edn) 802, 833.

Cases referred to in judgment

Cowcher v Cowcher [1972] 1 All ER 943, [1972] 1 WLR 425.

Davis v Vale [1971] 2 All ER 1021, [1971] 1 WLR 1022, CA, 27 (1) Digest (Reissue) 312, 2307.

g *Gissing v Gissing* [1970] 2 All ER 780, [1971] AC 886, [1970] 3 WLR 255, HL, 27 (1) Digest (Reissue) 311, 2303.

Hargrave v Newton (formerly *Hargrave*) [1971] 3 All ER 866, [1971] 1 WLR 1611, CA, 27 (1) Digest (Reissue) 100, 706.

Hazell v Hazell [1972] 1 All ER 923, [1972] 1 WLR 301, CA.

h *Heseltine v Heseltine* [1971] 1 All ER 952, [1971] 1 WLR 342, 135 JP 214, CA, 27 (1) Digest (Reissue) 192, 1278.

Pettitt v Pettitt [1969] 2 All ER 385, [1970] AC 777, [1969] 2 WLR 966, 20 P & CR 991, HL, 27 (1) Digest (Reissue) 102, 707.

Wachtel v Wachtel [1973] 1 All ER 113, [1973] 2 WLR 84; *varied* [1973] 1 All ER 829, [1973] 2 WLR 366, CA.

i Appeal

This was an appeal by the husband, Cyril Kowalczuk, against so much of the order of Mr Registrar Elliott, made on 17th October 1972 on the hearing of applications by the wife, Maria Kowalczuk, under s 17 of the Married Women's Property Act 1882 and s 4 of the Matrimonial Proceedings and Property Act 1970, as declared on the application under s 17 of the 1882 Act that the wife was beneficially entitled to

a one-quarter share of or interest in the equity of the property which had been the matrimonial home. The registrar dismissed the wife's application under s 4 of the 1970 Act. The facts are set out in the judgment of Lord Denning MR.

M E Mann for the husband.

Dennis Naish for the wife.

LORD DENNING MR. Husband and wife were married in December 1957. They had three children. One child died in infancy; there are two now living, a boy born in 1962, a girl born in 1963. After nine years of marriage, the wife left the house in September 1966. She took the two children with her. There was afterwards a divorce on the ground of two years' separation. A decree nisi was made on 12th October 1971, and a decree absolute on 17th February 1972. The husband has been paying maintenance of the children. The wife has remarried.

The question today is about the house, which was the matrimonial home. The feature which distinguishes this case from others is that it belonged to the husband long before the marriage. He bought it on 14th September 1955; that is over two years before the marriage. As far as we know, the parties had never met one another at that time. At any rate, they had not contemplated marriage. The husband bought it in his own name for the sum of £2,450. He paid £800 down and raised £1,650 on mortgage. Ever since that time he has been paying off the mortgage instalments of £12 17s 2d a month. He paid them before the marriage, during the marriage and after his wife left. By March 1970 he had paid off the mortgage completely. So there it is, a house bought two years before the marriage. The husband has now paid off all the mortgage instalments. So in point of law it is certainly his property.

The wife in 1972, although she had left six years before, put in a claim to this house. She put it in on two footings. One footing was that she had a property right in it under s 17 of the Married Women's Property Act 1882. Alternatively, she put in a claim to a transfer of the property or a share in it under s 4 of the Matrimonial Proceedings and Property Act 1970.

I would first say a word about the application under the 1970 Act. That Act gives a wide power to the court to adjust the property rights of the parties if it is just so to do. The registrar dismissed the wife's application under the 1970 Act and the wife does not appeal from that decision. That is very significant. If the wife had a good claim in equity to a share in the property, I should have thought she would have invoked the jurisdiction under s 4 of the 1970 Act. But she has not done so before us. Perhaps she or her advisers have no great confidence in the equity of her claim. At any rate, she has confined her claim before us so as to limit it to a property right under s 17 of the 1882 Act.

The registrar had before him the evidence of the parties. He was much impressed with the wife. He said:

'She has certainly lived frugally; she makes her own clothes. She is in no way extravagant... She utilised her wages towards the upkeep of the home and latterly she worked extremely long hours in a restaurant... she saved and bought a car which she took with her... She says that she paid some of the mortgage instalments... There is no doubt that both utilised their resources for their joint living and benefit... I feel myself that both in respect of the home and upkeep, the occasional mortgage payments, some of the electricity bills, tiles and fittings, some of the articles and the food came from her, the Applicant's, earnings.'

On those findings, the registrar held that the wife was entitled to a share in the property. His mind had fluctuated, he said, between a quarter and a fifth, but eventually he came down in favour of a quarter of the equity. All the

a reasoning of the registrar would have been very pertinent if he had been making an order under s 4 of the 1970 Act, especially having regard to s 5 (1) (f), which directs the court to have regard to the contributions made by each. But I do not think they are so pertinent to a claim under s 17 of the 1882 Act. Our attention has been directed to the cases under s 17 in the House of Lords: *Pettitt v Pettitt*¹ and *Gissing v Gissing*²; and to the subsequent cases in this court, such as *Hargrave v Newton*³, *Davis v Vale*⁴ and *Heseltine v Heseltine*⁵. Since those cases there has been the judgment of Bagnall J in *Cowcher v Cowcher*⁶ and the judgment of this court in *Hazell v Hazell*⁷. Bagnall J had not the opportunity of seeing the report of *Hazell v Hazell*⁷. If he had done so, he might have expressed himself differently. That case, with the others, shows that in this court we consistently hold that where a matrimonial home is acquired by both parties by their joint efforts from the very beginning, and the wife makes contributions, direct or indirect, to the purchase price or the mortgage instalments, then in those circumstances the law will impute or impose a trust for her benefit, the amount of her share depending on the circumstances.

b But those cases do not apply to the present case where the house was bought a long time before the marriage by the husband and was undoubtedly his sole property from the very beginning, the wife having made no contributions to its acquisition. In those circumstances the wife gets no share in the house by reason of subsequent contributions unless they are directly referable to the making of improvements to the house or to the payments of the mortgage instalments. The making of improvements is expressly covered by s 37 of the 1970 Act. That is a declaratory provision declaring what the law is and was before the Act. It shows that if the wife had contributed money or money's worth to the improvement of the property, the contribution, if of a substantial nature, would give her a share in the property to such an extent as may seem, in all the circumstances, to be just. In the present case there is a good deal of evidence that the wife did contribute, both in money and by her own physical help, to the repair, alteration and improvement to the house and garage. Such contributions come within the scope of that s 37 and there would be a trust for her in that regard.

e But I would not be prepared to go so far as the registrar seems to have done in taking into account—under s 17—her contributions in looking after and bringing up the family and in looking after the house, buying the food and so forth. Such contributions can be considered under the 1970 Act (see s 5 (1) (f)) but not under s 17 of the 1882 Act. So in this case I would be in favour of allowing the appeal to this extent; instead of giving to the wife a quarter share of the equity in the house, I would remit the case to the registrar so that he can decide what share it is just to award to the wife, having regard to any contributions by her, in money or money's worth, to the improvement of the property.

g I would only add this: I hope that, in future, after there has been a divorce, the property rights of the parties may be adjusted by means of an application under s 4 of the 1970 Act. It is unnecessary to decide the exact property rights under s 17 of the 1882 Act when all appropriate orders can be made under the 1970 Act. For instance, in this case, even if the wife's contributions do now entitle her—as a matter of property rights to a share—the registrar might well order that, instead of the house being sold, her share may be extinguished and the husband should pay her a lump sum in place of it; or he might not order him to pay any sum. The principles to be applied would be those which are stated in *Wachtel v Wachtel*⁸.

j 1 [1969] 2 All ER 385, [1970] AC 777.

2 [1970] 2 All ER 780, [1971] AC 886.

3 [1971] 3 All ER 866, [1971] 1 WLR 1611.

4 [1971] 2 All ER 1021, [1971] 1 WLR 1022.

5 [1971] 1 All ER 952, [1971] 1 WLR 342.

6 [1972] 1 All ER 943, [1972] 1 WLR 425.

7 [1972] 1 All ER 923, [1972] 1 WLR 301.

8 [1973] 1 All ER 113, [1973] 2 WLR 84; on appeal [1973] 1 All ER 829, [1973] 2 WLR 366.

So I would prefer, therefore, for the matter to be dealt with on both sides under s 4; but the appeal does not come before us on that basis. It comes before us only under s 17. On that basis I think there is ground for enquiry whether there is a trust to be imposed by s 37; but otherwise it seems to me, this house having been bought long before the marriage, no trust is to be imposed on him by virtue of her contribution in looking after the home and caring for the family. I would allow the appeal to that extent.

BUCKLEY LJ. I agree. We are not concerned here with any question arising under s 4 of the Matrimonial Proceedings and Property Act 1970, for neither party has attempted to make any claim under that section. We are only concerned with an application under s 17 of the Married Women's Property Act 1882, which is a purely procedural section under which parties can apply to the court for a declaration as to what their legal and equitable interests are without any opportunity for adjustment by the court. One thing I think is quite clear in this case, and that is that at the time the parties married this house belonged exclusively to the husband. He had bought it two years earlier. He had made a substantial cash payment from his own resources towards the purchase price and had raised the balance, which was about two-thirds of the purchase price, on a mortgage on which he alone was liable for payments of the instalments. The house was his. If, therefore, the wife is entitled to any equitable interest in any share in the house, it must be as the result of some trust declared expressly or by implication by the husband since the marriage. In consequence of the provisions of s 53 of the Law of Property Act 1925, such a declaration of trust would have to be in writing unless it were a case of a resulting or constructive trust. This is not a case in which the two parties to the marriage together embarked on the purchase of a house with a common intention that they should contribute towards discharging the purchase price. It may be that the wife after the marriage made contributions to the family expenses—may even have paid, as the registrar found that she did, I think, some of the mortgage instalments, and in that way have assisted her husband in discharging his liabilities under the mortgage; but that alone in my judgment would be insufficient to raise any constructive trust, although it might possibly give the wife a right to relief against her husband on some other ground such as, for instance, that she had paid money for his use, or something of that kind; but would not give her any equitable interest in the property. It seems, however, to be clear that if she did make contributions toward the cost of improving the property, she would be entitled under s 37 of the 1970 Act to some interest in the house under the statutory provisions contained in that section. The registrar, naturally enough, has not attempted to quantify what that interest would be, and the matter, it seems to me, must go back to him for the purpose of considering that aspect of the case. I agree that this appeal succeeds and should be allowed, that the matter should be remitted to the registrar to quantify such interest, if any, as the wife may establish that she is entitled to under s 37; and at that stage I suppose it would still be open to either party to make further applications to the court under s 4.

STEPHENSON LJ. I agree with both the judgments which have been delivered and have nothing of my own to add.

Appeal allowed. Case remitted to registrar to determine what interest, if any, the wife was entitled to in the light of her contributions to the improvements, with liberty to either party to make further application under s 4 of the Matrimonial Proceedings and Property Act 1970.

Solicitors: Machin & Co, Luton (for the wife); Potter, Sandford & Cosgrove, agents for Balderston, Warren & Co, Baldock, Herts (for the husband).

L J Kovats Esq Barrister.

Sutcliffe v Thackrah and others

COURT OF APPEAL, CIVIL DIVISION

EDMUND DAVIES, MEGAW LJ AND SIR SEYMOUR KARMINSKI

10th, 11th, 12th, 13th APRIL 1973

Negligence – Duty to take care – Arbitrator – Person acting in arbitral capacity – Exercise of professional skill and judgment – Architect – Interim certificate – Building contract – Architect appointed to supervise works under building contract between employer and contractor – Contract in RIBA form – Interim certificate issued by architect over-certifying amount due to contractor – Whether architect liable to employer for negligent over-certification.

By an oral contract the plaintiff engaged the defendants, a firm of architects, in connection with the designing and building of a house. It was an implied term of the contract that the defendants would perform their instructions in a competent and efficient manner. Thereafter the plaintiff entered into a contract with builders for the building of the house in accordance with the defendants' drawings and bills of quantities. The contract was in the standard RIBA form. The defendants were appointed architects for the purpose. The work went badly and the plaintiff brought an action against the defendants claiming damages for negligent supervision and negligence in issuing two interim certificates. The official referee found in the defendants' favour on the issue of negligent supervision but found that there had been over-certifying to the extent of £3,090; he held that, in issuing the certificates, the defendants were in breach of a duty of care owed to the plaintiff and awarded damages accordingly. The defendants appealed.

Held – It was established by authority that, in issuing a final certificate, an architect was exercising his professional skill and judgment in the role of an arbitrator and was not therefore liable for negligence in the exercise of his functions in that capacity. No relevant distinction could be drawn between the function of an architect in issuing a final certificate and his function in issuing interim certificates which called for professional skill in calculating the amount for which the certificate should be made. It followed, therefore, that the defendants could not be liable in negligence in respect of the interim certificates and the appeal would be allowed (see p 1052 c, p 1053 f and g, p 1054 g, p 1055 f, p 1056 f to h, p 1057 d and f, post).

Chambers v Goldthorpe [1900-3] All ER Rep 969 applied.

Notes

For the quasi-judicial duties of an architect under a building contract, see 3 Halsbury's Laws (3rd Edn) 529, para 1052, and for cases on the liability of architects as to certificates, see 7 Digest (Repl) 461, 479-481.

Cases referred to in judgments

Arenson v Arenson [1973] 2 All ER 235, [1973] 2 WLR 553, CA.

Badgley v Dickson (1886) 13 AR 494, 7 Digest (Repl) 458, *954.

Burden (R B) Ltd v Swansea Corp'n [1957] 3 All ER 243, [1957] 1 WLR 1167, 55 LGR 381, HL, 7 Digest (Repl) 370, 129.

Chambers v Goldthorpe, Restell v Nye [1901] 1 KB 624, [1900-3] All ER Rep 969, 70 LJKB 482, 84 LT 444, CA, 7 Digest (Repl) 461, 480.

Dawnays Ltd v F G Minter Ltd [1971] 2 All ER 1389, [1971] 1 WLR 1205, [1971] 2 Lloyd's Rep 192, CA.

Hickman & Co v Roberts [1913] AC 229, 82 LJKB 678, 108 LT 436, HL, 7 Digest (Repl) 367, 116.

Hoffman v Meyer 1956 (2) SA 752, 7 Digest (Repl) 369, *248.

Hosier & Dickinson Ltd v P & M Kaye Ltd [1971] 1 All ER 301, [1970] 1 WLR 1611, CA. a

Panamena Europea Navigacion (Compania Limitada) v Frederick Leyland & Co Ltd (J Russell & Co) [1947] AC 428, [1947] LJR 716, 176 LT 524, HL, Digest (Cont Vol B) 36, 289ff.

Stevenson v Watson (1879) 4 CPD 148, 48 LJQB 318, 40 LT 485, 43 JP 399, 7 Digest (Repl) 462, 484. b

Tharsis Sulphur & Copper Co v M'Elroy & Sons (1878) 3 App Cas 1040, HL, 7 Digest (Repl) 398, 242.

Wisbech Rural District Council v Ward [1928] 2 KB 1, [1927] All ER Rep 486, 97 LJKB 56, 138 LT 308, 91 JP 200, 26 LGR 10, CA; *rvsg* [1927] 2 KB 556, 38 Digest (Repl) 101, 726. c

Appeal

This was an appeal by the defendants, Ronald Thackrah, Arthur Simpson and T Richard Collick (carrying on business as 'Chippindale and Edmondson') against the judgment of his Honour Judge William Stabb QC, official referee, given on 11th January 1972 whereby on the trial of the action he gave judgment for the plaintiff, Joseph Dermot Sutcliffe, against the first and second defendants for £588 with costs to be taxed if not agreed, and for the third defendant against the plaintiff and dismissed the defendants' counterclaim. The grounds of appeal were (i) that the official referee was wrong in law in holding that an architect employed under the standard RIBA contract and under a duty to issue interim certificates from time to time was liable to the employer for negligent over-certification of the sums due from the employer to the builder; (ii) that the official referee was wrong in law and/or exercised his discretion improperly in holding that the defendants should pay the whole of the plaintiff's costs. The plaintiff cross-appealed seeking an order that the judgment be varied by increasing the award to £3,629 and interest thereon with costs to be taxed if not agreed. The acts are set out in the judgment of Edmund Davies LJ. d

Brian Neill QC and J E Previté for the defendants. e

M R Hickman for the plaintiff. f

EDMUND DAVIES LJ. The question posed by this appeal may be thus stated: is an architect liable in damages for breach of his contract with a building employer if he negligently, but honestly, issues interim certificates in relation to work done under an RIBA contract, as a result of which he overcertifies the sums due to the building contractor. It arises by way of a defendants' appeal from the judgment of his Honour Judge William Stabb QC of 11th January 1972, awarding the plaintiff £588, with costs, against the first and second defendants. The plaintiff cross-appeals for an order that the damages be increased but we are relieved from the necessity of dealing with that matter as the parties have agreed that, in the event of his retaining his judgment on the issue of liability, the plaintiff's damages should be increased to £2,000. g

The defendants are a firm of architects practising under the style of 'Chippindale and Edmondson'. In 1962 the plaintiff engaged them in connection with the designing and building of a dwelling-house on a site in Pontefract owned by him. No documentary evidence is available regarding the terms of the defendants' engagement. By their re-amended defence they admitted only that there was an implied term in the oral contract of employment that they would perform their instructions 'in a competent and efficient manner', but they denied being under any duty to the plaintiff to use reasonable care in issuing certificates in respect of work done by any contractor during the course of construction of the house. h

a Thereafter, on 1st October 1963, the plaintiff entered into a contract with David A Walbank (Builders) Ltd to build the house for the sum of £22,368 in accordance with the drawings and bills of quantities prepared by the defendants (who were appointed for the purpose both architects and quantity surveyors). The contract was in the RIBA standard form of contract (1963 edition), and the contractor undertook to complete the works on and subject to the conditions annexed thereto. The builders had already begun work on the site before their contract was signed, and the date of completion was fixed as 31st January 1964. But the work went badly and by the end of June 1964 the plaintiff turned the builders off the site—justifiably, as the official referee held. Other builders then completed the works, but for a larger sum than originally contracted for. The plaintiff sued the original builders, but they went into liquidation.

b In March 1968 the plaintiff issued a writ—

‘for damages for negligence and breach of duty by the Defendants as Architects employed by the Plaintiff in supervising the building of a dwellinghouse ... and in certifying for work not done or improperly done by the Builder.’

d For present purposes, it is sufficient to say that in the ensuing prolonged trial during 1971 and 1972 the plaintiff complained of (1) negligent supervision throughout, and (2) negligence by the defendants in issuing the last two interim certificates. The official referee found in the defendants’ favour in relation to the complaint of lack of proper supervision. The second complaint related to certificate 9 for £2,620 issued by the defendants on 25th May 1964 and certificate 10 for £1,837 issued on 1st July 1964. As to these, the official referee found that there had been over-certifying to the extent of £3,090. While disputing the correctness of that figure, counsel for the defendants, accepts that, assuming that a duty of care was owed by the defendants, they must pay the plaintiff £2,000 in respect of the consequential damage sustained by him. But by this appeal they challenge the official referee’s finding that any such duty exists.

e Before turning to the legal authorities, I must say something about the conditions annexed to the building contract. While the defendants were not, of course, parties thereto, some of these contemplated their acting solely as the agents of the employers, others as involving them in a wider role. Examples of the former are condition 2 (‘Architect’s Instructions’), 5 (‘Levels and setting out of the Works’), and 17 (‘Assignment or sub-letting’). Counsel for the defendants points to others as involving the architects playing a role independent both of employer and contractor and holding the scales evenly between them. These include condition 11 (5) relating to the issuing of interim certificates, 15 (1) as to a certificate of practical completion, 22 (‘Damages for non-completion’), 23 (‘Extension of time’) and 30 (‘Certificates and payments’).

f Condition 30 (1) and (2) related to interim certificates, which were required to be issued at monthly intervals, and was in these terms:

h ‘(1) At the Period of Interim Certificates named in the appendix to these Conditions the Architect shall issue a certificate stating the amount due to the Contractor from the Employer, and the Contractor shall, on presenting any such certificate to the Employer, be entitled to payment therefor within the Period for Honouring Certificates named in the appendix to these Conditions. Interim valuations shall be made whenever the Architect considers them to be necessary for the purpose of ascertaining the amount to be stated as due in an Interim Certificate.

i ‘(2) The amount stated as due in an Interim Certificate shall, subject to any agreement between the parties as to stage payments, be the total value of the work properly executed and of the materials and goods delivered to or adjacent to the Works for use thereon up to and including a date not more than seven

days before the date of the said certificate less any amount which may be retained by the Employer (as provided in sub-clause (3) of this Condition) and less any instalments previously paid under this Condition . . .'

Condition 30 (6) and (7) dealt with the final certificate in this way:

'(6) So soon as is practicable but before the expiration of 3 months from the end of the Defects Liability Period stated in the appendix to these Conditions or from completion of making good defects under clause 15 of these Conditions or from receipt by the Architect of the documents referred to in paragraph (b) of sub-clause (5) of this Condition, whichever is the latest, the Architect shall issue the Final Certificate. The Final Certificate shall state:—(a) The sum of the amount paid to the Contractor under Interim Certificates and the amount named in the said appendix as Limit of Retention Fund, and (b) The Contract sum adjusted as necessary in accordance with the terms of these conditions, and the difference (if any) between the two sums shall be expressed in the said certificate as a balance due to the Contractor from the Employer or to the Employer from the Contractor as the case may be. Subject to any deduction authorised by these Conditions, the said balance as from the fourteenth day after presentation of the Final Certificate by the Contractor to the Employer shall be a debt payable by the Employer to the Contractor or as the case may be as from the fourteenth day after issue of the Final Certificate shall be a debt payable by the Contractor to the Employer.'

'(7) Unless a written request to concur in the appointment of an arbitrator shall have been given under clause 35 of these Conditions by either party before the Final Certificate has been issued or by the Contractor within 14 days after such issue, the said certificate shall be conclusive evidence in any proceedings arising out of this Contract (whether by arbitration under clause 35 of these Conditions or otherwise) that the Works have been properly carried out and completed in accordance with the terms of this Contract and that any necessary effect has been given to all the terms of this Contract which require an adjustment to be made to the Contract Sum, except and in so far as any sum mentioned in the said certificate is erroneous by reason of:—(a) Fraud, dishonesty or fraudulent concealment relating to the Works, or any part thereof, or to any matter dealt with in the said certificate; or (b) Any defect (including any omission) in the Works, or any part thereof which reasonable inspection or examination at any reasonable time during the carrying out of the Works or before the issue of the said certificate would not have disclosed; or (c) Any accidental inclusion or exclusion of any work, materials, goods or figure in any computation or any arithmetical error in any computation.'

Condition 30 (8) provided:

'Save as aforesaid no certificate of the Architect shall of itself be conclusive evidence that any works materials or goods to which it relates are in accordance with this Contract.'

I should finally refer to condition 35 ('Arbitration'), para (1) of which is in these terms:

'Provided always that in case any dispute or difference shall arise between the Employer or the Architect on his behalf and the Contractor, either during the progress or after the completion or abandonment of the Works, as to the construction of this Contract or as to any matter or thing of whatsoever nature arising thereunder or in connection therewith (including any matter or thing left by this Contract to the discretion of the Architect or the withholding by the Architect of any certificate to which the Contractor may claim to be entitled

a or the measurement and valuation mentioned in clause 30 (5) (a) of these Conditions or the rights and liabilities of the parties under clauses 25, 26, 32 or 33 of these Conditions), then such dispute or difference shall be and is hereby referred to the arbitration and final decision of a person to be agreed between the parties ...'

b It follows from the foregoing that, on presenting an interim certificate to the employer, the contractor was entitled to be paid the amount certified within 14 days unless meanwhile the employer invoked the arbitration clause. But a final certificate was binding on the employer immediately it was issued, whereas the contractor was given 14 days within which he could take steps to challenge it by setting in motion the arbitration machinery provided by condition 35.

c I revert to the question posed by this appeal. There being no suggestion of dishonesty by the defendants or latent or accidental inclusions or exclusions within the exception to condition 30 (7), counsel for the plaintiff conceded that, were we here dealing with a final certificate issued by the defendants, their negligence in over-certifying would create no liability in them to the plaintiff. He finds himself obliged to make that concession as far as this court is concerned, for there is authority for so saying, and while he wants to keep the point open, he accepts that it is binding on this court.

d In *Stevenson v Watson*¹, where, it should be noted, the building contract contained no arbitration clause, an action against an architect for negligently under-certifying failed. The contract provided that the parties²—

e 'will be bound to leave all questions or matters of dispute which may arise during the progress of the works or in the settlement of the account to the architect whose decisions shall be final and binding upon all parties.'

Denman J said³:

f '... it seems to me that the architect is an arbitrator from the beginning to the end of the contract, he is throughout to have his eye on the work, and give certificates from time to time, all having reference to his final certificate, and, unless he gave the duty up altogether from the first appointment, he is from the first a person exercising judgment on a matter in which the parties cannot exercise judgment. I think, therefore, that the parties have trusted to him, and that from the beginning he must exercise his functions fairly and honestly between them, and that if he violates that duty he is liable to an action. If he honestly performs them then he honestly performs his bargain, if it be a bargain, or his duty, if it be a duty, arising from the acceptance of the functions, and the parties must abide by it.'

g Binding on us is the decision of this court in *Chambers v Goldthorpe*⁴, where the building contract contained a clause providing:

h 'A certificate of the architect, ... shewing the final balance due or payable to the contractors, is to be conclusive evidence ... that the contractors are entitled to receive payment of the final balance ...'

i Defending the architect's action to recover his fees, the employer asserted that the plaintiff had negligently issued a final certificate for a larger amount than he ought to have done. A L Smith MR and Collins LJ, following, inter alia, *Stevenson v Watson*¹, held that the architect in certifying occupied the position of an arbitrator

1 (1879) 4 CPD 148

2 (1879) 4 CPD at 150

3 (1879) 4 CPD at 162

4 [1901] 1 KB 624 at 629, [1900-3] All ER Rep 969 at 971

and was therefore not liable for negligence in the exercise of his functions in that capacity. But the powerful dissenting judgment of Romer LJ has attracted the support of many who share the view he expressed¹, that to hold that the employer is in such circumstances without a remedy 'would be a most lamentable conclusion'. Outstanding support to that dissent was expressed in South Africa by Ogilvie Thompson J in *Hoffman v Meyer*². And Lord Denning MR, who had expressed doubt in *Hosier & Dickinson Ltd v P & M Kaye Ltd*³ regarding the correctness of *Chambers v Goldthorpe*⁴, recently cited the South African judgment with evident approval in his dissenting judgment in *Arenson v Arenson*⁵.

But *Chambers v Goldthorpe*⁴ binds us. It dealt, however, with a final certificate, whereas we are here concerned with two negligently issued interim certificates. Does it follow that *Chambers v Goldthorpe*⁴ protects these defendants? Not necessarily, according to Lord Radcliffe in *R B Burden v Swansea Corp*⁶. And in *Wisbech Rural District Council v Ward*⁷ Sankey J said:

'Although it is probably right to say that in giving a final certificate the architect acts in a quasi-judicial character unless there is some express clause in the contract to contradict it, it cannot, I think, be asserted that in giving an interim certificate he is so acting. Personally I should have thought that the inference was just the other way—namely, that in giving an interim certificate he is merely acting as agent for the building owner unless there is something in the contract to contradict that; but after all the contract must be looked at to see whether or no in giving an interim certificate the architect was acting as an arbitrator or quasi-arbitrator.'

The matter went to appeal and the finding of the learned trial judge as to negligence was reversed. Atkin LJ⁸ said with reference to *Chambers v Goldthorpe*⁴:

'I am not aware of any case which has extended that doctrine to the granting of interim certificates, and I do not desire to express any opinion about it, except to say that it is obvious that that case would have to be very carefully considered before we came to a conclusion in favour of the plaintiffs, supposing that negligence were otherwise proved. In this case it appears to me quite definitely to be disproved.'

After reviewing the authorities, the official referee in the present case said:

'Plainly it is part of an architect's duty of supervision, as agent for his employer, to see that the work is properly executed, and therefore to my mind supervision and the issuing of interim certificates cannot be regarded as wholly separate and distinct functions. I think that it was rightly contended on behalf of the plaintiff that in a well supervised contract an architect would not certify for work not properly executed. I have come to the conclusion that the architect, in discharging his function of issuing interim certificate, is primarily acting in the protection of his employer's interests, by determining what payment he can properly make on account, such determination being based on his assessment of the value of the work properly carried out, that assessment being performed by virtue of his professional skill, for which the building owner

1 [1901] 1 KB at 644, [1900-3] All ER Rep at 978

2 1956 (2) SA 752

3 [1971] 1 All ER 301 at 305, [1970] 1 WLR 1611 at 1616

4 [1901] 1 KB 624, [1900-3] All ER Rep 969

5 [1973] 2 All ER 235 at 244, [1973] 2 WLR 553 at 563

6 [1957] 3 All ER 243 at 247, [1957] 1 WLR 1167 at 1172

7 [1927] 2 KB 556 at 565, [1927] All ER Rep 486 at 489

8 [1938] 2 KB 1 at 23

a has engaged him. It is in my view part of his supervisory function to see that the value of work properly executed, and only work properly executed, is included in the valuation for the purpose of an interim certificate, and that therefore he is under a duty of care to his employer in the performance of that function. Accordingly, if by his failure to exercise due skill and care, he should fail to exclude from the certificate the value of work not properly executed, he would
b in my view be liable to his employer for any damage attributable to such default.'

But if *Chambers v Goldthorpe*¹ is not to govern this appeal, some basis must be established for saying that the architect performs a different role when finally certifying from that played when he issues interim certificates. Counsel for the plaintiff has stressed that, in the words of Lord Blackburn in *Tharsis Sulphur & Copper Co v M'Elroy & Sons*², the latter—
c

'were made out with a view to regulating the advances, and shewing how much should be paid on account, not at all as shewing how much was to be paid ultimately upon the final account and reckoning.'

d That view was recently repeated by Lord Denning MR who in *Dawnays Ltd v F G Minter Ltd*³ described an interim certificate as being the equivalent of cash or being like a bill of exchange. But, to my way of thinking, there nevertheless remains the difficulty of following why this undoubted difference between the effect of the two types of certificate should affect the nature of the functions performed by the architects in the two cases. 'Condition 30 (2) requires that—

e 'The amount stated in an Interim Certificate shall . . . be the total value of the work properly executed and of the materials and goods delivered . . .'

It is true that, as a rule, the payments contemplated thereby represent only the approximate value of the work done and materials delivered, but even so some exercise of judgment based on and calling for professional skill is contemplated.

f Adopting the distinction drawn by Lord Coleridge CJ in *Stevenson v Watson*⁴ between a professional duty and a clerkly duty, the former is generally involved in calculating the amount for which an interim certificate should be made out, even though I suppose there might be certificates relating solely to the value of materials delivered to the site where the work involved could be of a purely 'clerkly' nature, negligence in relation to which would presumably impose liability on the architect despite his
g professional status. Such is not the case, however, in relation to either of the interim certificates with which we are presently concerned, and I do not find myself able to exclude them from the ambit of the ratio decidendi of *Chambers v Goldthorpe*¹.

This is a conclusion to which I have reluctantly come. The immunity of a person filling an arbitral role from being held liable in negligence is said to be based on public policy. I can understand such immunity being extended to the judge who is
h a stranger to both parties and is under no greater duty to the one than to the other. But the position of architects under a building contract is undoubtedly different, as was brought out in the Canadian case of *Badgley v Dickson*⁵, cited in *Hudson*⁶. There it was held that, although an architect employed by the building owner may, as between the owner and the contractor by the terms of their building contract,

i 1 [1901] 1 KB 624, [1900-3] All ER Rep 969

2 (1878) 3 App Cas 1040 at 1054

3 [1971] 2 All ER 1389 at 1392, 1393, [1971] 1 WLR 1205 at 1208, 1209

4 (1879) 4 CPD 148 at 158

5 (1886) 13 AR 494

6 Building and Engineering Contracts (10th Edn, 1970), p 167

be in the position of an arbitrator and his decision between them be unimpeachable if honest, yet as between himself and the owner he is answerable for either negligence or unskilfulness in the performance of his duty as architect. Osler JA said¹:

'In the case before us the action and counterclaim are based upon a distinct contract, by which the plaintiff was employed as a skilled professional person to perform certain services for reward, and he is not, in my opinion, absolved from the usual obligations attaching to such a contract merely because under another contract between his employer and the builder he may, as arbitrator, have determined between them as to the performance of that contract in a manner which assumes that he has properly performed his own.'

Such an attitude commends itself to my mind, and I have difficulty in seeing that public policy, that 'unruly horse', requires its rejection.

What is the public policy which necessitates another conclusion in the case of an architect under a building contract? Whatever may be urged as to the necessity for judges, arbitrators and quasi-arbitrators in general being held immune, such an architect is in a special position which calls for separate consideration. The contractor is fully aware of his engagement by the employer, and there is therefore no concealment of the fact that for many purposes he is the agent of the latter. And I fail to see why a duty to the employer, in relation to other aspects of his position, to exercise proper care in making a professional judgment should be regarded as inconsistent with his holding the scales evenly between the parties or as putting at risk his capacity to do so. It is true that knowledge that he owed a duty of care to his employer would bring with it realisation that he would be liable to the employer if he failed to discharge that duty. But were that the law, and known by all concerned (including the contractor) to be the law, why should it tempt him to act other than independently or of itself cast doubt on his independence? The very nature of the architect's role in certifying would present a formidable task to an employer asserting that he had acted negligently, but, if clear proof of negligence is forthcoming (and in the present case it is uncontested), I should have thought that public policy required that he should be made to pay for it.

To my way of thinking, it is (to echo Romer LJ's² phrase) 'a lamentable conclusion' that an architect who negligently issues a certificate (interim or final), and thus places his employer in the position of having to pay under it, should be free of all liability. Nor do I find it easy to follow why, since (as is admitted in the present case) the architect is liable to the employer for negligence in supervision, he should be under no liability in respect of the incorrect certificate which, as a result of that inadequate supervision, he subsequently negligently issues. But such is the effect of *Chambers v Goldthorpe*³ regarding a final certificate, and, despite his valiant efforts, counsel for the plaintiff has not succeeded in persuading me that the nature of interim certificates is so different that they can be treated in any other way, and the observations of Denman J in *Stevenson v Watson*⁴ appear to indicate that he made no distinction between the two types of certificate.

I therefore have regretfully to say that I am for allowing this appeal and ordering judgment to be entered in favour of the defendants.

MEGAW LJ. Counsel for the plaintiff concedes that in this court the correctness of the decision in *Chambers v Goldthorpe*³ cannot be challenged. He desires to keep open the possibility of such a challenge in the House of Lords.

*Chambers v Goldthorpe*³ decided that an architect issuing a final certificate under the terms of a building contract, in the form of contract which existed in that case,

1 (1886) 13 AR at 499

2 [1901] 1 KB at 644, [1900-3] All ER Rep at 978

3 [1901] 1 KB 624, [1900-3] All ER Rep 969

4 (1879) 4 CPD 148 at 162

a occupied the position of an arbitrator; hence the defendant building owner could not succeed in a counterclaim against the plaintiff architect on the ground of negligence by the architect in ascertaining and certifying the amount payable by the building owner to the contractor.

b The decision of the majority in *Chambers v Goldthorpe*¹ has been the subject of not a little adverse criticism. Thus, in a very powerful and persuasive judgment of a South African court, delivered by Ogilvie Thompson J in *Hoffman v Meyer*², the court refused to follow *Chambers v Goldthorpe*¹, expressing a carefully reasoned and decided preference for the views expressed by Romer LJ in his dissenting judgment. Lord Denning MR in *Hosier & Dickinson Ltd v P & M Kaye Ltd*³ says that *Chambers v Goldthorpe*¹ 'has been much criticised, and will, if the occasion arises, have to be reconsidered.' In Hudson's Building and Engineering Contracts, there is criticism of *Chambers v Goldthorpe*¹ and considerable comment on what it is suggested are its unfortunate effects in practice.

c On the other hand, it may be thought that the speeches in the House of Lords in *Hickman & Co v Roberts*⁵, explained in *Panamena Europea Navigacion (Compania Limitada) v Frederick Leyland & Co Ltd*⁶, lend at least some support to the view that their Lordships accepted the general principles underlying the decision in *Chambers v Goldthorpe*¹ in respect of architects' certificates and of the arbitral status of an architect certifying under a building contract. In *R B Burden Ltd v Swansea Corp*⁷ Lord Radcliffe said:

e 'It is an established principle of law that, in granting a final certificate under a building contract, the architect acts in an arbitral capacity and is not "merely in the position of an agent for the building owner": *Chambers v. Goldthorpe*, *Restell v. Nye*¹.'

f It seems to follow from that decision that Lord Radcliffe was treating this as a principle of general application, at any rate in relation to final certificates, and that he did not regard it as being related to any special contractual provisions in the particular contract which was relevant in *Chambers v Goldthorpe*¹. I think that for present purposes this must be accepted. It is not permissible to treat *Chambers v Goldthorpe*¹ as doing anything less than laying down what Lord Radcliffe⁷ describes as 'an established principle of law'.

g The issue in this case is whether a distinction can properly be drawn between the architect's negligence in issuing an interim certificate, on the one hand, and his negligence in issuing a final certificate, on the other hand. In the latter case, as I have said, it is conceded that in this court it has to be accepted that the architect is not liable: and that concession applies in respect of the particular contract here in question—the RIBA form of contract, 1963 edition.

The passage which I have cited from Lord Radcliffe's speech in *Burden v Swansea Corp*⁷ continued with this sentence:

h 'The considerations which give him [the architect] this arbitral position with regard to a final certificate are not necessarily applicable so as to place him in the same position with regard to each interim certificate.'

j 1 [1901] 1 KB 624, [1900-3] All ER Rep 969

2 1956 (2) SA 752

3 [1971] 1 All ER 301 at 305, [1970] 1 WLR 1611 at 1616

4 10th Edn (1970), pp 161-169, 489-492

5 [1913] AC 229

6 [1947] AC 428

7 [1957] 3 All ER 243 at 247, [1957] 1 WLR 1167 at 1172

In *Wisbech Rural District Council v Ward*¹ Sankey J held that the principle of *Chambers v Goldthorpe*² did not apply to an interim certificate; but, with all respect, I do not find it clear on what grounds the learned judge based the distinction. His judgment was reversed by this court³ on the facts, and no views were expressed on the issues of law. Edmund Davies LJ has quoted the observation which Atkin LJ⁴ made, reserving consideration of the correctness of Sankey J's view on the question of the suggested distinction.

Counsel for the plaintiff submitted that the principle of *Chambers v Goldthorpe*² was, as he put it, 'suspect'; and that, though he could not invite this court to abrogate that suspect rule, we ought not to sanction the extension of its application to a wider field than is strictly required by the authority by which we are bound: that is, that the rule should be confined to cases in which it is the final certificate which is in question. The main criticism of the rule is that it is next to impossible to distinguish, whether as a matter of logic or practical common sense, between, on the one hand the architect's function of general supervision, in the exercise of which function he is unquestionably acting as the agent of the building owner and is liable for negligence, and, on the other hand, his function in preparing and issuing the certificate. Why should he be free from liability, as being an arbitrator, if in the certificate which issues he includes the cost of work which the contractor has not done, and which the architect ought to have known that he had not done; whereas he is unquestionably liable for negligence in his duty of general supervision if he has negligently failed to realise that the contractor has not done the work which he ought to have done and if loss or damage results from that failure?

While I see very great force in criticism such as that, I do not think that it is permissible or desirable to make an artificial distinction, where no true distinction exists. This is a sphere of the law in which certainty, or uniformity, is more important than subtlety. It would, on balance, be harmful if the question whether or not an architect were to have the immunity of an arbitrator in respect of the issue of certificates were to depend on minute and detailed analysis of individual clauses in the building contract, and the comparison of them with the clauses which were treated as relevant in earlier decided cases. Unless some real, relevant, logical or practical reason can be found for treating the arbitrator's legal position as being different when he issues interim certificates from that which it is when he issues a final certificate, I think we ought not to rely on some merely verbal or insubstantial difference as a ground for applying a different rule from that which binds us in respect of final certificates.

With regret, I have been unable to see what logical, or what practically relevant, distinction can be drawn between the architect's legal position vis-à-vis the building owner when the architect is issuing a final certificate and that which applies when he is issuing an interim certificate. It is, to my mind, odd, indeed, that an architect should be regarded as an arbitrator or (to use the phrase which is used in some of the cases) a 'quasi-arbitrator', when he issues a certificate, despite the fact that the relevant contract contains an arbitration clause in the proper sense of the word, providing for the appointment of an arbitrator in the proper sense of the word, and despite the fact that the issuing of the certificate, and its contents, may be the subject-matter of that arbitration properly so called. The architect is not so much a 'quasi-arbitrator' (the phrase used, but left undefined, in a number of cases) as, if I may coin a still less elegant phrase, a 'sub-quasi-arbitrator', the outcome of whose arbitrament is subject, as being a matter of dispute, to the arbitrament of an

¹ [1927] 2 KB 556, [1927] All ER Rep 486

² [1901] 1 KB 624, [1900-3] All ER Rep 969

³ [1928] 2 KB 1, [1927] All ER Rep 486

⁴ [1928] 2 KB at 23

a arbitrator properly so called. But I am forced to remind myself that in *Chambers v Goldthorpe*¹ there was an arbitration clause, providing for arbitration properly so called, yet the architect was nonetheless held to be, himself, an arbitrator. It is true that it was a different arbitration clause from that which is to be found in the RIBA 1963 contract. But, as I have already said, I do not think that the question whether or not the architect has the status of an arbitrator should depend on a meticulous examination of contractual clauses.

b It is said that an important factor to be considered when it falls to be decided whether arbitral immunity is conferred on a person is the factor of finality. Is the decision—here the issue of the certificate—final and binding on the parties who seek the decision? I could see much force in that submission if it were not for the fact that we are bound by authority to treat a so-called ‘final’ certificate as giving arbitral immunity to the architect who issues it; and at least in the contract with which we are concerned, even the ‘final’ certificate is, by the provision of cl 30 (7), not ‘final’.

c The most that can be said for it is that it is rather less far away from finality than is the interim certificate.

d Agreeing, as I do, with the conclusion reached by Edmund Davies LJ, and with the reasons given by him, I feel bound, with regret, to hold that the appeal should be allowed, and that it should be held, on the authority of *Chambers v Goldthorpe*¹, that the defendant architects are not liable to the plaintiff employer for the loss caused to him by their negligence in the preparation and issuing of the two interim certificates.

e The other point, as to costs, raised by the notice of appeal does not now arise. If it had, I should have had no hesitation in holding that there was no ground for interfering with the learned judge’s discretion as to costs.

f **SIR SEYMOUR KARMINSKI.** I agree with the order proposed by Edmund Davies LJ and the reasons given by him in the course of his judgment. They were, if I may respectfully say so, so full that I do not feel called on to take any further time by elaborating on them.

Appeal allowed. Leave to appeal granted.

g Solicitors: Ward, Bowie & Co, agents for Willey, Hargrave & Co, Leeds (for the defendants); Parker, Garrett & Co, agents for Bridge, Sanderson & Co, Doncaster (for the plaintiff).

Ilyas Khan Esq Barrister.

Coupe v Guyett

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QUEEN'S BENCH DIVISION

LORD WIDGERY CJ, ASHWORTH AND BRIDGE JJ

12th APRIL 1973

Trade description – Act or default of another person – Commission of offence due to other person's fault – Liability of other person to be charged with offence – Proof of commission of offence necessary to establish liability of other person – False or misleading statements as to services – Statement made recklessly by manager of business – Proprietor of business charged with offence – Proprietor having no knowledge of statement – Proprietor acquitted because of absence of mens rea – Manager also charged on ground that commission of offence due to his default – Whether manager entitled to acquittal if proprietor acquitted – Trade Descriptions Act 1968, ss 14 (1) (b), 23.

b

c

S was the registered proprietor of a car repair business but she took no part in its conduct or control. At all material times the business was under the control of the respondent who was in charge of the workshop. A customer brought his car to the workshop for a new sill to be welded on to it. When the customer collected the car he was handed an invoice which stated that a new sill had been welded. In fact the sill had not been welded. S was charged with recklessly making a false statement contrary to s 14 (1) (b)^a of the Trade Descriptions Act 1968. The respondent was charged with an offence under s 23^b of the 1968 Act on the ground that the commission of the offence by S had been due to his default. The justices dismissed the information against S finding that although she was the registered owner of the business she personally neither made nor authorised nor was even aware of the making of the false statement, and that in any event she had a valid defence under s 24^c of the 1968 Act. The justices found that the respondent had made a false statement and had made it recklessly, but that as they had acquitted S it was not open to them to convict the respondent of the offence charged under s 23. On appeal by the prosecutor,

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Held – A person could only be charged with an offence under s 23 when an offence under the Act had been committed, or would have been committed but for the statutory defence under s 24, by another person. An offence under s 14 (1) required knowledge or recklessness on the part of the offender. Accordingly S had been properly acquitted since she did not herself have the requisite mens rea, and the mens rea of the respondent could not be attributed to her. It followed therefore that, since no offence against s 14 (1) had been committed by S, quite apart from the defence under s 24, the respondent could not be charged with or convicted of the offence under s 23 (see p 1062 a d to g and j to p 1063 a and c d, post).

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Notes

For the liability of a person through whose default an offence in relation to trade descriptions has been committed, see Supplement to 10 Halsbury's Laws (3rd Edn) para 1314E, 3.

h

For false or misleading statements as to services, see Supplement to 10 Halsbury's Laws (3rd Edn) para 1314C, 3.

For the Trade Descriptions Act 1968, ss 14, 23, 24, see 37 Halsbury's Statutes (3rd Edn) 959, 965.

Case referred to in judgment

i

Tesco Supermarkets Ltd v Natrass [1971] 2 All ER 127, [1972] AC 153, [1971] 2 WLR 1166, 135 JP 289, 69 LGR 403, HL.

a Section 14 (1), so far as material, is set out at p 1061 c, post

b Section 23 is set out at p 1061 f, post

c Section 24, so far as material, is set out at p 1061 g, post

Cases also cited

- MFI Warehouses Ltd v Natrass* [1973] 1 All ER 762, [1973] 1 WLR 307, DC.
Moussell Brothers Ltd v London and North-Western Railway Co [1917] 2 KB 836, [1916-17] All ER Rep 1101, DC.
Vane v Yiannopoulos [1964] 3 All ER 820, [1965] AC 486, HL.

Case stated

This was an appeal by way of case stated by justices for the Middlesex area of Greater London acting in and for the petty sessional division of Brentford, in respect of their adjudication as a magistrates' court sitting at Brentford on 7th June 1972.

On 4th April 1972 an information was preferred by the appellant, Marshall William Coupe, against the respondent, Colin Edward Alfred Guyett, that on 16th June 1971 at 195 Hanworth Road, Hounslow, Middlesex, Ruth Jane Shaw trading as Advance Autos in the course of the trade or business of motor repairer recklessly made a statement, namely 'Cut away n/s sill and weld', which was false as to the nature of a service, viz, the repair of a Cortina MK II motor vehicle, provided in the course of the trade or business, contrary to s 14 (1) (b) of the Trade Descriptions Act 1968; and that the commission of that offence was due to the default of the respondent whereby he was guilty of an offence, contrary to s 23 of the Act.

The justices heard the information, together with another information against Ruth Jane Shaw alleging an offence contrary to s 14 (1) (b) of the Act which referred to the same statement, on 7th June 1972 and found the following facts: (1) Miss Shaw, who was an airline hostess by occupation, was at all material times registered under the Registration of Business Names Act 1916 as the sole proprietor of a car repair business known as Advance Autos at 195 Hanworth Road, Hounslow. She had invested £200 in the business but took no part whatsoever in its conduct or control. (2) At all material times the business was under the conduct and control of the respondent, who was in charge of the workshop, and a Mr Humphrey, who also ran another garage at Teddington, who was in charge of the administration side of the business. (3) In June 1971 Bernard Thomas Richard Bill, who was anxious that his Cortina II motor car should have a respray and a new sill fitted, brought the car to the garage where he saw the respondent who gave him a verbal estimate of £65 for the work which was accepted. (4) On the following day, 16th June, Mr Bill brought the car in for the repairs, and the respondent wrote out that day on a form which he used as a job-sheet, and a copy of which was subsequently handed to Mr Bill as an invoice, the words 'To cut away N/S sill and weld in new panel', being the work Mr Bill required. (5) The following week Mr Bill collected his car and was handed the invoice. He paid the sum of £74 cash in the belief that the work set out in the invoice had been done. (6) On the following day Mr Bill formed the view that the sill had been pop-riveted, not welded, but when he returned to the garage the respondent tried to tell him that it had been welded and that he had no intention of doing any further work on the car and refused point blank to discuss the matter further. (7) On 17th November 1971 the respondent was seen by Mr Waite, a senior officer of the weights and measures department of the London Borough of Hounslow, to whom he insisted that a new sill had been welded on to the car and that it had been offered to the side, spot welded underneath and bent down and spot welded at the bottom and then riveted. (8) On 3rd December 1971 the sill was examined by Mr Gillett, a consulting engineer, who found no evidence of welding anywhere and whose report the justices accepted. (9) The respondent was in charge of the workshop but did not adequately supervise the work which was carried out by a panel beater.

It was contended on behalf of the appellant: (1) that a false statement had been made recklessly on the invoice of Advance Autos and that even if Miss Shaw, the registered proprietor of that business, succeeded in setting up a defence under s 24 of the Act, the respondent was still liable to be convicted if the justices were satisfied that Advance Autos had committed an offence under the Act due to his act or default;

(2) that the statement on the invoice was false, that it had been made recklessly, and that the respondent who made it, and who was responsible for its accuracy, was therefore liable, because of the effect of s 23 of the Act. a

The respondent, who appeared in person, did not ask questions of any of the witnesses called on behalf of the appellant and did not give sworn evidence, but made an unsworn statement and answered some questions the justices put to him. He made no contentions of law to the justices. b

The justices dismissed the summons against Miss Shaw on the grounds that, although she was the registered owner of Advance Autos, she personally neither made nor authorised nor was she even aware of the making of the false statement and that in any event she had a valid defence under s 24 of the Act. b

The justices were of the opinion (1) that the respondent had made the statement in the invoice, for whose accuracy he was responsible, recklessly and the statement was false; but (2) that since they had decided to acquit Miss Shaw of an offence under s 14 (1) of the 1968 Act it was not open to them to convict the respondent of the offence charged under s 23 of the 1968 Act on the true construction of that section. Accordingly they dismissed the summons against the respondent. c

The questions for the opinion of the High Court were: (1) if a summons under s 14 (1) (b) of the 1968 Act against a principal offender was dismissed, was it open to the court on the same occasion to convict the person through whose act or default the alleged offence had been committed if all the other ingredients of ss 14 (1) (b) and 23 of the Act were proved against that person? (2) did they come to a correct determination in point of law? d

The case first came before the court (Lord Widgery CJ, Eveleigh and May JJ) on 25th January 1973 when it was adjourned for counsel to be instructed as *amicus curiae*. e

Henry Brooke for the appellant.

Gordon Slyn as *amicus curiae*.

The respondent did not appear and was not represented.

LORD WIDGERY CJ. This is an appeal by case stated by justices for the Middlesex area of Greater London sitting at Brentford in respect of their adjudication on 7th June 1972. In April 1972 an information was preferred by the appellant against the respondent that on 16th June 1971 at an address in Middlesex, Ruth Jane Shaw, trading as Advance Autos, in the course of the trade or business of motor repairer did recklessly make a statement namely: f

“Cut away n/s sill and weld” which was false as to the nature of a service viz: the repair of a Cortina MK II motor vehicle provided in the course of the said trade or business, contrary to Section 14 (1) (b) of the Trade Descriptions Act 1968; And that the commission of the said offence was due to the default of the [respondent] whereby he is guilty of an offence, contrary to Section 23 of the said Act. g

The information was heard together with a parallel information against the Miss Shaw referred to, and in her case it was alleged that she had committed an offence under s 14 (1) (b) of the 1968 Act. Miss Shaw is an airline hostess by occupation, and was at the material time registered under the Registration of Business Names Act 1916 as the sole proprietor a car repair business trading as Advance Autos at this address in Middlesex. However, at all material times the business was under the conduct and the control of the respondent, who was in charge of the workshop, and there was another gentleman, a Mr Humphrey, who looked after administration. h

The facts giving rise to the charge were that in June 1971 a Mr Bill wanted his Cortina car to be resprayed and have a new sill fitted. He brought it to the garage of Advance Autos, and naturally enough saw the respondent and not Miss Shaw, i

a because Miss Shaw was not normally in attendance on the premises. He told the respondent what he wanted, he was given a verbal estimate for the work which was to be done, and on the following day, 16th June, Mr Bill brought the car in for repairs and the respondent made a note of the work which was to be done; that note subsequently became the invoice rendered by the respondent to Mr Bill in respect of work, and in that invoice, as I will now call it, it is in terms described that the work to be done, or the work then done, included 'Cut away [nearside] sill and weld'.
b Mr Bill was not very satisfied that the work had been done, and evidence was given before the justices that the sill had not been welded at all, but had been riveted, and the justices found, I imagine without very much difficulty, that the statement was a false statement, because the invoice properly interpreted meant that the sill had been welded when in fact it had not.

c Section 14 of the Act, which is the relevant section, is, insofar as material, in these terms:

'(1) It shall be an offence for any person in the course of any trade or business—
(a) to make a statement which he knows to be false; or (b) recklessly to make a statement which is false; as to any of the following matters, that is to say . . .
(ii) the nature of any services, accommodation or facilities provided in the
d course of any trade or business . . .'

The respondent therefore had made a statement which was false; he had made it in the course of the trade or business, and the justices found that he had made it recklessly. It seems to me, therefore, although we need not decide the point today, that had the respondent been directly charged with an offence under s 14, he would almost certainly have been properly convicted. The statement made by him was
e false, and the justices found it was made recklessly.

The problems in this case have arisen because the charge against the respondent was not a direct charge of an offence under s 14, but an indirect approach provided by ss 23 and 24 of the same Act. Section 23 provides:

f 'Where the commission by any person of an offence under this Act is due to the act or default of some other person that other person shall be guilty of the offence, and a person may be charged with and convicted of the offence by virtue of this section whether or not proceedings are taken against the first-mentioned person.'

Section 24 is also relevant, and I will read it before going back to s 23:

g '(1) In any proceedings for an offence under this Act it shall, subject to subsection (2) of this section, be a defence for the person charged to prove—(a) that the commission of the offence was due to a mistake or to reliance on information supplied to him or to the act or default of another person, an accident or some other cause beyond his control . . .'

h Certain other requirements are specified in the section, but those are the essential ones for present purposes. At first sight there appears to be something of a conflict between ss 23 and 24, because s 23 contemplates that the person first referred to therein shall have committed an offence by reason of the act or default of another. When one moves on to s 24, it becomes apparent that someone who has otherwise committed an offence but has done it through the act or default of another has a
j special statutory defence. Accordingly it is difficult at first sight to see how the two sections can be fitted together. But the conflict has been resolved, and one can seek guidance on it in the speech of Lord Diplock in *Tesco Supermarkets Ltd v Natrass*¹. The solution of the conflict is this, that when a person first named in s 23 has no defence to the charge except the statutory defence under s 24, he or she can properly

still be regarded as having committed the offence for the purpose of s 23. On the other hand, in my judgment, if the person first referred to in s 23 has a defence on the merits, as it were, and without reference to s 24, then it is not possible to operate s 23 so as to render guilty the person whose act or default gave rise to the matter in complaint. a

With that for background, one must now attempt to see what the justices made of the position of Miss Shaw. The prosecution were clearly saying that Miss Shaw and the respondent were guilty, subject of course to Miss Shaw's defence under s 24 but not otherwise. The justices took a different view. Their actual words were: b

'We dismissed the summons against Miss Shaw on the grounds that although she was the registered owner of Advance Autos, she personally neither made nor authorised nor was she even aware of the making of the false statement and that in any event she had a valid defence under section 24 of the Act.' c

If the justices had taken the view that Miss Shaw was to be acquitted solely because of the statutory defence, then for the reasons I have already given it would have been open to them to convict the respondent. If on the other hand they were right in saying that Miss Shaw was entitled to be acquitted on other grounds, then they would not be in a position to convict the respondent under the terms of s 23. Accordingly counsel for the appellant has been faced with the somewhat uphill task of trying to satisfy us that the justices were wrong in law when they concluded that Miss Shaw should be acquitted on grounds other than the grounds of the statutory defence. If he can do that, then of course the conviction of the respondent must follow; if he cannot, then the acquittal of the respondent was in my judgment right. d

In order to allege that Miss Shaw was guilty of the offence and was able only to rely on her defence under s 24, counsel for the appellant has to urge and establish that not only the statement made by the respondent, the falsity of which gave rise to the proceedings, but also the mental state of the respondent must be attributed to Miss Shaw. I think, without deciding it, that in these circumstances it may well be right to say that the statement can properly be attributed to Miss Shaw, because after all, it was her business, and the statement was made on behalf of the business. So far as that point is concerned I could be easily persuaded that the making of the statement simpliciter could be attributed to Miss Shaw, the principal. e

But that is not enough unless one can also attribute to her the state of mind alleged, namely that the statement was made recklessly. As I understand it, as a general proposition of the criminal law a principal is not to be made immediately liable, in an offence involving mens rea, merely because his servant or agent had the necessary mental intent. As a question of general principle I would have thought it wrong to allow the mental state of the respondent to be attributed to Miss Shaw so as to complete the offence so far as she is concerned. f

Counsel for the appellant has ranged widely over the rest of the Act and has referred us, as I have said, to Lord Diplock's speech in the *Tesco* case¹ to show that generally speaking the scheme of this Act is to make the employer liable in the first instance, subject to his possible defence under s 24, and that that should be so in cases of strict liability is not I think suprising. It is the case that most, if not all, of the other offences under this Act are offences of strict obligation; and it seems to me consistent with principle in those cases that the employer should be the person primarily responsible when an infringement occurs. g

But s 14 of the Act is peculiar in many ways. It deals with services, and deals with services for the first time, because they were not dealt with in the Merchandise Marks Acts 1887 to 1953 and also contains the specific mental element of knowledge of falsity or recklessness to which I have already referred. For my part I do not think it h

¹ [1971] 2 All ER at 150-159, [1972] AC at 193-203 i

a would be consistent with principle or required by the terms of this Act, looked at as a whole, that the mental element attributed properly to the respondent should be also attributed to Miss Shaw in the circumstances of this case.

I recognise that the situation may appear at all events to be somewhat different where the employer in a case of this kind is a limited company, because again it is established in principle that the actions and the state of mind of the ruling officers of a company may be attributed to the company. Accordingly, somewhat different considerations may apply in those circumstances. Here we have no question of a company, we have two individuals, and I think the result should be as I have stated.

b This may mean, of course, that the defence under s 24 will rarely, if ever, be appropriate to a charge under s 14. I say that because, if I am right, in order to establish the charge under s 14 you have to show knowing falsity or recklessness, which themselves are inconsistent with the statutory defence. But be that as it may, I think in this case the justices were entirely justified in saying that Miss Shaw was to be acquitted on the general grounds as opposed to the statutory defence, and once they reached that conclusion it was inevitable, having regard to the form of the charge, that they should acquit the respondent as well. For those reasons I would dismiss the appeal.

d **ASHWORTH J.** I agree.

BRIDGE J. I also agree.

Appeal dismissed.

e Solicitors: M W Coupe, Hounslow (for the appellant); Treasury Solicitor.

N P Metcalfe, Esq Barrister.

f Chapman and others v Goonvean & Rostowrack China Clay Co Ltd

COURT OF APPEAL, CIVIL DIVISION

LORD DENNING MR, BUCKLEY AND ORR LJJ

30th MARCH, 16th APRIL 1973

g *Employment – Redundancy – Dismissal by reason of redundancy – Cessation of or diminution in requirements of business for employees to carry out work of particular kind – Test to be applied – Whether account to be taken of terms and conditions of employment of employee claiming redundancy payment – Employees brought to work from long distance at employers' expense – Provision of transport ceasing to be economic – Employers withdrawing transport – Employees dismissed by reason of employers' repudiation of contract – Employers engaging other men living nearby in place of dismissed employees – Whether employees dismissed by reason of redundancy – Redundancy Payments Act 1965, s 1 (2) (b).*

h The appellants were employed by the respondents in their china clay works, which were some 30 miles from the place where the appellants lived. The appellants and three other men, making a party of ten in all, were taken to and from their work each day in a bus paid for by the respondents. That service cost the respondents £20 per week. There was a recession in the china clay industry and the respondents decided to reduce their labour force by 12 men. Nine were chosen because they were over age and due for retirement; the remaining three chosen were those with the shortest service. It happened that those were the three who came with the seven appellants in the bus party. In consequence the appellants were told that the respondents could no longer provide the bus service for them because its cost would no longer be justified. The appellants had no other means of getting to work and so they gave

notice to terminate their employment. By withdrawing the bus service the respondents were in breach of contract and in consequence the appellants were entitled to treat themselves as having been dismissed by the respondents. The appellants claimed that they had been dismissed by reason of redundancy, by virtue of s 1 (2) (b)^a of the Redundancy Payments Act 1965, since they had been dismissed because the requirements of the respondents' business for employees to carry out the work which the appellants had been doing had ceased or diminished; they contended that the 'requirements of [the] business for employees to carry out work of a particular kind', referred to in s 1 (2) (b), meant requirements for employees to carry out the work on which the appellants had been engaged on the terms and conditions of the appellants' contracts of employment, and the requirements of the respondents' business for the work to be carried out on those terms and conditions had ceased or diminished.

Held – Section 1 (2) (b) could not be read as if it included the words 'on the existing terms and conditions of employment'. The test under s 1 (2) (b) was simply whether there had been a cessation of, or diminution in, the requirements of the respondents' business for employees to carry out the kind of work on which the appellants had been engaged. On the evidence the respondents' requirements for employees to carry out that kind of work had neither ceased nor diminished for they had employed other men to do the work; nor had the appellants been dismissed because the respondents expected their need for employees to do that work to cease or diminish. Accordingly the appellants had not been dismissed by reason of redundancy (see p 1065 h, p 1067 a and f, p 1069 d and e, p 1070 h to p 1071 a and p 1072 c to f, post).

Dutton v C H Bailey Ltd [1968] 2 Lloyd's Rep 122 and *Line v C E White & Co* (1969) 4 ITR 336 disapproved.

Decision of the National Industrial Relations Court [1973] 1 All ER 218 affirmed.

Notes

For the dismissal of an employee by reason of redundancy, see Supplement to 38 Halsbury's Laws (3rd Edn) 808c, 1.

For the Redundancy Payments Act 1965, s 1, see 12 Halsbury's Statutes (3rd Edn) 238.

Cases referred to in judgments

Dutton v C H Bailey Ltd [1968] 2 Lloyd's Rep 122, 3 ITR 355, DC.

Line v C E White & Co (1969) 4 ITR 336, DC.

Appeals

The claimants, William Francis Chapman, Christopher George Hallett, Francis Henry Ford, Arthur William Chadband, Robert William Melhuish, John Henry Ford and Thomas John Avery appealed against the judgment of the National Industrial Relations Court¹ (Sir John Donaldson P, Mr J H Arkell and Mr R Davis) given on 9th November 1972 dismissing their appeals against the decision of an industrial tribunal (chairman John Shaw Esq QC) sitting at Truro, Cornwall, dated 15th June 1972, whereby the claimants' applications for the payment of redundancy payments by their employers, Goonvean & Rostowrack China Clay Co Ltd, were dismissed. The facts are set out in the judgment of Lord Denning MR.

Peter Pain QC and *James Mitchell* for the claimants.

Alexander Irvine and *Eldred Tabachnic* for the employers.

Cur adv vult
16th April. The following judgments were read.

LORD DENNING MR. The china clay industry has been very active in Cornwall in recent years. So much so that a firm at St Stephen in the south has drawn men

^a Section 1 (2), so far as material, is set out at p 1065 g, post

1 [1973] 1 All ER 218, [1972] 1 WLR 1634

a from Port Isaac in the north. That is 30 miles away along the narrow winding roads of those parts. There is no public transport. So the firm provided a bus to take the men to and from the works. This was imported as a term in their contract of employment. So they were entitled by contract to free transport to work. The industrial tribunal so found.

b In March 1972 there were ten men regularly travelling by the bus from Port Isaac to St Stephen and back. Then there was a trade recession in the china clay industry. The firm decided to dismiss 12 out of their 220 men. Nine were selected because they were over age and due for retirement. That left three to be made redundant. The firm selected the three with the shortest service. All three happened to be men from Port Isaac. Those three got redundancy payments. But the dismissal of those three had an unfortunate result on the bus service. It cost the firm £20 a week. That expense was justified when the bus carried ten men to and c fro, but it was not economic for seven men. So the firm decided to cut off the bus service and leave the seven men to find their own way to work. The firm told these seven that work was still available for them if they were prepared to make their own arrangements to get to work. But none of them could make such arrangements. Only two had cars, and those were old and unsuitable and the insurers refused d to give passenger cover. So those seven told the firm that they could not get to work and would have to give up. The firm were reluctant to lose them as they were good men, but they could not see their way to pay the expense of the bus. So the seven men left and the firm replaced them by seven other men who lived at or near St Stephen.

e The seven Port Isaac men then claimed that they had been dismissed for redundancy. They claimed redundancy payments. The industrial tribunal rejected the claim. Their decision was affirmed by the National Industrial Relations Court¹. The men appeal to this court.

f There is no doubt that the seven men were 'dismissed' by the employers. The employers' conduct (in withdrawing the bus in breach of the contract) amounted to a repudiation which entitled the men to terminate their contract: see s 3 (1) (c) of the 1965 Act. Although the seven men were 'dismissed', the question is whether they were dismissed 'by reason of redundancy'. This depends on s 1 (2) of the Act which, so far as material, says:

g '... an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is attributable wholly or mainly to ... (b) the fact that the requirements of that business for employees to carry out work of a particular kind, or for employees to carry out work of a particular kind in the place where he was so employed, have ceased or diminished or are expected to cease or diminish.'

h Taking those words as they stand, this case is not one of dismissal for redundancy. The requirements of the business—for the work of these seven men—continued just the same as before. After they stopped work, the firm had to take on seven other men to replace them and to do the work that they had been doing. The requirements for work of that kind in that place had not ceased or diminished, nor were they expected to do so. So it would seem that the case does not come within the statute.

i But the men say that the words of the section cannot be taken as they stand. They point out that the employers sought to alter the terms of the contract of employment to the disadvantage of the men. They took away the free transport and left the men to pay their own travelling expenses. This free transport cost the firm £2 a week for each man (£20 for ten men, £2 for each man). It would cost the men much about the same. So it would mean that the men would take home £2 a week less. If the employers sought to reduce wages by that sum—and the men refused to accept the reduction—would not it be a dismissal for redundancy? So say the men.

There are two cases in the Divisional Court which support the men's case. The first is *Dutton v C H Bailey Ltd*¹. Dutton had been employed for nearly 20 years as a boilermaker. In 1967 the employers considered that there were too many restrictive practices and tried to get the employees' society to agree to do away with them. The employees' society refused. Thereupon the employers told the men that, if they wished to continue to work, they would have to agree to new working rules and conditions. Dutton refused to agree. So did all the other boilermakers. In consequence, the employers told him that his labour was not required. The industrial tribunal held that he was not dismissed by reason of redundancy. They said:

'We find that the reason for the employers' termination of the old contract is that they wished—wisely or unwisely—to impose or attempt to impose new terms upon their work force. It was not because of any existing or expected reduction in the need for boilermakers.'

The Divisional Court reversed the tribunal. Lord Parker CJ said that² 'the proper approach is to say what in all the circumstances would have happened if these men had been retained on the old terms'.

In *Line v C E White & Co*³ two men were employed in a joinery shop at time rates. The employers were dissatisfied with the work being turned out on that basis and offered the men piece rates instead. The men refused to accept it and were dismissed. The industrial tribunal found that the men were dismissed because they would not accept the new terms. It was not because there was any falling off in work. So the tribunal rejected the claim for redundancy payment. The Divisional Court reversed the tribunal. They held that the case was governed by *Dutton v C H Bailey Ltd*¹.

If those two cases were correctly decided, they do show that if an employer seeks to alter the terms and conditions of employment to the disadvantage of the men, and the men do not accept it, they can treat themselves as dismissed for redundancy. The Industrial Court⁴ held, however, that those two cases were wrongly decided. They declined to follow them. The question for us is whether those two cases were right or wrong.

Counsel for the claimants sought to uphold the decisions in those two cases. He submitted that s 1 (2) (b) of the Act is to be read with s 2 (3) and (4), and other sections of the 1965 Act. So read, he says that s 1 (2) (b) is to be read as if it included the words 'on the existing terms and conditions of employment' at an appropriate place.

During the argument I was much attracted by this submission, but, on further consideration, I do not think it is right. I will take s 2 (3) and (4) on which counsel principally relied. Those subsections are intended to cover cases where a man has been given notice by reason of redundancy but afterwards, before he actually leaves, the employer makes a new offer to him. Thus s 2 (3) is apt to cover a case where, owing to lack of orders, an employer gives notice to a number of his men. But afterwards, before they leave his employ, more orders come in and the employer changes his mind. He makes an offer to the men, or some of them, to renew their contract or to re-employ them on the same work at the same place on the same terms. If the employee unreasonably refuses the offer, it is a bar to redundancy payment.

Section 2 (4) is apt to cover similar cases, but the employer does not offer the employee the same, but different. He offers him other work which may differ in kind and in place and on different terms. If the work is suitable for him and he unreasonably refuses it, it is a bar to redundancy payment. So construed, s 2 (3) and (4) do not affect s 1 (2) (b). They only apply *after* a man has been dismissed for redundancy

1 [1968] 2 Lloyd's Rep 122

2 [1968] 2 Lloyd's Rep at 123

3 (1969) 4 ITR 336

4 [1973] 1 All ER 218, [1972] 1 WLR 1634

whereas s 1 (2) applies at the time when he is dismissed. It defines the cases in which a man is to be taken to be dismissed for redundancy.

I come back, therefore, to s 1 (2) (b); and I am afraid that I cannot read into it the words 'on the existing terms and conditions of employment'. I think the two cases were wrongly decided. I have less hesitation in overruling them because I notice that Lord Parker CJ¹ himself decided as he did with reluctance; and I can see why. It is very desirable, in the interests of efficiency, that employers should be able to propose changes in the terms of a man's employment for such reasons as these: so as to get rid of restrictive practices; or to induce higher output by piece work; or to cease to provide free transport at an excessive cost. Take an instance very like the present case. The employers are able to obtain all the labour they need from places near their works without paying travelling expenses. So, as vacancies occur, they replace them locally and gradually reduce the number of men coming from a distance. The number falls so low that it is an unwarranted expense to provide a bus to bring them. Are employers then to keep on a bus so as to bring seven, six, five or a less number of men to work? Clearly not. The employers can properly say to the men: 'You have not lost your jobs because you are redundant. You have lost your jobs because you live so far away that it is not worth our while paying the cost of bringing you here—when we can get all the men we need nearby.' So, in *Dutton v C H Bailey Ltd*² the men did not lose their jobs because they were redundant. They lost them because they were parties to restrictive practices and refused to alter them. Likewise in *Line v C E White & Co*³ the men lost their jobs, not because they were redundant, but because they insisted on being paid on a time basis which was unproductive.

I would, however, remark, that if an employer sought to reduce the wages of his men on the plea that otherwise he could not keep the business going—or if he employed women in the place of men to save expenses—with the result that some men lost their jobs, then I think the employer would have difficulty in resisting a claim. There is a presumption that the men were dismissed by reason of redundancy: see s 9 (2) (b). I expect that the tribunal would in those circumstances hold that the presumption was not rebutted. The reduction in wages would probably be because a redundancy situation had arisen, or was expected to arise. Such is not the case here. These men did not lose their jobs because they were redundant. They lost them because they lived too far away to make it worth while to pay the cost of bringing them in.

I agree with the Industrial Court⁴ and would dismiss the appeal.

BUCKLEY LJ. The question for decision in this case is whether the seven claimants, who are appellants in this court, are entitled to receive redundancy payments from the employers under the Redundancy Payments Act 1965. They had all been in the employers' employment for the requisite period. Under s 1 (1) of the Act such an employee is entitled to receive a redundancy payment from his employer if he has been dismissed by his employer by reason of redundancy. Dismissal for the purposes of the Act can occur in four ways: (1) by summary dismissal, (2) by dismissal on notice, (3) by effluxion of a fixed term of employment, (4) by the employee summarily determining the contract of employment where the conduct of the employer entitles him to do so (s 3 (1)). Section 9 (2) (b) provides that an employee who has been dismissed by his employer shall, unless the contrary is proved, be presumed to have been so dismissed by reason of redundancy. The claimants were dismissed from their employment by the employers, and accordingly

1 In *Dutton v C H Bailey Ltd* [1968] 2 Lloyd's Rep 122

2 [1968] 2 Lloyd's Rep 122

3 (1969) 4 ITR 336

4 [1973] 1 All ER 218, [1972] 1 WLR 1634

the burden of proving that they were not dismissed by reason of redundancy lies on the employers. Section 1 (2), so far as relevant to the present case, provides that for the purposes of the Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is attributable wholly or mainly to the fact that the requirements of the business for the purposes of which he was employed for employees to carry out work of a particular kind have ceased or diminished or are expected to cease or diminish. So the burden resting on the employers in the present case is to establish that on the facts of the case that criterion is not satisfied. a
b

Lord Denning MR has already recounted the history of the matter and I need not repeat the facts.

Counsel for the claimants has contended that on the facts they were dismissed because the requirements of the employer's business for employees to carry out the work which the claimants were doing was expected to cease or diminish. Such expectations must depend on the circumstances and manner in which it is anticipated that the employer will carry on the business in the future. Counsel contends that on the true interpretation of the Act it should be assumed for this purpose that the employer will continue to carry on the business as it was carried on during the employment of the claimant of the redundancy payment, that is to say, continuing to employ the claimant on the terms and conditions on which he was employed down to the date of his dismissal. In support of this contention, counsel relied on the context of the 1965 Act as a whole and in particular of s 2 (3), and (4). He also relies on two decisions¹ of the Divisional Court, to which I will refer later. Stated shortly and in colloquial terms, s 2 (3) provides that an employee shall not be entitled to a redundancy payment if before his dismissal takes effect his employer has offered that he shall have his job back on the same terms as before without any interruption of employment and the employee has unreasonably refused that offer. Section 2 (4) provides that an employee shall not be entitled to a redundancy payment if before his dismissal takes effect his employer has offered to re-employ him, not necessarily in the same job, but in suitable employment to take effect not more than four weeks after the date of his dismissal and the employee has unreasonably refused that offer. Counsel contends that these two subsections should be read as provisos to, or modifications of, the provisions of s 1 conferring the right to a redundancy payment. He suggests that, so read, those provisions of the Act demonstrate that the policy of the legislature was that the employee should be safeguarded in a job at least as beneficial to him as his job was before his dismissal. c
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Section 2 (3) and (4) are complementary to s 3 (2) (a) and (b). I have already referred to s 3 (1) which defines dismissal for the purposes of the Act. Section 3 (2) deals with cases which would otherwise fall within sub-s (1) of the section, in which the employee is not to be treated as having been dismissed. Section 3 (2) reads as follows: g

'An employee shall not be taken for the purposes of this Part of this Act to be dismissed by his employer if his contract of employment is renewed, or he is re-engaged by the same employer under a new contract of employment, and—
(a) in a case where the provisions of the contract as renewed, or of the new contract, as the case may be, as to the capacity and place in which he is employed, and as to the other terms and conditions of his employment, do not differ from the corresponding provisions of the previous contract, the renewal or re-engagement takes effect immediately on the ending of his employment under the previous contract, or (b) in any other case, the renewal or re-engagement is in pursuance of an offer in writing made by his employer before the ending of his employment under the previous contract, and takes effect either immediately on the ending of that employment or after an interval of not more than four weeks thereafter.'

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¹ *I e Dutton v C H Bailey Ltd* [1968] 2 Lloyd's Rep 122 and *Line v C H White & Co* (1969) 4 ITR 336

a So, if an employee before his dismissal takes effect gets his old job back on the same terms as before he is not to be treated as dismissed (s 3 (2) (a)); but if he is offered this and unreasonably refuses, his dismissal takes effect but he is entitled to no redundancy payment (s 2 (3)). If, on the other hand, before his dismissal takes effect he is offered a new job by his employer or his old job on different terms, to start not later than four weeks after his dismissal takes effect, he is not to be treated as having been dismissed (s 3 (2) (b)). If the employer makes such an offer as last referred to and it is b an offer of suitable employment in relation to the employee and the employee unreasonably refuses it, his dismissal takes effect but he is entitled to no redundancy payment (s 2 (4)).

c In a case falling within s 3 (2) the employee is not to be treated as having been dismissed, and so no question of dismissal by reason of redundancy can arise. Section 2 (3) and (4) on the other hand both start with the words 'An employee shall not be entitled to a redundancy payment by reason of dismissal if ...' Here 'dismissal' must d of necessity refer to dismissal by reason of redundancy, for it is only in that case that an employee can be entitled to a redundancy payment. Starting from the statutory presumption under s 9 (2) (b) that an employee who has been dismissed by his employer has been so dismissed by reason of redundancy, the next logical step is to consider whether the employer can displace that presumption by establishing that e the criterion contained in s 1 (1) is not satisfied. It is only if the employer is unsuccessful in doing so that s 2 (3) or (4) can come into play. There is consequently, in my judgment, no justification for giving to s 1 (2) by reason of the provisions contained in s 2 any other meaning than that which its language primarily bears unless such a construction of s 1 (2) would produce results which it cannot reasonably be supposed f that Parliament intended.

e I will therefore first consider the terms of s 1 (2) without reference to the provisions of s 2. Where an employer has ceased or intends to cease to carry on the business in which the employee has been employed, either altogether or in the place where the employee was so employed (see s 1 (2) (a)), it seems to me that there is likely to be little difficulty in establishing the relevant facts. So also, where the requirement of the employer's business for employees to carry out work of a particular kind has f ceased, either altogether or at the place where the employee is employed, proof of the relevant facts should cause no probable difficulty. We are concerned, however, with a case in which it is said that the requirement of the employer's business for employees to carry out work of a particular kind was expected to cease or diminish. Whether such an expectation can justifiably be said to have existed must depend on g the circumstances in which it was supposed that the business would be conducted in the future. The test cannot, I think, be a purely subjective one, depending only on the apprehensions, justified or unjustified, of the employer. The employer must, I think, justify his expectation by reference to objective circumstances relating to the commercial situation of his business and those commercial and economic conditions h which exist generally at the relevant time or which could then reasonably be anticipated in the future. There seems to me, however, to be nothing in the language of the section to suggest that the employer should be treated as bound or likely to carry on his business in all, or indeed in any, respects in precisely the way in which he was carrying it on at the time when the facts have to be considered.

i Suppose, for instance, that the employment is of a kind for which there is a recognised rate for the job, and that an employer in a period of affluence and in the interests of good staff relations has been paying his employees more than that rate. If a time comes when he can no longer afford to pay his employees more than the recognised rate for the job but he is prepared to continue to employ them at that rate, there is nothing in s 1 of the 1965 Act to suggest that for the purpose of considering whether his requirement for employees to do that particular job is likely to cease or diminish he must be treated as an employer who is going to continue to pay the higher rate. This, however, as I understand counsel's argument, would be the consequence of

the view which he propounds. The facts would not, it seems to me, establish that the employer's need for employees to carry out work of the particular kind was expected to cease or diminish, but only that the employer was no longer able to pay his employees on so generous a scale as before. The position would be quite different if an employer dismissed his employees because he was no longer able to pay them either the recognised rate for the job, where one existed, or a fair wage at which he could secure the services of other employees in the labour market.

In *Dutton v C H Bailey Ltd*¹ the respondent company attempted to impose on its boilermaker employees, including the appellant Dutton, new terms of employment which seem to have affected not rates of pay but conditions of employment involving the removal of restrictive practices, the increase of mobility, the discontinuance of the employment of a mate to work with each boilermaker and matters of that sort. The changes were no doubt designed to make the company's labour force more productive and less expensive without altering rates of pay. The industrial tribunal decided that the case was not a redundancy case because the reason for the termination of the old contracts of employment was not any existing or expected reduction of the need for boilermakers. On appeal the Divisional Court¹ reversed the decision of the industrial tribunal. Lord Parker CJ said²:

'In my judgment, however, the Tribunal approached this in the wrong way. It seems to me that the proper approach is to say what in all the circumstances would have happened if these men had been retained on the old terms. To that there is only one answer as it seems to me, and that is that the requirements for boilermakers would diminish and possibly cease in that the employers would no longer be able, as they themselves said, to offer a competitive service. In other words, this was a case where, if instead of saying: "Unless you enter into new terms you will be dismissed", they at first dismissed these men and later, on sought to negotiate new terms, it would then as it seems to me be perfectly clear that the dismissal was one on account of the expected diminution or cessation in the work for boilermakers. It is in my judgment *nihil ad rem* to look to the future and say what would have happened if this man had accepted these new terms. It may be then that the employers would have had so much work that they would even want more boilermakers. The test, it seems to me, is what would have happened if termination of the contract had not been effected.'

In the later case of *Line v C E White & Co*³ the appellants were employed by the respondent company in its joinery shop on time rates. The company, being dissatisfied with the amount of work turned out for the hours worked, decided to offer them new contracts on piece rates. The appellants refused to accept the change in their contracts, and were thereupon dismissed. The industrial tribunal held that the cases were not cases of redundancy, but on appeal the Divisional Court followed its earlier decision in *Dutton v C H Bailey Ltd*¹.

With the utmost respect to the learned judges who were concerned with those two decisions, I am unable to see any justification in the language of s 1 for the test adopted by the Divisional Court. The section does not pose the question, what might be expected to happen if the employees were not dismissed but continued under their prior contracts of employment. It poses the question whether the employers' requirement for employees to carry out work of the particular kind in question is expected to cease or diminish. That is a question which needs to be answered objectively in the light of all the circumstances affecting the employers' business, but not, in my opinion, with any special relation to the particular contracts of employment

¹ [1968] 2 Lloyd's Rep 122

² [1968] 2 Lloyd's Rep at 123, 124

³ (1969) 4 ITR 336

a under which the dismissed employees were previously employed. It may be that on their particular facts, which are shortly recorded in the books, *Dutton v C H Bailey Ltd*¹ and *Line v C E White & Co*² were correctly decided, but, in my judgment, they should not be taken as laying down a general principle.

Assuming then that I am right in thinking that s 1 should be interpreted in the way I have indicated, can s 2 (3) and (4) operate in conjunction with s 1 in a sensible manner, or do they give rise to any consequences of so surprising a character as to suggest that s 1 must have been misinterpreted?

b At first impression it may seem strange that, where an employee immediately on the termination of his existing contract of employment could get his job back on the same terms, a redundancy situation can exist, and yet s 2 (3) and (4), as I have already indicated, postulate a redundancy situation. It is a mistake, however, to think of the Act as operating in relation to one employee alone. It must normally c operate in circumstances in which an employer is reducing his labour force by laying off a number of workpeople. We are not, I think, concerned under s 2 (3) and (4) with cases in which the contract of service is summarily determined by either the employer or the employee. We are concerned with cases of dismissal on notice or termination of employment by effluxion of time.

d Suppose an employer to employ 20 men on a particular type of work and to wish to reduce that number to 15 because he has not, or does not expect to have, work for more. He may give five men a month's notice, but before the month is out he may lose two of the remaining 15 men for some reason or other and so want to retain two of the five. He offers to renew the employment of two of them on the same terms as before. If they accept, their employment will continue as though they had never been given notice. They will be treated as though they had never been dismissed e (s 3 (2) (a)). But if, when he is offered his job back, one of the two unreasonably refuses the offer, he will fall within s 2 (3). He will have been dismissed by reason of redundancy because, when he was given notice, the employer expected that the need for his services would cease, but he will not qualify for a redundancy payment because, notwithstanding his dismissal by reason of redundancy, he need not have lost his f job in consequence.

g Or suppose that the 20 men in the previous example are all employed for fixed periods and that the periods of employment of seven of them are due to expire on the same day. Two of these are re-employed on the same terms as before and the other five are not re-engaged. All seven would have been dismissed within the meaning of that word in this Act (s 3 (1)) and all such dismissals would have occurred in a redundancy situation. Were it not for s 2 (3), it might be difficult to say that the two who were re-engaged were not entitled to redundancy payments.

I have no doubt that a number of other examples could be devised in which s 2 (3) could serve a useful purpose without, as it seems to me, in any way conflicting with the interpretation of s 1 which I have suggested.

h Section 2 (4) appears to me to be primarily, though not exclusively, concerned with a situation in which the employer is reorganising his business or some part of it. It would apply in a case in which an employer was no longer able to continue to employ an employee in the job in which he was previously employed but was able to offer him suitable alternative employment. Under this subsection it is not necessary that the re-employment should take effect immediately on the termination of the prior employment. It must, however, take effect not later than four weeks after that determination. This seems to me to be designed to give the employer a reasonable interval for reorganisation of his business or that part of it which is affected. i It would seem, however, that the subsection would also operate in a case in which the employer offered to re-employ the employee in the same capacity and place as before

1 [1968] 2 Lloyd's Rep 122

2 (1969) 4 ITR 336

but on different terms of service or remuneration. To fall within the subsection the offer must be one of suitable employment in relation to the employee. If an offer is made before the termination of the prior employment and is accepted, no question will arise as to suitability or dismissal (s 3 (2)), but if the offer is refused, s 2 (4) will only apply if such refusal is unreasonable. These provisions appear to me to indicate that the Act does not give an employee any vested right to be employed on the same terms and conditions as those obtaining during his prior employment or other terms at least as beneficial as those obtaining during his prior employment, and to negative rather than to support the views expressed by the Divisional Court in the two cases¹ to which I have referred. I cannot discern that s 2 (4) is likely to operate in a way which would be inimical to the interpretation of s 1 which I have suggested.

I accordingly reach the conclusion that the question whether an employee has been dismissed by reason of redundancy must be answered in the light of the relevant surrounding circumstances not on the basis of any hypothesis but on a basis of actuality.

Section 1 (2) (a) cannot apply to the facts of the present case. As regards s 1 (2) (b), the employers' requirement for employees to carry out the work previously carried out by the claimants have neither ceased nor diminished. They have employed seven other men in their place to do that work. Nor were the claimants dismissed because the employers expected their need for employees to do that work to cease or diminish. What has happened is that the employers have succeeded in securing the services of seven employees at the same wage but in respect of whom the employers do not have to incur the cost of providing free transport to their work. The claimants were unwilling to continue in the employment of the employers unless they continued to supply them with free transport. In these circumstances, in my judgment, the claimants are not entitled to be treated as having been dismissed by reason of redundancy. Accordingly in my opinion this appeal fails.

LORD DENNING MR. Orr LJ is unable to be here this morning; but he has read the judgments which have been delivered and agrees with them.

Appeal dismissed. Leave to appeal to the House of Lords.

Solicitors: *Pattinson & Brewer* (for the claimants); *Robbins, Olivey & Lake*, agents for *Stephens & Scown*, St Austell (for the employers).

L J Kovats Esq Barrister.

¹ I.e. *Dutton v C H Bailey Ltd* [1968] 2 Lloyd's Rep 122 and *Line v C H White & Co* (1969) 4 ITR336

a Halfdan Grieg & Co A/S v Sterling Coal & Navigation Corporation and another

COURT OF APPEAL, CIVIL DIVISION

LORD DENNING MR, MEGAW AND SCARMAN LJJ

b 21st, 22nd MARCH, 3rd APRIL 1973

Arbitration – Special case – Direction by court – Direction to arbitrator to state question of law or award in form of a special case – Discretion of court – Exercise of discretion – Issue involving question of law – When discretion to direct a special case should be exercised – Dispute as to construction of contract terminating time charter – Delay in bringing dispute to arbitration – Arbitration Act 1950, s 21 (1).

c The owners let their vessel to the charterers on a time charter, dated 21st January 1964, for 24 months. The parties agreed to determine the charter as at 30th October 1964, before it had run its full course, leaving a balance of 17 months of the charter undone. The vessel was redelivered to the owners on 29th March 1964. The agreement terminating the charter, which was dated 4th November 1964, provided, by **d** cl 1, that from the time of redelivery the owners were free to operate and fix the vessel at their discretion, including fixing her on a time charter for any period. By cl 5 of the agreement accounts between the parties were to be adjusted according to whether the owners earned more or less during the balance of the original charter period than they would have done under the original charter. The agreement **e** stated that any dispute should be settled in London according to English law. For the last eight months of the balance of the original charter period the owners let the vessel on a long term time charter at a low rate which was less than the rate payable under the original charter. The owners claimed to be compensated under cl 5 of the agreement for the difference in the rates. A dispute then arose as to the construction and effect of the agreement insofar as it concerned the basis on which the **f** vessel's earnings under the subsequent charter were to be measured and the accounts adjusted between the parties. In money terms the amount in dispute between the parties was some £57,000. In 1966 the dispute was referred to arbitration in London, the charterers being the claimants in the arbitration and each side appointed an experienced arbitrator. There was delay in bringing the matter to a hearing and it did not come on for hearing until July 1972. At the arbitration the parties were **g** represented by counsel and solicitors. The owners requested the arbitrators to state their award in the form of a special case for the decision of the court but by letter dated 19th July 1972 the arbitrators refused on the ground that, if a question of law arose, it was as to the interpretation of the agreement of 4th November 1964 which was a question more suitable for decision by arbitrators since it was closely allied to commercial practice and the interpretation commercial men would give **h** to the agreement, and involved no principle of law. The owners took out a summons before the commercial judge seeking an order under s 21 (1)^a of the Arbitration Act 1950 directing the arbitrators to state their award in the form of a special case for the court's decision. The judge refused to direct a special case to be stated because he thought the question of law raised was well within the experience and capacity of the arbitrators, and because of the delay in bringing the dispute to arbitration which he considered was attributable to the inaction of the owners. The owners **j** appealed against the dismissal of the summons.

a Section 21 (1) provides: 'An arbitrator or umpire may, and shall if so directed by the High Court, state—(a) any question of law arising in the course of the reference; or (b) any award or any part of an award, in the form of a special case for the decision of the High Court.'

Held – The court would direct the arbitrators to state their award in the form of a special case for the following reasons—

(i) As a matter of general principle, the discretion (conferred by s 21 (1) of the 1950 Act on an arbitrator or umpire to state an award in the form of a special case, and on the High Court to direct a special case to be stated) should be exercised whenever the proved or admitted facts gave rise to a point of law which was real and substantial, such as to be open to serious argument and appropriate for decision by a court of law; the point should be clear cut and capable of being accurately stated as a point of law, and be a point of law of such importance that its resolution was necessary for the proper determination of the case; when parties agreed to arbitrate it was (by virtue of s 21) on the assumption that a point of law in a proper case could be referred to the courts (see p 1077 c to g, p 1080 a to c and p 1083 b and c, post).

(ii) In the present case, the judge had erred in refusing to direct a special case to be stated because (a) the point of law at issue depended on the true construction of the agreement of 4th November 1964 which was not a point of law specially within the arbitrators' expertise but was one which the court was well qualified to decide, and on which a party was entitled to ask the court itself to rule, and (b) delay on the part of the owners was not a sufficient ground for refusing to direct a special case where, as here, both sides were at fault over delay and the timely conduct of the arbitration was the responsibility of the charterers as claimants (see p 1078 d and e, p 1080 g, p 1081 a g and h and p 1083 h to p 1084 b, post).

Re Nuttall and Lynton and Barnstaple Railway Co (1899) 82 LT 17, and dictum of Lord Wilberforce in *Compagnie d'Armement Maritime SA v Compagnie Tunisienne de Navigation SA* [1970] 3 All ER at 89 considered.

Decision of Kerr J [1973] 1 All ER 545 reversed.

Notes

For applications to compel the statement of a special case, see 2 Halsbury's Laws (3rd Edn) 40, 41, para 91, and for cases on the subject, see 2 Digest (Repl) 580-582, 1122-1134.

For the Arbitration Act 1950, s 21, see 2 Halsbury's Statutes (3rd Edn) 450.

Cases referred to in judgments

Compagnie d'Armement Maritime SA v Compagnie Tunisienne de Navigation SA [1970] 3 All ER 71, [1971] AC 572, [1970] 3 WLR 389, HL; *rvsg sub nom Compagnie Tunisienne de Navigation SA v Compagnie d'Armement Maritime SA* [1969] 3 All ER 589, [1969] 1 WLR 1338, [1969] 2 Lloyd's Rep 71, CA, *rvsg* [1969] 1 WLR 449, Digest (Cont Vol C) 140, 721b.

Comptoir Commercial Anversoise & Power, Son & Co, Re [1920] 1 KB 868, [1918-19] All ER Rep 661, 89 LJKB 849, 122 LT 567, CA, 39 Digest (Repl) 570, 975.

Gray, Laurier & Co and Boustead & Co, Re (1892) 8 TLR 703, 36 Sol Jo 666, 2 Digest (Repl) 581, 1126.

Nuttall and Lynton and Barnstaple Railway Co, Re (1899) 82 LT 17, CA, 2 Digest (Repl) 581, 1130.

Orion Compagnia Espanola de Seguros v Belfort Maatschappij voor Algemene Verzekering [1962] 2 Lloyd's Rep 257, Digest (Cont Vol B) 28, 1499a.

Tsakiroglou & Co Ltd v Noble & Thorl GmbH [1961] 2 All ER 179, [1962] AC 93, [1961] 2 WLR 633, [1961] 1 Lloyd's Rep 329, HL, 39 Digest (Repl) 569, 967.

Tzortzis v Monark Line A/B [1968] 1 All ER 949, [1968] 1 WLR 406, [1968] 1 Lloyd's Rep 337, CA, Digest (Cont Vol C) 141, 734c.

Cases also cited

Czarnikow v Roth, Schmidt & Co [1922] 2 KB 478, [1922] All ER Rep 45, CA.

Henry (D I) Ltd v Clasen [1973] 1 Lloyd's Rep 159.

- a *Union-Castle Mail Steamship Co Ltd v Houston Line (London) Ltd* (1936) 55 Lloyd LR 136, CA.
Zwanenberg Ltd v McCallum & Sons (1923) 14 Lloyd LR 350.

Interlocutory appeal

- b The owners, Halfdan Grieg & Co A/S, the respondents in an arbitration reference in which the charterers, Sterling Coal & Navigation Corporation and A C Neleman's Handelen Transportonderneming, were the claimants, took out an originating summons, dated 17th October 1972, seeking an order pursuant to s 21 of the Arbitration Act 1950 that the arbitrators be directed to state in the form of a special case for the decision of the court the following question of law arising in the course of the reference:

- c 'Whether, upon the facts found and upon the true construction of the agreement dated 4th November 1964 the amount that the vessel ['Lysland'] was able to earn in respect of the period between 29th July 1965 and 31st March 1966, falls for the purposes of clause 5 of the said Agreement, to be assessed as:—(a) The sums actually received by the Owners during that period under the time-charter dated 9th June 1965, or (b) the above sums adjusted to take account of the differences between the timecharters dated the 21st January 1964 and the 9th June 1965, in respect of (i) expiry date, and/or (ii) redelivery range, and/or (iii) commissions payable, and/or (iv) quality of fuel to be used.'
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- e On 29th November 1972 Kerr J gave a reserved judgment in open court¹ dismissing the summons. The owners appealed seeking an order that the arbitrators be directed to state in the form of a special case the question of law set out in the summons. The facts are set out in the judgment of Lord Denning MR.

R L A Goff QC and Basil Eckersley for the owners.

C S Staughton QC and P N Legh-Jones for the charterers.

Cur adv vult

- f 3rd April. The following judgments were read.

- LORD DENNING MR.** By a charterparty dated 21st January 1964, the owners of the Norwegian vessel 'Lysland' let her on a time charter for 24 months to charterers. Delivery was effected on 29th March 1964, so that, if the time charter had run its full course, it would have expired about March 1966. But it did not run its full course. The parties agreed to determine it as at 30th October 1964. So it only lasted seven months, leaving the remaining 17 months undone. The owners were thereafter free to operate the vessel at their discretion, but the agreement provided that accounts were to be adjusted according to whether the owners earned more or less during the remaining 17 months than they would have done under the original charter. During the first nine months out of the 17 months, that is, from 30th October 1964, to 29th July 1965, the owners let her on several voyage charters. The figure for those nine months can be adjusted without difficulty. But for the last eight months, from August 1965, to March 1966, the owners let the vessel on a long-term charter at a low rate, which was less than the rate in the original charter. The owners claim to be compensated for the difference. But the charterers say that the owners, if they had tried, could have let the vessel for a shorter term at a rate equivalent to the rate in the original charter, and that, accordingly, the owners are entitled to nothing for that period.
- j

The dispute was referred to arbitration in London. It depended on the true construction of the agreement by which the original charter was determined after

seven months. The agreement was dated 4th November 1964. The most material clauses are these: a

'1. [From the time of redelivery] the Owners to operate the vessel at their discretion and Owners are entirely free so fix the ship at their discretion including fixing her on time charter for any period also in excess of the expiry of the time-charter period under C/P dated 21st January 1964 and at rate lower than dollars 3.00 ... b

'4. The deposit [by the charterers to the owners] is to be brought up to the full amount viz. Norw. Kr. 750,000 ...

'5. The amount deposited according to the preceding clause of this agreement is to be returned to the Timecharterers, if, for the balance of the time-charter period as per Charterparty of the 21st January 1964, the Owners are able to earn an amount equivalent to or exceeding dollars 3.00 less 2½% address commission on T/C basis. If the Owners earn less, the difference to be deducted from the amount deposited and the balance of the deposit, if any, to be returned to Timecharterers. If the deposit is not sufficient to cover the said difference the Timecharterers shall immediately pay the said difference so far as it exceeds the amount deposited ... c

'9. Should any dispute arise out of the present agreement, same to be settled in London according to English Law.' d

The contention of the shipowners is that under cl 1 they were entitled to fix the ship for the long-term time charter, and that under cl 5, as it earned less, they were entitled to the difference: whereas, the charterers contend that the sums should be adjusted so as to take account of (a) expiry date; (b) redelivery range; (c) commission payable, and (d) quality of fuel to be used. In money terms, it makes a difference of some £57,000. e

The agreement contained no provision for arbitration. It simply provided that any dispute should be 'settled in London according to English law'. In 1966 the parties did agree to submit the difference to arbitration. We have not seen the arbitration agreement. I assume that it was a simple agreement which would bring in all the provisions of the Arbitration Act 1950 as to the award being final and binding, and so forth. The owners appointed Mr Chesterman as their arbitrator. The charterers appointed Commander Sumpton as theirs. The two arbitrators appointed Mr Barclay as umpire. There was much delay in bringing the matter to a hearing. It did not come on for hearing until 10th and 11th July 1972. At the hearing the parties were represented by counsel and solicitors. The owners requested the arbitrators to state their award in the form of a special case. On 19th July 1972 the arbitrators refused in a letter which I must read in full: f

"LYSLAND"

'With reference to the [owners'] request that we should state our Award in the form of a Special Case we have to advise you that we have decided not to do so for the following reasons:—We do not feel that this is a proper case to be so stated. Whilst it may well be that there is a question of law it is our feeling that, whilst we do not presume to usurp the functions of the Court, it is more suitable for decision by a commercial arbitration tribunal than by the Courts since its interpretation is so closely allied to commercial practice and the interpretation that commercial men would give it. Counsel agreed that the Courts' decision would add nothing to the wealth of law which is already available to us and as there is no further principle of law involved we feel it unnecessary from the point of view of both time and expense to trouble their Lordships further. We have also decided to delay the issue of our Award for fourteen days so that the parties may, if they wish, apply to the Court.' g

On 25th July 1972 the owners took out an originating summons before the commercial judge. They applied for an order under s 21 of the Arbitration Act 1950 that

a the arbitrators be directed to state their award in the form of a special case for the decision of the court. They said that a question of law had arisen in the course of the reference as to the assessment of the amount under cl 5 of the agreement.

On 29th November 1972 Kerr J, the commercial judge, gave his decision in open court¹. He declined to order the arbitrators to state their award in the form of a special case. He gave leave to appeal because the case had become a case of principle. So indeed it has been treated before us.

b Counsel for the charterers submitted to the judge several factors which he suggested would be relevant in considering whether or not a case should be stated. Some of them I would accept. Others I would not. I prefer the criteria which junior counsel for the owners put before the judge, and which he accepted. But I would venture to expand them somewhat.

c When one party asks an arbitrator or umpire to state his award in the form of a special case, it is a matter for his discretion. If the issues are on matters of fact and not of law, he should refuse to state a case. If they raise a point of law, it depends on what the point of law is. He should agree to state a case whenever the facts, as proved or admitted before him, give rise to a point of law which fulfils these requisites. The point of law should be real and substantial and such as to be open to serious argument and appropriate for decision by a court of law (see *Re Nuttall and Lynton and Barnstaple Railway Co*²) as distinct from a point which is dependent on the special expertise of the arbitrator or umpire (see *Orion Compagnia Espanola de Seguros v Belfort Maatschappij voor Algemene Verzekering*³). The point of law should be clear cut and capable of being accurately stated as a point of law—as distinct from the dressing up of a matter of fact as if it were a point of law. The point of law should be of such importance that the resolution of it is necessary for the proper determination of the case—as distinct from a side issue of little importance.

e If those three requisites are satisfied, the arbitrator or umpire should state a case. He should not be deterred from doing so by such suggestions as these: it may be suggested that a special case should be reserved for cases which are of general application (such as the construction of a standard form) or which would elucidate or add to the general principles of law (such as the doctrine of frustration or repudiation). I would not so limit the stating of a special case. In most cases the parties themselves are concerned, not with general principles, but with their particular dispute. If the case does involve a point of law which satisfied the requisites which I have mentioned, either of the parties should be enabled to have it decided by a judge of the High Court. When the parties agree to arbitrate, it is, by our law, on the assumption that a point of law can, in a proper case, be referred to the courts.

g It may be suggested that if the point of law is only as to the construction of a particular document or of the words in it—as applied to the proved facts—then it should be left to the arbitrator or umpire. I do not agree. Most of the special cases are stated on points of construction. No one hitherto has thought that they should be refused on that ground.

h It may be suggested that, if the point of law is only as to the proper inference, or the appropriate implication—to be drawn from the proved facts—then it should be left to the arbitrator or umpire. Again, I do not agree. Some of the most important awards have been of that kind: see, for instance, *Re Comptoir Commercial Anversois & Power, Son & Co*⁴.

i It may be suggested that if only a small sum is in dispute, a special case should be refused. Sometimes a small sum can involve big issues of much importance for the parties. In those cases a special case should be stated. But, when the sum is so small as not to justify further time or money being spent on it, it should be refused.

1 [1973] 1 All ER 545, [1973] 2 WLR 237

2 (1899) 82 LT 17

3 [1962] 2 Lloyd's Rep 257

4 [1920] 1 KB 868 at 898, [1918-19] All ER Rep 661 at 673

Whilst setting out those guidelines, I would give a word of warning. The arbitrator or umpire should be watchful to see that the procedure by special case is not abused. The conference of Commercial Court Users over which Pearson J presided in 1962¹ drew attention to abuses such as a special case on 'whether upon the facts found by the Umpire his ultimate decision is correct'. That is why I have said that the point of law should be clear cut. Other abuses spring readily to mind. A party may seek to raise a point of law which is too plain for serious argument. Or he may seek to use it as a means of delaying the day when a final award is made against him. In all cases where the arbitrator or umpire is of opinion that the application is not raised bona fide, but for some ulterior motive, he should, of course, refuse it.

In the present case there is no suggestion that the application is not made bona fide or that it is an abuse of the process of a special case. But the judge² has refused to order the arbitrators or umpire to state a special case for two main reasons: (i) that the question of law is one which is well within the experience and capacity of arbitrators; and (ii) a delay of three years between 1969 and 1972 appeared to him² 'to have been due to inaction on the side of the owners'. As to (i), whilst the experience and capacity of the arbitrators and umpire is undoubted, I do not think that the point of law is one which is specially within their expertise. It seems to me that the point at issue depends on the true construction of the agreement which the court is well qualified to decide, and which a party is entitled to ask the court itself to rule on. The court would, of course, give great weight to the views of the arbitrators and umpire on it, but should come to its own decision. As to (ii), I would not myself put anything against the owners on the ground of delay. Neither side is without reproach on this score. The conduct of the arbitration was in the hands of the charterers who were the claimants. It was for them to apply to fix a day for the hearing. In any case, delay in the earlier stages is no reason for a departure from proper practice at the later stages—unless it goes to show want of bona fides, which is not suggested here.

Counsel for the charterers referred to the words of Lord Wilberforce in *Compagnie d'Armement Maritime SA v Compagnie Tunisienne de Navigation SA*³ and suggested that when the decision of the arbitrators was followed by the decision of the commercial judge—refusing a special case—that should end the matter. In the ordinary way I would agree. But this case was treated by the judge as raising a question of principle. So it has been in this court. His decision would, I think, alter the practice hitherto adopted. The judge said that he did not wish to do this. He emphasised⁴ that his decision 'should not be taken as any indication . . . that special cases should be stated less frequently in the future than in the past'. But I think that it would inevitably tend to do so. This is a typical case where the court in the past would order a special case. If the residual discretion (to which the judge referred) is to be applied in this case, it would fall to be applied in many others like it. I would keep to the existing practice and order the arbitrators to state their award in the form of a special case. I would allow the appeal, accordingly.

MEGAW LJ. Section 21 (1) (b) of the Arbitration Act 1950 gives to the High Court a discretion whether or not to direct that an arbitrator or umpire shall state an award in the form of a special case.

In the earlier part of his judgment, Kerr J⁴ has sought to deal with a question of general principle. I use the words 'general principle' because the learned judge himself used them. The general principle is the definition of factors which (I quote the words in the judgment⁵)—

1 Commercial Court Users' Conference Report 1962, Cmnd 1616

2 [1973] 1 All ER at 554, [1973] 2 WLR at 247

3 [1970] 3 All ER 71 at 89, [1971] AC 572 at 600

4 [1973] 1 All ER at 545, [1973] 2 WLR at 237

5 [1973] 1 All ER at 551, [1973] 2 WLR at 244

- a 'would be relevant in considering how the exercise of the discretion should be approached insofar as they may be applicable in any particular case, but without any single one being by itself likely to be decisive'.

What the learned judge had in mind was the very desirable object of helping to achieve greater uniformity in decisions by the courts, and perhaps also by arbitrators, where a request for a special case is made by one party and is opposed by the other party; and also helping the parties and their advisers to predict the probable result of such an application, if it were to be made to the High Court.

- b With very great respect to the learned judge, I do not think that his statement of relevant factors would, on balance, assist in achieving those results. On the contrary, I believe that the acceptance of his general principle (the suggested relevant factors) would have the opposite effect. Where there was, or was intended to be, c an application for a case to be stated, which was, or was likely to be, opposed, the parties or their advisers would be likely to scrutinise the list of approved relevant factors and to try to find matters, falling within the respective heads, for which, in the absence of such a list, it would perhaps not have occurred to them to claim materiality or relevance. With regard to some of the factors, this would be particularly unfortunate. For example, factor (a)¹, at least unless it were given further d qualification, might well result in invidious and undesirable evidence being proffered as to the particular qualifications or experience of an individual arbitrator. Factor (g)¹ might result in evidence and counter-evidence being adduced of things alleged to have been said or done in the course of the arbitration, from which the court might be asked to draw an inference one way or the other as to what the arbitrator was minded to decide. Still worse, the court might be asked to investigate e an alleged¹ 'tendency in some way to behave unjudicially', when such an allegation, if it is properly to be made at all, ought to be made in some wholly different proceedings under the Arbitration Act 1950. Again factor (c)¹—the acceptance in principle of the presence or absence of citation of authorities as a relevant factor—might well, without any impropriety, create a tendency towards such citation where none is really required, or an overcautious, excessive citation of textbooks and cases in order f to try to establish the more firmly that the point of law is a lawyers' point. None of these tendencies, if they were to arise, would help the parties, or the arbitrators or the court.

- Further, I suspect, the suggested 'relevant factors', elevated to the status of judicially recognised principle in respect of the exercise of the discretion, would themselves be but the starting point for further judicial exposition and qualification, all coming g in as additional rules or sub-rules by way of accepted jurisprudence affecting the exercise of the discretion.

- Moreover, this gallant, and very understandable, attempt to assist in providing greater uniformity and certainty, is, in my judgment, not only likely to produce the opposite effect. It is also, I believe, unnecessary because of another, and as I think correct, simple general principle affecting the exercise of the discretion which the h learned judge himself stresses. At the end of his discussion of the 'relevant factors', and immediately before he passes on, 'having dealt with the general principle', to consider the exercise of the discretion in the present case, the learned judge says²:

- i '... I think that borderline cases should be decided in favour of stating or directing special cases, because in cases of doubt parties should not be shut out from arguing a question of law in the courts.'

The learned judge, as I understand him, re-emphasises the same general principle in a passage towards the end of his judgment, in which he says³:

1 See [1973] 1 All ER at 551, [1973] 2 WLR at 244

2 [1973] 1 All ER at 552, [1973] 2 WLR at 245

3 [1973] 1 All ER at 554, [1973] 2 WLR at 247

'It is however necessary to emphasise that my decision not to direct the statement of a special case on this application should not be taken as any indication . . . that special cases should be stated less frequently in the future than in the past. If one takes the criteria put forward by counsel for the owners, that is to say, a clear-cut question of law which is seriously arguable, substantial in the sense of being important for the resolution of the dispute and to the parties, and which is raised bona fide and not merely for the purposes of delay, then I would expect that in the great majority of cases in which these criteria are satisfied, special cases will in future, as in the past, be stated on request or, if necessary, directed by the courts.'

That, in my judgment, is a correct, and sufficient, statement of the general principle of the exercise of the discretion in a case such as this. Of course, there may always be special factors in a particular case: they may include some, at least, of the factors to which the learned judge referred in his statement of general principle. But they are not a part of any general principle which can usefully be stated.

I now turn to the issue which arises directly in this case and the question of the exercise of the discretion in this particular case. As I understand the judgment, the learned judge was content to accept the criteria referred to in the passage of his judgment which I have most recently quoted. He says¹:

'... although these criteria are admittedly satisfied here, I consider that in the particular circumstances of this case the court's discretion should not be exercised.'

It is, therefore, necessary, not as a matter of general principle, but in relation to the circumstances of this case, to consider whether the reasons given by the learned judge, since he did, very properly, state his reasons, justify the exercise of the discretion against the stating of a special case. Two reasons were given. I shall take the second of them first¹:

'On the evidence before me, a delay of nearly three years between 1969 and 1972 appears to have been due to inaction on the side of the owners, who have been in possession of a substantial deposit for more than seven years since this was claimed back by the charterers. The owners' request for a special case at this stage would therefore inevitably still further delay the resolution of this long-standing dispute.'

The only evidence before the judge was affidavit evidence. On that evidence, I fear that I am unable to accept that the fault lay, either exclusively or principally, with the owners. The charterers were the claimants. The timely conduct of the arbitration was, at least primarily, theirs. They could at any time have taken effective steps to bring it to hearing. The fact, as asserted in the affidavit for the charterers, that the owners failed, for an unspecified period, to tell the charterers which of the charterers' documents they wished to have copied is—I say it with all respect—not a sufficient basis for putting the whole or main responsibility for the delay in the hearing on the owners. Indeed, the very fact that such a complaint is put in the forefront of the charterers' evidence before the judge might be an indication of the poverty of the available material. It is true that before us, when counsel for the owners poured gentle scorn on this aspect of the charterers' case, we were told by counsel for the charterers that there was more in this than appeared in the affidavit. We, rightly, I think, refused to hear further evidence on that matter at this stage. When the charterers are asserting that delay on the part of the owners is a relevant factor, it would be inappropriate to allow them to rely on further evidence which they should, if it were material, have produced months ago. It would be wrong that they

¹ [1973] 1 All ER at 554, [1973] 2 WLR at 247

a should succeed now, if the fresh evidence were indeed material, on a ground of delay by the owners, when that delay is sought to be proved by evidence produced for the first time in this court. If I am right in this, then that fact alone—the reliance by the judge on an unsound reason in exercising his discretion—justifies this court, apart from any other considerations, in reviewing the exercise of the discretion.

b The other reason, the first reason, given by the learned judge for exercising his discretion to refuse to direct a case to be stated was, if I have understood it correctly, that, though the question was a question of construction, and therefore technically a question of law¹, 'The sole issue is the proper comparison of the earnings of a vessel under two time charters'. With great respect, that is not the issue. I think that the learned judge has fallen into error. The question was whether on the construction of this agreement, the owners being under cl 1 contractually free to operate and fix the vessel at their discretion and cl 5 including the phrase 'if . . . the Owners are able to earn' and 'if the Owners earn', what was relevant was, on the one hand, actual earnings, or, on the other hand, earnings on the basis of charterparties comparable in various respects to the abandoned charterparty. There was, it appears, much evidence, and argument, at the hearing of the arbitration as to the feasibility of a comparable charterparty and as to the earnings which it would produce. Obviously c if the charterers were right on the question of construction, part at least of that evidence would be vitally relevant to the amount of any award. It had to be carefully tested and explored for that, if for no other reason. It is possible (it is not for me to express a view) that the question whether the parties, at the time when they entered into the agreement, would or would not have contemplated as commercial men that such a comparable charterparty would or would not have been likely to be available at the time when the agreement was to be performed, might be of relevance e to the question of construction. It is possible (again it would be wrong for me to express any view) that the correspondence leading up to the making of the agreement, on which it appears much time was spent at the hearing, might have a bearing on the meaning to be given to the agreement. But I think that the very fact that in the affidavit on behalf of the charterers it is said: 'The correspondence was investigated in order to advance submissions concerning the aims of the parties in entering f into the Agreement' is itself an indication that the review by the court of a decision on the construction of the agreement might be appropriate.

I see nothing in these questions which leads to the conclusion that this is the sort of case in which the special knowledge and experience of the arbitrators as to the chartering market makes it undesirable that the question of construction should be considered by the court. I think that the indications, from what we have been g told in the affidavits, are the other way.

Accordingly, with great respect to the learned judge, I do not think that either of the considerations on which he based his decision to refuse a special case justify his opinion that there are particular circumstances in this case which warrant the exercise of his discretion in that way. In my judgment the discretion should have been exercised to direct that the award be stated in the form of a special case. I reach this h conclusion because of my disagreement as to the particular factors of the particular case on which the judge based his exercise of discretion.

There are two further matters which I would mention. First, I agree with the learned judge's criticism² of the letter in which the arbitrators announced their decision to refuse a special case. The other matter which I should mention is that j counsel for the charterers sought support from a paragraph in the speech of Lord Wilberforce in *Compagnie d'Armement Maritime SA v Compagnie Tunisienne de Navigation SA*³. With very great respect, I do not think that what is said in that paragraph

1 [1973] 1 All ER at 554, [1973] 2 WLR at 247

2 See [1973] 1 All ER at 552, 553, [1973] 2 WLR at 245, 246

3 [1970] 3 All ER 71 at 89, [1971] AC 572 at 600

assists in the decision of the present case, helpful though it undoubtedly is in other types of case. In *Compagnie d'Armement*¹ no one had resisted the request for the statement of an interim award in the form of a special case under s 21 (1) (b) of the Arbitration Act 1950. Indeed, unless my recollection is at fault, the indication was that both parties desired that there should be a decision of the High Court. So far as concerns appeals thereafter, with great respect I have difficulty in following the suggestion in the last sentence of the paragraph² to the effect that leave to appeal from the commercial judge should be given only in exceptional cases. For by s 21 (3) of the 1950 Act, Parliament has provided that leave is not required for an appeal to this court, where an award, whether final or interim, has been stated in the form of a special case under s 21 (1) (b) and has been decided by the High Court. Moreover, the judge who decided the *Compagnie d'Armement* case¹ in the High Court³, as I happen to know, regarded himself, properly I think, as bound to follow the reasoning of the judgments in an earlier case, *Tzortzis v Monark Line A/B*⁴. It follows, I think, that had it not been for the statement of the special case in *Compagnie d'Armement*³ and its subsequent curriculum of appeals, to this court⁵ as of right and to the House of Lords¹ by leave of their Lordships, it is fair to assume that the *Tzortzis*⁴ reasoning would have remained to this day as authoritative in English commercial and private international law, instead of, as in fact happened, ceasing to be of authority as a result of disapproval by the House of Lords in *Compagnie d'Armement*¹. Further, unless there is some special magic in frustration cases, the decision of the House of Lords in *Tsakiroglou & Co Ltd v Noble & Thorl GmbH*⁶, appears, at least by implication, to indicate that there is nothing out of place in the courts exercising supervision by the special case procedure, even though commercial considerations are of paramount importance in the particular case in deciding what is, at least technically, a question of law, and even though, as had happened in *Tsakiroglou*⁶, experienced commercial arbitrators had expressed clear and strong findings as to the relevant commercial considerations.

I would allow the appeal.

SCARMAN LJ. This appeal is concerned with a dispute between American charterers and the Norwegian owners of the 'Lysland' as to the true effect of the financial terms of a contract by which they agreed to the premature termination of a time charter. The contract provided for disputes 'to be settled in London according to English law'. After the dispute had arisen, the parties referred it to arbitration. The owners applied to the arbitrators to state their award in the form of a special case: but the arbitrators refused, saying:

'Whilst it may well be that there is a question of law . . . it is more suitable for decision by a commercial arbitration tribunal than by the Courts since its interpretation is so closely allied to commercial practice and the interpretation that commercial men would give it.'

The commercial judge has upheld their refusal⁷.

It is not very often that, when faced with a question of law, arbitrators refuse to accede to an application that they state their award in the form of a special case. But when they do, and the commercial judge supports them, this court should not, I

1 [1970] 3 All ER 71, [1971] AC 572

2 [1970] 3 All ER at 89, [1971] AC at 600

3 [1969] 1 WLR 449 (Megaw J)

4 [1968] 1 All ER 949, [1968] 1 WLR 406

5 [1969] 3 All ER 589, [1969] 1 WLR 1338

6 [1961] 2 All ER 179, [1962] AC 93

7 [1973] 1 All ER 545, [1973] 2 WLR 237

a think, interfere unless it can be shown that such refusal is either wrong in principle or based on a misunderstanding of the matters in issue.

The discretion conferred by s 21 (1) of the Arbitration Act 1950 on an arbitrator or umpire to state an award in the form of a special case and on the High Court to direct one is unqualified. The statute imposes no restrictions, formulates no guidelines: but it does declare the purpose of such an award—to obtain on the case stated the decision of the court. By declaring this purpose the statute makes plain that our law offers to those who refer their disputes to arbitration the opportunity of seeking a decision of the court on a point of law, the decision of which is necessary to the proper determination of their dispute. One can, therefore, conclude, not by way of judicial gloss, but by inference deriving directly from the language of the section, that the power to state a case or to direct that a case be stated should not be exercised unless there has arisen a point of law real, substantial, relevant and such as ought to be decided by the High Court.

c So far as one can judge from the books, the practice since 1889 has adhered faithfully to this purpose, which was to be found equally clearly stated in the Arbitration Acts of 1889 and 1934. The courts have had regard to the nature of the point of law raised and, if satisfied that it was genuine and had to be decided, would direct a case to be stated: see *Re Nuttall and Lynton and Barnstaple Railway Co*¹. Sometimes, in the exercise of their discretion, they have refused, as in *Re Gray, Laurier & Co and Boustead & Co*². But generally their approach appears to have been that, once satisfied that a point of law needed to be decided, they would not refuse unless there were special circumstances: for instance, in commercial disputes most points of law are questions of construction of an agreement. Judges are not necessarily or always the best qualified to decide such questions which may turn on the trade or customary meaning of terms used in a particular branch of commerce. In such a case the court may take the view that decision of the point of law is best left to the arbitrator: see *Orion Compagnia Espanola de Seguros v Belfort Maatschappij voor Algemene Verzekering*³.

e Although, as Lord Denning MR and Megaw LJ have shown, the judgment under appeal can be criticised in a number of respects where it is attempting to offer guidance as to the exercise of the discretion, the judge, in my opinion, correctly identified the issues he had to decide in this case. He attached importance to two factors—the nature of the point of law raised and delay in the conduct of the arbitration. He was clearly right to do so: the point of law is the heart of the matter, while delay is always relevant to the exercise of discretion. But, unfortunately, he reached a demonstrably wrong conclusion on each.

g First, the point of construction. He thought it⁴ 'well within the experience and capacity' of the arbitrators, though he did not go so far as to agree with them that it was, to quote their letter 'more suitable for decision by a commercial arbitration tribunal than by the Courts'. In fact, there is nothing specialist or esoteric in the clauses of the contract that have to be construed. Their language is perfectly ordinary English. Though, no doubt, they must be construed against the background and in the circumstances of a particular trade, they are not such as would cause a court (assisted, as it would be, by the case stated by the arbitrators) any unusual difficulty calling for the exercise of other than ordinary legal skill or judicial experience. Accordingly, I think the judge erred in regarding this point of law as better left to the arbitrators. In my opinion, it is suitable for decision by the court, and, because of its importance to the parties in this arbitration, should be so decided.

1 (1899) 82 LT 17

2 (1892) 8 TLR 703

3 [1962] 2 Lloyd's Rep 257

4 [1973] 1 All ER at 554, [1973] 2 WLR at 247

Secondly, the factor of delay. The judge¹ thought that the delay was 'due to inaction on the side of the owners' and that to direct a special case would cause further delay in the resolution of this long-standing dispute. But the charterers, as claimants in the arbitration, could at any time have applied to fix a date for the arbitration, but did not. They cannot now be heard to complain of past delay. As for the future, if a special case is stated, the parties face no more than the delays necessarily incidental to the legal process. Accordingly, I think the judge erred also in regarding delay in this case as a ground for refusing to direct that a case be stated.

For these reasons I think an award stated in the form of a special case should be directed. I would allow the appeal.

Appeal allowed. Order made in the terms asked in the originating summons. Leave to appeal to the House of Lords refused.

Solicitors: Sinclair, Roche & Temperley (for the owners); Thomas Cooper & Stibbard (for the charterers).

Wendy Shockett Barrister.

Morris v Ford Motor Co Ltd Cameron Industrial Services Ltd (third party), Roberts (fourth party)

COURT OF APPEAL, CIVIL DIVISION
LORD DENNING MR, STAMP AND JAMES LJ
6th, 27th MARCH 1973

Indemnity – Subrogation – Contract of indemnity – Right of indemnifier to be subrogated to rights of indemnified – Nature of right – Right as an incident to all contracts of indemnity – Exclusion of right – Implied exclusion – Circumstances in which right will be excluded – Contract between firm of cleaners and factory owner to clean factory – Contract containing indemnity by cleaners to indemnify owner against loss or damage caused by negligence of factory owner's servants – Cleaners' servant injured at factory by negligence of factory owner's servant – Indemnity sought by factory owner against cleaners for liability to cleaners' servant – Cleaners seeking to be subrogated to owner's right of action against his own negligent servant.

By a contract made in 1969 between the defendants and the third party, a firm of cleaners, the third party agreed to perform cleaning services at the defendants' factory. The contract contained a number of general clauses dealing with the provision of the cleaning services. It also contained an indemnity clause by which the third party undertook to indemnify the defendants against all losses and claims in respect of injuries or damage to any person arising out of or in connection with the performance of the cleaning services, whether occasioned by the negligence of the defendants, the third party or their respective servants or agents. Underneath the indemnity clause, there was a note in large black type advising the third party to extend its employer's liability insurance to include liability under the indemnity clause. The plaintiff, a servant of the third party, while employed in cleaning the defendants' factory was injured as a result of the negligence of one of the defendants' servants employed at

¹ [1973] 1 All ER at 554, [1973] 2 WLR at 247

a the factory. The plaintiff sued the defendants for damages for injuries caused by their servant's negligence and the claim was settled for £686.95 damages and costs. Relying on the indemnity clause in the contract between themselves and the third party the defendants brought the third party into the action claiming against it an indemnity in respect of the defendants' liability to the plaintiff. The third party then brought into the action the defendants' negligent servant, the fourth party, claiming b indemnity from him in respect of the third party's liability to the defendants. The basis of the claim against the fourth party was that the third party was entitled, on indemnifying the defendants, to be subrogated to the defendants' right to recover against their negligent servant the damages and costs for which they were liable. As a matter of principle the defendants would never have sought to enforce their right against the fourth party for they knew that to do so would court industrial action in the form of strikes. Like other employers the defendants were insured against c liability for their servants' negligence; the insurers would likewise never have sought to institute a claim against a negligent employee of the defendants, in respect of injury to a fellow employee, because by a 'gentleman's agreement' made in 1959 members of the British Insurers Association (to which the defendants' insurers belonged) had agreed not to institute such claims. The third party did not know of the gentleman's agreement or that the defendants had never sued their own negligent servants. At d the trial the judge upheld the third party's claim and the fourth party appealed.

Held – (i) Where a person entered into a contract to indemnify another, whether by a contract of insurance or by any other contract of indemnity, and he paid the amount of the loss or damages to the person indemnified, he was entitled to the advantages of every right of action of the person indemnified, whether in contract or tort, which e might go in diminution of the loss, but he had to sue in the name of the person indemnified. That right of subrogation arose from the nature of the contract of indemnity itself, as a necessary incident of that contract, and did not arise as a matter of implied contract. Accordingly, the third party was entitled under the contract with the defendants, which was a contract of indemnity, to be subrogated to the defendants' f right of action against their servant, the fourth party, unless it could be shown that the contract of indemnity by implication excluded the right of subrogation, or (per Lord Denning MR), the right of subrogation being an equitable right, unless it could be shown that it was not just or equitable to compel the defendants to lend their name to an action by the third party against their servant (see p 1089 j to p 1090 b and e, p 1093 b to e, p 1094 h, p 1095 f and p 1100 b c and f, post); dicta of Lord Cairns LC in *Simpson v Thomson* (1877) 3 App Cas at 284, of Lord Blackburn in *Burnand v Rodocanachi* (1882) 7 App Cas at 339 and of Cotton and Bowen LJ in *Castellain v Preston* (1883) 11 QBD at 393, 403, 404 applied; dictum of Lord Eldon LC in *Craythorne v Swinburne* (1807) 14 Ves at 164 explained.

(ii) (Stamp LJ dissenting) In the circumstances the third party was not entitled to be subrogated to the defendants' right of action and the appeal would be allowed because a) (per Lord Denning MR) it was not just and equitable to compel the defendants to h lend their name to an action against their own servant; such an action would lead to a strike; it would be unjust to make the fourth party personally liable since the defendants were insured against the risk of his negligence and the third party had been advised in the contract of indemnity to insure against its liability under the indemnity (see p 1090 h to p 1091 b and f, post); (b) (per James LJ) the contract of indemnity was operative in an industrial setting in which subrogation of the third j party to the rights and remedies of the defendants against their servants was unacceptable and unrealistic; accordingly there should be implied in the contract a term whereby the right of subrogation was excluded (see p 1102 f and g, post).

Notes

For the doctrine of subrogation generally, see 14 Halsbury's Laws (3rd Edn) 618, 619, paras 1141-1146; for subrogation in insurance cases, see 22 *ibid* 160-164, paras 309-313;

for subrogation in guarantee cases, see 18 *ibid* 468, 469, paras 863, 864; for cases on subrogation, see 29 Digest (Repl) 450-452, 3292-3301. a

Cases referred to in judgments

Burnand v Rodocanachi Sons & Co (1882) 7 App Cas 333, 51 LJQB 548, 47 LT 277, 4 Asp MLC 576, HL, 29 Digest (Repl) 240, 2586.

Castellain v Preston (1883) 11 QBD 380, [1881-85] All ER Rep 493, 52 LJQB 366, 49 LT 29, CA, 29 Digest (Repl) 451, 3298. b

Churchill (Lord), Re, Manisty v Churchill (1888) 39 Ch D 174, 58 LJCh 136, 59 LT 597, 26 Digest (Repl) 133, 951.

Compania Colombiana de Seguros v Pacific Steam Navigation Co, Empresa de Telefona de Bogota v Pacific Steam Navigation Co [1964] 1 All ER 216, [1965] 1 QB 101, [1964] 2 WLR 484, [1963] 2 Lloyd's Rep 479, Digest (Cont Vol B) 453, 2578a. c

Cousins (H) & Co Ltd v D & C Carriers Ltd [1971] 1 All ER 55, [1971] 2 QB 230, [1971] 2 WLR 85, [1970] 2 Lloyd's Rep 397, CA.

Craythorne v Swinburne (1807) 14 Ves 160, [1803-13] All ER Rep 181, 33 ER 482, LC, 26 Digest (Repl) 145, 1063.

Duncan Fox & Co v North and South Wales Bank (1880) 6 App Cas 1, 50 LJCh 355, 43 LT 706, HL, 26 Digest (Repl) 118, 829.

Edwards (John) & Co v Motor Union Insurance Co Ltd [1922] 2 KB 249, 91 LJBK 921, 128 LT 276, 16 Asp MLC 89, 27 Com Cas 367, 29 Digest (Repl) 338, 2574. d

Harris v Lee (1718) 1 P Wms 482, 24 ER 482, sub nom *Anon* 2 Eq Cas Abr 135, Prec Ch 502, 27 (1) Digest (Reissue) 217, 1501.

King v Victoria Insurance Co Ltd [1896] AC 250, 65 LJPC 38, 74 LT 206, PC, 29 Digest (Repl) 69, 222.

Lister v Romford Ice & Cold Storage Co Ltd [1957] 1 All ER 125, [1957] AC 555, [1957] WLR 158, 121 JP 98, [1956] 2 Lloyd's Rep 505, HL, 34 Digest (Repl) 145, 996. e

London Assurance Co v Sainsbury (1783) 3 Doug KB 245, 99 ER 636, 29 Digest (Repl) 69, 225.

Marlow v Pitfield (1719) 1 P Wms 558, 2 Eq Cas Abr 516, 24 ER 516, 28 (2) Digest (Reissue) 697, 335. f

Mason v Sainsbury (1782) 3 Doug KB 61, 99 ER 538, 29 Digest (Repl) 451, 3293.

Randal v Cockran (1748) 1 Ves Sen 98, 27 ER 916, LC, 26 Digest (Repl) 115, 801.

Reigate v Union Manufacturing Co (Ramsbottom) Ltd [1918] 1 KB 592, [1918-19] All ER Rep 143, 87 LJBK 724, 118 LT 479, CA, 34 Digest (Repl) 123, 833.

Simpson & Co v Thomson (1877) 3 App Cas 279, 38 LT 1, 3 Asp MLC 567, HL, 29 Digest (Repl) 337, 2564.

Yates v Whyte (1838) 4 Bing NC 272, 1 Arn 85, 5 Scott 640, 7 LJCP 116, 132 ER 793, 29 Digest (Repl) 339, 2584. g

Yorkshire Insurance Co Ltd v Nisbet Shipping Co Ltd [1961] 2 All ER 487, [1962] 2 QB 330, [1961] 2 WLR 1043, [1961] 1 Lloyd's Rep 479, 29 Digest (Repl) 339, 2583.

Cases also cited

Dering v Earl of Winchelsea (1787) 1 Cox Eq Cas 318, 29 ER 1184. h

Lucena v Craufurd (1806) 2 Bos & PNR 269, 127 ER 630, HL.

Wrexham, Mold & Connah's Quay Railway Co, Re [1899] 1 Ch 440.

Appeal

The plaintiff, Eric Morris, a servant of the third party, Cameron Industrial Services Ltd, cleaners who had contracted to clean a factory owned by the defendants, Ford Motor Co Ltd, was injured in the course of his employment at the factory by the negligence of the defendants' servant, the fourth party, Frederick Roberts. The plaintiff's claim against the defendants for damages for injuries caused by their servant's negligence was settled for £686.95 damages and taxed costs of £305.69. By a third party notice the defendants claimed to be indemnified by the third party in respect i

a of the plaintiff's claim under the contract between the defendants and the third party to clean the defendants' factory. The third party conceded liability to indemnify the defendants but by a fourth party notice claimed against the fourth party indemnity in respect of the defendants' claim against the third party. On the trial of the fourth party proceedings, Hollings J, on 21st April 1972, adjudged that on payment by the third party to the defendants of the agreed damages and costs in settlement of
b the plaintiff's claim against the defendants the third party was entitled to a declaration that it should be subrogated to the defendants' right of action against their servant, the fourth party, to recover against him complete indemnity in respect of the plaintiff's claim. The fourth party appealed from that judgment. The grounds of the appeal were that the judge was wrong in law in holding: (1) that the third party was entitled to be subrogated to the defendants' rights; (2) that the contract
c between the defendants and the third party was a contract of indemnity; (3) that subrogation was a right conferred by law where there was a duty to indemnify; (4) that the contract, or relevant part of it, was a contract of insurance, and that the right of subrogation should be extended to include the contract as analogous to a contract of insurance; and (5) that the judge ought to have held as a matter of law that subrogation arose out of a term implied in certain contracts of which the present
d contract was not one. The facts and the material terms of the contract between the defendants and the third party are set out in the judgments of Lord Denning MR and James LJ.

Michael Ogden QC and *S C Desch* for the fourth party.

R L Ward QC and *J H Roberts* for the third party.

The plaintiff and the defendants did not appear and were not represented.

e

Cur adv vult

27th March. The following judgments were read.

LORD DENNING MR. On 26th January 1969 Mr Eric Morris was working at
f the huge motor factory owned by the Ford Motor Co at Halewood in Lancashire. He was not employed by Fords but by a firm of cleaners, Cameron Industrial Services Ltd, who had contracted to clean the factory. Whilst at his work, Morris was injured. It was all due to the negligence of one of Fords' servants. This servant was one Mr Frederick Roberts. He drove a fork-lift truck without keeping a proper look-out. In consequence Morris's leg was jammed against a wall. Morris was not very
g seriously injured. His damages were only £686.95. But his claim has given rise to an interesting point. It arises in this way.

Morris issued a writ against Fords claiming damages for injuries caused by the negligence of Fords' servant. Fords then served a third party notice against the firm of cleaners claiming an indemnity. Fords said that, under the cleaning contract,
h the firm of cleaners had contracted to indemnify Fords against any liability to Morris, even though it was caused by the negligence of Fords' own servants. The firm of cleaners then issued a fourth party notice against Roberts personally. He was the servant of Fords who was driving the fork-lift truck.

Now this firm of cleaners had obviously no claim on their own account against Roberts. Roberts by his negligence had done no damage to the property or person of the cleaners themselves. He had only done damage to their servant Morris. Roberts was, therefore, liable to Morris. So also were Fords liable to Morris because
i they were the employers of Roberts. Roberts and Fords were joint tortfeasors. Morris could, if he had wished, have sued them together and got judgment against both of them. As it was, he sued Fords only. He got damages against them. Thereupon Fords could themselves have sued their own servant Roberts on the ground that Roberts owed Fords a duty to drive the truck carefully: and that his negligence had involved Fords in liability to Morris. If Fords had sued Roberts, they would no

doubt have got judgment against him for the full amount which they had had to pay to Morris. That is clear from the decision of the House of Lords in *Lister v Romford Ice & Cold Storage Co Ltd*¹. But, in point of fact, Fords would never, for a moment, have dreamt of suing their own servant Roberts. If they did so, all the men would have come out on strike. The men would say, with great force: 'This sum should be paid by the insurance company, and not by Roberts himself.' To make him pay personally for an accident at the works would be most unfair. But, although Fords would not themselves sue their own servant, Roberts, the firm of cleaners seek to sue him. The cleaners cannot, of course, sue Roberts in their own name. But they assert that they are entitled to use Fords' name to sue Roberts. Using the lawyer's words, the cleaners say that they are entitled 'to be subrogated' to the rights of Fords against Roberts. Using the layman's words, the cleaners say that they are entitled to 'stand in the shoes of Fords' and to exercise against Roberts all the rights which Fords have against him.

If the cleaners are right in this contention—if they can thus force Roberts to pay the damages personally—it would imperil good industrial relations. When a man such as Roberts makes a mistake—like not keeping a good look-out—and someone is injured, no one expects the man himself to have to pay the damages personally. It is rather like the driver of a car on the road. The damages are expected to be borne by the insurers. The courts themselves recognise this every day. They would not find negligence so readily—or award sums of such increasing magnitude—except on the footing that the damages are to be borne, not by the man himself, but by an insurance company. If the man himself is made to pay, he will feel much aggrieved. He will say to his employers: 'Surely this liability is covered by insurance?' He is employed to do his master's work, to drive his master's trucks, and to cope with situations presented to him by his master. The risks attendant on that work—including liability for negligence—should be borne by the master. The master takes the benefit and should bear the burden. The wages are fixed on that basis. If the servant is to bear the risk, his wages ought to be increased to cover it.

It was such considerations as these which prompted the Minister of Labour and National Service in 1957 to appoint an inter-departmental committee to study the implications of *Lister v Romford Ice & Cold Storage Co Ltd*¹. The committee made its report in 1959. It did not recommend legislation to reverse that decision because it felt that insurers would not abuse it. It said:

'The decision in the *Lister case*¹ shows that employers and their insurers have rights against employees which, if exploited unreasonably, would endanger good industrial relations. We think that employers and insurers, if only in their own interests, will not so exploit their rights . . .'

In consequence of that report, the members of the British Insurance Association adhered to this 'gentleman's agreement':

'Employers' Liability Insurers agree that they will not institute a claim against the employee of an insured employer in respect of death of or injury to a fellow-employee, unless the weight of evidence clearly indicates (1) collusion or (2) wilful misconduct, on the part of the employee against whom the claim is made.'

According to that agreement, if Roberts, the driver of the fork-lift truck, had injured one of Fords' own employees, the injured employee would have his remedy against Fords, who would be indemnified by Fords' insurers, but those insurers would not seek to recover the amount from Roberts, the driver.

The present case does not come within the 'gentleman's agreement' because the

¹ [1957] 1 All ER 125, [1957] AC 555

a injured man, Morris, was not an employee of Fords but was an employee of the firm of cleaners. So the cleaners claim to make Roberts, Fords' driver, personally liable. Fords object to this. In their view it would produce serious industrial repercussions. But, despite Fords' objection, the cleaners are determined to press their claim to be subrogated to the rights of Fords. The claim is based on the contract of indemnity, to which I will now turn.

b *The contract of indemnity*

Fords employed the firm of cleaners to clean the factory under a contract which contained a number of general clauses. These were applicable to an order given by the purchaser (Fords) to the contractor (the cleaners). These dealt with: (1) working hours; (2) payment for day work and overtime; (3) increased costs; (4) responsibility for materials etc on the site; (5) labour and plant. Then cl 6 dealt with

c 'insurance and third party risks'. The material sub-clause of cl 6 is (b), which says:

d 'The Contractor [the cleaners] shall indemnify the Purchaser [Fords] against all losses and claims of whatsoever nature for or in respect of injuries or damage to any person or property howsoever caused arising out of or in connection with the performance of the Order [for cleaning to be done] and also against all claims, demands, proceedings, damages, costs, charges and expenses whatsoever in respect thereof or in relation thereto, and without prejudice to the generality of the foregoing the Contractor [the cleaners] shall be liable to indemnify the Purchaser [Fords] under this clause whether the loss or claim is occasioned by or arises from the negligence or breach of statutory duty of the Purchaser [Fords], the Contractor [the cleaners] or any sub-Contractor or their respective

e servants or agents.'

It is conceded that under that clause the cleaners are bound to indemnify Fords against their liability to Morris.

Then there is a note in bigger blacker type directed to the contractor (the cleaners):

f 'N.B. YOU ARE ADVISED TO ARRANGE IF NECESSARY FOR THE EXTENSION OF YOUR EMPLOYERS LIABILITY AND THIRD PARTY POLICIES TO INCLUDE YOUR CONTRACTUAL LIABILITY HAVING REGARDS PARTICULARLY TO CLAUSE 6 (a) AND (b).'

The doctrine of subrogation

This is a contract which contains an indemnity. As such, it gives rise to a right in the indemnifier to be subrogated to the rights of the indemnified. But it is necessary

g to analyse this right. In particular, to see whether it gives the indemnifier a right to sue in the name of the indemnified.

Let me first distinguish it from a contract of suretyship. When a surety pays off the debt, he is entitled in his own name to sue the principal debtor for the amount, or to sue his co-sureties for contribution. He is entitled to any securities which may have been given for the debt by the principal debtor to the creditor. These

h rights do not depend on contract, but on the established principles of the courts of equity. It was so stated by Sir Samuel Romilly in his argument in *Craythorne v Swinburne*¹, which was approved by Lord Eldon LC². Also by Lord Selborne LC and Lord Blackburn in *Duncan, Fox & Co v North and South Wales Bank*³.

Now I turn to contracts of indemnity. Where an insurer—or any other person who enters into a contract to indemnify another—pays the amount of the loss or

j damages to the insured, he is entitled to the advantages of every right of action of the assured, whether in contract or in tort, which may go in diminution of the loss:

1 (1807) 14 Ves 160 at 162, cf [1803-13] All ER Rep 181 at 182

2 (1807) 14 Ves at 169, cf [1803-13] All ER Rep at 184, 185

3 (1880) 6 App Cas 1 at 12, 18, 19

see *Castellain v Preston*¹ and *H Cousins & Co Ltd v D & C Carriers Ltd*². This entitlement, too, does not depend on the contract itself but on the 'plainest equity'. At any rate, Lord Hardwicke LC said so: see *Randal v Cockran*³ as explained in *Yates v Whyte*⁴. But this entitlement does not amount to an assignment of the right of action. It does not entitle the insurer or the indemnifier to sue in his own name a wrongdoer who has caused the loss or damage: see *London Assurance Co v Sainsbury*⁵; *Simpson v Thomson*⁶. In order to sue the wrongdoer, the insurer or indemnifier must use the name of the insured party indemnified: see *Mason v Sainsbury*⁷. But the important point to notice is this. The insurer has no right at law to make use of the name of the assured. If the assured did not consent to it, the insurer had to go to a court of equity to compel him to allow it. And the court of equity could impose such terms as it thought fit. Take this case: suppose an insurer, without the consent of the assured, brings an action in the name of the assured against the wrongdoer. The action fails, and costs are awarded against the assured. The insurer does not pay the costs. He may be insolvent and not have the money to pay the costs. In that case the assured would have to pay the costs himself. That cannot be right. So it was always held that, if an insured did not consent to his name being used, the insurer had to go to a court of equity to compel him to allow his name to be used: see *Yorkshire Insurance Co Ltd v Nisbet Shipping Co Ltd*⁸ per Diplock J. A court of equity would only compel it on such terms as were just and equitable. It might, for instance, insist on the insurer giving security for the costs: see *John Edwards & Co v Motor Union Insurance Co*⁹. Strangely enough, no case has been found in the reports in which a court of equity has been asked to compel a man to give his name to be used in action of tort. At any rate, Mr Arthur Cohen QC, one of the best lawyers of the last century, did not find one: see *King v Victoria Insurance Co*¹⁰. So I do not suppose I could. But, the very fact that the insurer had to go to a court of equity shows that the right of the insurer to sue in the name of the assured arises in equity and not by virtue of an implied contract.

I should say, for sake of completeness, that if the insured assigns his right of action to the insurers and notice of the assignment is given to the wrongdoer, the insurer can now sue in his own name: see *Compania Colombiana de Seguros v Pacific Steam Navigation Co*¹¹. But, otherwise, unless the assured consents, the insurer has to resort to equity.

What is the equity in this case?

In my opinion, therefore, this case is to be tested according to the principles of equity. Before the Supreme Court of Judicature Act 1873, the question would be: would a court of equity compel Fords to allow their name to be used to sue their servant, Roberts? Since the Judicature Act, the question is: is it just and equitable that Fords should be compelled to sue, or to lend their name to sue, their own servant, Roberts, for damages, so as to make him personally liable? My answer to that is emphatic. It is not just and equitable. In the contract with the cleaners, Fords advised the cleaners to arrange with their insurance company to cover their liability under the indemnity. I expect they did so. Their insurance company has received

1 (1883) 11 QBD 380, [1881-85] All ER Rep 493

2 [1971] 1 All ER 55, [1971] 2 QB 230

3 (1748) 1 Ves Sen 98

4 (1838) 4 Bing NC 272 at 283

5 (1783) 3 Doug KB 245

6 (1877) 3 App Cas 279

7 (1782) 3 Doug KB 61

8 [1961] 2 All ER 487 at 490, [1962] 2 QB 330 at 339

9 [1922] 2 KB 249 at 254

10 [1896] AC 250 at 256

11 [1964] 1 All ER 216, [1965] 1 QB 101

a the premiums and should bear the loss. It should not seek to make Roberts personally liable. Everyone knows that risks such as these are covered by insurance. So they should be, when a man is doing his employer's work, with his employer's plant and equipment, and happens to make a mistake. To make the servant personally liable would not only lead to a strike. It would be positively unjust. *Lister v Romford Ice & Cold Storage Co Ltd*¹ was an unfortunate decision. Its ill effects have been avoided only by an agreement between insurers not to enforce it. It should not be extended to this case. I would apply this simple principle: where the risk of a servant's negligence is covered by insurance, his employer should not seek to make that servant liable for it. At any rate, the courts should not compel him to allow his name to be used to do it.

c *Implied contract*

If I am wrong in putting the right of subrogation on principles of equity, then it must be put on implied contract. Diplock J so put it in *Yorkshire Insurance Co Ltd v Nisbet Shipping Co Ltd*² when he said:

d 'The expression "subrogation" in relation to a contract of marine insurance is thus no more than a convenient way of referring to those terms which are to be implied in the contract between the assured and the insurer to give business efficacy ...'

e Tested in this way, the question would be: in the contract between Fords and the cleaners, was there an implied term that, if the cleaners paid under the indemnity, they should be entitled to use Fords' name so as to sue Fords' servant? The answer is clearly No. If the circumstances had been put to any of those concerned they would have said: 'The risk must be covered by insurance effected by the cleaners. The insurance company must pay the amount. They cannot come down on the servant personally.'

Conclusion

f In my opinion the doctrine of subrogation cannot be used here so as to entitle the cleaners or their insurers to sue Roberts and make him personally liable. No matter whether it arises in equity or in contract, the doctrine cannot be carried so far. I would, therefore, allow the appeal and dismiss the claim for subrogation.

g **STAMP LJ.** The plaintiff, Mr Eric Morris, was employed as a cleaner by Cameron Industrial Services Ltd ('Camerons'). While cleaning the factory of the defendants, Ford Motor Co Ltd ('Fords') at Halewood, Lancashire, the plaintiff was injured as the result of the negligent act of the fourth party who was one of Fords' employees. The plaintiff sued Fords and the claim was settled for £686.95 and £305.69 costs. h Fords could recover against their employee, the fourth party, the amount of the damage which they were bound to pay (see *Lister v Romford Ice & Cold Storage Co Ltd*¹) but would not seek to do so and nor would their insurers. Nevertheless the right is there.

There was an agreement between Fords and Camerons under which the latter contracted to clean the factory. Clause 6 of that agreement provided, inter alia, as follows:

j '(b) The Contractor [i.e. Camerons] shall indemnify the Purchaser [i.e. Fords] against all losses and claims of whatsoever nature for or in respect of injuries or damage to any person or property howsoever caused arising out of or in

1 [1957] 1 All ER 125, [1957] AC 555

2 [1961] 2 All ER at 490, [1962] 2 QB at 339, 340

connection with the performance of the Order and also against all claims, demands, proceedings, damages, costs, charges and expenses whatsoever in respect thereof or in relation thereto, and without prejudice to the generality of the foregoing the Contractor shall be liable to indemnify the Purchaser under this clause whether the loss or claim is occasioned by or arises from the negligence or breach of statutory duty of the Purchaser, the Contractor or any sub-Contractor or their respective servants or agents. a

'(c) The Contractor shall insure and keep insured during the continuance of the order in the joint names of the Purchaser and the Contractor all liabilities which may attach to them or either of them for any injury, loss or damage to any person or property arising out of or in connection with the performance of the order. This sub paragraph is in addition to and not in derogation of sub paragraph (b) of this clause. Provided nevertheless that (a) (b) and (c) above shall not apply when the enquiry or order is subject to the I.M.E. and I.E.E. General Conditions of Contract or to the General Conditions of Contract issued by the Institute of Civil Engineers.' b

Relying on these provisions Fords brought in Camerons as third parties to the action brought against them by the plaintiff claiming an indemnity in respect of the plaintiff's claim for damages and costs. The third party (Camerons) then brought in as the fourth party the employee of Fords whose negligence it was alleged caused the damage: the basis of this claim being that the third party by the effect of the doctrine of subrogation was entitled on indemnifying Fords to have the benefit of Fords' rights against the fourth party, their employee. d

No point being taken on the fact that the third party has not yet discharged its liability to Fords the question for determination is whether on discharging its liability to Fords Camerons will, by the effect of the doctrine of subrogation, be entitled to Fords' rights against the fourth party. e

Counsel for the fourth party submitted that the right of subrogation exists only in five classes of case—insurance cases, suretyship, persons who provide money for wives and infants, ultra vires borrowing and in executorships—and ought not to be extended. He submitted also, mainly on the authority of some remarks of Lord Eldon LC in *Craythorne v Swinburne*¹, that the right of subrogation arises not as a matter of law but as the result of contract to be implied between the parties. And since the right arises by the effect of an implied contract it cannot, so the argument ran, arise where the facts are such that the parties cannot be taken to have intended it. To exclude the notion that here the parties impliedly contracted that Camerons should be subrogated to Fords' rights against any of its employees, counsel for the fourth party relied first on the existence of an agreement between the members of the British Insurance Association of which Fords' insurers were a member. By this agreement entered into, as I understand it, following the decision in *Lister v Romford Ice & Cold Storage Co Ltd*² the parties agreed, inter alia, not to sue their assured's servant whose negligence gave rise to a right of action against their assured. The agreement, however, only extended to preclude an insurer making a claim against the insured's employee in respect of injury to a fellow employee. f

In the second place, counsel for the fourth party relied on evidence that Fords as a matter of principle, for reasons which are sufficiently obvious, never sue their negligent servants; that Fords were aware of the British Insurance Association agreement; and that Fords could not be expected to enter into an agreement which would or might entitle the other party in their name to do what they themselves would not contemplate doing. g

Hollings J remarked in relation to these submissions that the implication of terms into a contract depends on the court's finding as to the presumed intentions of the h

1 (1807) 14 Ves 160 at 164, [1803-13] All ER Rep 181 at 183

2 [1957] 1 All ER 125, [1957] AC 555 j

a part—both parties. If, he said, counsel for the fourth party's submissions were right—with the effect that the right of subrogation was *in all cases* (I emphasise those words) a matter of implication of the presumed intention of both parties and that the onus of establishing such a right or terms in the contract was on Camerons, there would be much force in the submission. But he added that if this were so he would have to consider whether the test should not be that of an objective observer not aware of secret reservations on the part of one party.

b Basic to counsel for the fourth party's submissions was that the right of subrogation, assuming its existence on the facts of the present case, arises as a matter of implication of a contract between Camerons and Fords. I agree with Hollings J that that submission is not well-founded and that the right arises from the nature of the express contract of indemnity into which they entered as part of their agreement and as a necessary incident of that contract of indemnity, and not by the effect of a contract to be implied between them. That the provisions contained in the contract between Camerons and Fords was a contract of indemnity cannot be doubted. Under a contract of indemnity he who is indemnified must bring into account for the benefit of the other party all benefits received or recoverable by him, or otherwise he would be getting more than he is entitled to. There is high authority first that this is the basis of the doctrine of subrogation as it applies to a contract of indemnity, and second, that the right of subrogation which insurers have under a policy of insurance to the remedies of their assured when they have paid the loss, arises not because contracts of insurance are a special class of contracts in which the right of subrogation exists, but because a policy of assurance is a contract of indemnity. When a policy of assurance secures payment of a specified sum on the happening of a specified event a right of subrogation does not normally arise. Nor can I accept the submission that the five classes of case in which the right arises and to which counsel for the fourth party referred are by any means exhaustive: see Rowlatt on Principal and Surety¹.

e In *Simpson v Thomson*² Lord Cairns LC, dealing with the liability of insurers under an insurance policy, said:

f 'I know of no foundation for the right of underwriters, except the well-known principle of law, that where one person has agreed to indemnify another, he will, on making good the indemnity, be entitled to succeed to all the ways and means by which the person indemnified might have protected himself against or reimbursed himself for the loss. It is on this principle that the underwriters of a ship that has been lost are entitled to the ship in specie if they can find and recover it; and it is on the same principle that they can assert any right which the owner of the ship might have asserted against a wrongdoer for damage for the act which has caused the loss.'

g The right of subrogation which an insurer has accordingly depends not, as was submitted, on some special rule applicable to contracts of insurance but stems from the wider principle stated by Lord Cairns LC. The law is well stated in the judgment of Cotton LJ in *Castellain v Preston*³:

h 'I think that the question turns on the consideration of what a policy of insurance against fire is, and on that the right of the plaintiff depends. The policy is really a contract to indemnify the person insured for the loss which he has sustained in consequence of the peril insured against which has happened, and from that it follows, of course, that as it is only a contract of indemnity, it is only to pay that loss which the assured may have sustained by reason of the fire which

i 1 3rd Edn (1936), pp 184 et seq

2 (1877) 3 App Cas 279 at 284

3 (1883) 11 QBD 380 at 393, cf [1881-85] All ER Rep 493 at 498

has occurred. In order to ascertain what that loss is, everything must be taken into account which is received by and comes to the hand of the assured, and which diminishes that loss. It is only the amount of the loss, when it is considered as a contract of indemnity, which is to be paid after taking into account and estimating those benefits or sums of money which the assured may have received in diminution of the loss.' a

And then a little later he quotes¹ the judgment of Lord Blackburn in *Burnand v Rodocanachi*²: b

"The general rule of law (and it is obvious justice) is that where there is a contract of indemnity (it matters not whether it is a marine policy or a policy against fire on land, or any other contract of indemnity), and a loss happens, anything which reduces or diminishes that loss reduces or diminishes the amount which the indemnifier is bound to pay; and if the indemnifier has already paid it, then, if anything which diminishes the loss comes into the hands of the person to whom he has paid it, it becomes an equity that the person who has already paid the full indemnity is entitled to be recouped by having that amount back.'" c

And Bowen LJ in that same case of *Castellain v Preston*³ said: d

"It seems to me that a good deal of confusion would be caused, if one were to suppose that insurers are in the position of sureties. A surety is a person who answers for the default of another, and an insurer is a person who guarantees against loss by an event. The default or non-default of another, as between that other and the person who is insured, may diminish or increase the loss; but what the insurer is guaranteeing is not the default of that person, he is guaranteeing that no loss shall happen by the event. And subrogation is itself only the particular application of the principle of indemnity to a special subject matter, and there I think is where the learned judge has gone wrong. He has taken the term "subrogation" and has applied it as if it were a hard and fast line, instead of seeing that it is part of the law of indemnity. If there are means of diminishing the loss, the insurer may pursue them, whether he is asking for contracts to be carried out in the name of the assured, or whether he is suing for tort. It is said that the law only gives the underwriters the right to stand in the assured's shoes as to rights which arise out of, or in consequence of, the loss. I venture to think there is absolutely no authority for that proposition. The true test is, can the right to be insisted on be deemed to be one the enforcement of which will diminish the loss?" e

That the right of subrogation under a contract of indemnity arises from the very nature of the contract of indemnity itself—a contract to indemnify against a loss and not to put the party to be indemnified in a better position than he would have been had there been no loss—is, in my judgment, far too deeply embedded in our law to admit of its application only where it can be shown that there was an implied agreement that it should be applicable. f

As I have said, counsel for the fourth party based his submission that the doctrine of subrogation rests on an implied contract on observations of Lord Eldon LC in *Craythorne v Swinburne*⁴ where he said: g

"Upon the relation of principal and surety some things are very clear. It has been long settled, that, if there are co-sureties by the same instrument, and the creditor calls upon either of them to pay the principal debt, or any part of it, h

1 (1883) 11 QBD at 394, [1881-85] All ER Rep at 498

2 (1882) 7 App Cas 333 at 339

3 (1883) 11 QBD at 403, 404

4 (1807) 14 Ves at 164, cf [1803-13] All ER Rep at 183 i

a that surety has a right in this Court, either upon a principle of equity, or upon
contract, to call upon his co-surety for contribution; and I think, that right is
properly enough stated as depending rather upon a principle of equity than
upon contract: unless in this sense; that, the principle of equity being in its
operation established, a contract may be inferred upon the implied knowledge
b of that principle by all persons, and it must be upon such a ground, of implied
assumpsit, that in modern times Courts of Law have assumed a jurisdiction
upon this subject; a jurisdiction convenient enough in a case simple and uncom-
plicated; but attended with great difficulty, where the sureties are numerous . . .

As the learned judge in the court below remarked, Lord Eldon LC was there
stating that the principle of contribution between co-sureties was a principle of
equity and that the 'implied assumpsit' was, in effect, an implied knowledge of that
c principle by all persons. The remarks were, in any event, directed not to the right
of subrogation under a contract of indemnity, but to the right of contribution be-
tween co-sureties; but even if they be applied to the former situation, they do not
in my judgment support the wider submission that only where the parties must
be taken so to have intended does the right of contribution or subrogation arise.

Even if the submission based on the implication of intention were accepted its
d application to the facts of the present case would present difficulty. The contract in
cl 6 (b) is a contract to indemnify Fords against 'losses and claims . . . in respect of
injuries or damage to any person or property'. Are Camerons, because the parties
cannot be taken to have intended that Camerons should have by subrogation a right
to sue Fords' servants, to be taken not to have stipulated for a right of subrogation
in respect of Fords' rights against a third party not being their servant who damages
e Fords' property? If, as is submitted, the parties cannot be taken to have intended any
right of subrogation, Camerons will have none of the rights which have been held to
be an incident of a contract of indemnity: and Fords having received payment
from Camerons of the damage suffered to their property, will be in a position to
recover it again from the person who caused the damage. In order to succeed on this
appeal Fords must, as I see it, introduce into the contract a term that notwithstanding
f the rights of subrogation arising under the contract those rights shall not be exercised
against an employee of Fords. It was not the case put by the fourth party that the
parties must be taken impliedly to have agreed to exclude a right of subrogation
where the party to be sued was an employee of Fords but that the burden of showing
the existence of the right was on the party claiming it to establish it by showing an
implied agreement to that effect. On the case as put, it might have been enough
g to show that one of the parties, namely Fords, could not be taken to have so agreed.
But once the position is reached that under a contract of indemnity the right exists
in the absence of an agreement to the contrary, in order to exclude it by the effect
of an implied term you must, as I understand the law, conclude that had the absence
of an express term to that effect been called to their attention both parties would
have said in effect 'we did not bother to express it, it is too clear' (see *Reigate v Union*
h *Manufacturing Co (Ramsbottom)*¹). The judge found that it was neither proved nor
admitted that Camerons knew of the existence of the British Insurance Associa-
tion agreement; but even apart from that finding I can only guess at what Camerons
would have said had the point been drawn to their attention at the time
they contracted to indemnify Fords.

I agree with the judgment of Hollings J.

i I have taken the same view as that of Lord Denning MR regarding the basis of the
right of subrogation which arises on a contract of indemnity. He, relying on the
equitable nature of the right, takes the view that it ought not to be exercisable where
its exercise would be inequitable and that this is just such a case. This was no part

of the fourth party's case which, as I have said, rested on the submission that the doctrine arose by the effect of an implied term. I am not persuaded that the third party might not be able to muster powerful and perhaps convincing arguments to the effect that the right of subrogation ought not to be cut down by consideration of what the court might think in any particular case would lead to an inequitable result. Nor am I persuaded that the court has before it all the facts necessary on which to form such an opinion. The point is not foreshadowed in the pleadings: and because the fourth party has not taken it and the third party has had no opportunity of dealing with it, I would express no opinion on it without having further argument.

I would dismiss the appeal.

JAMES LJ. Eric Morris, the plaintiff, a servant of Cameron Industrial Services Ltd, the third party, was employed at the Ford Motor Co's, the defendants', premises at Halewood. On 26th January 1969 in the course of his employment the plaintiff suffered injury when his leg was trapped against a wall by reason of the negligent driving of a fork-lift truck by Frederick Roberts in the course of his employment by the defendants. The plaintiff sued the defendants alleging that the negligence of their servant, Roberts, caused his injuries. The defendants eventually settled the plaintiff's claim for £686.95 and £305.69 costs. The defendants brought into the action the third party, claiming against them an indemnity in respect of the defendants' liability to the plaintiff. The claim was based on a contract between the defendants and the third party. The contract provided for the third party to perform for reward cleaning services at the defendants' factory. It included the defendants' general clauses of contract. The relevant clause is cl 6 (b), (c) and (d).

'(b) The Contractor shall indemnify the Purchaser against all losses and claims of whatsoever nature for or in respect of injuries or damage to any person or property howsoever caused arising out of or in connection with the performance of the Order and also against all claims, demands, proceedings, damages, costs, charges and expenses whatsoever in respect thereof or in relation thereto, and without prejudice to the generality of the foregoing the Contractor shall be liable to indemnify the Purchaser under this clause whether the loss or claim is occasioned by or arises from the negligence or breach of statutory duty of the Purchaser, the Contractor or any sub-Contractor or their respective servants or agents.

'(c) The Contractor shall insure and keep insured during the continuance of the order in the joint names of the Purchaser and the Contractor all liabilities which may attach to them or either of them for any injury, loss or damage to any person or property arising out of or in connection with the performance of the order. This sub paragraph is in addition to and not in derogation of sub paragraph (b) of this clause. Provided nevertheless that (a) (b) and (c) above shall not apply when the enquiry or order is subject to the I.M.E. and I.E.E. General Conditions of Contract or to the General Conditions of Contract issued by the Institute of Civil Engineers.

'(d) The Insurance referred to in sub paragraph (c) of this clause shall be effected in such sum as may be agreed, but in any event for not less than an indemnity of £100,000 any one accident or series of accidents arising out of one event and the Contractor shall produce for inspection to the Purchaser as and when the Purchaser may require it, such policy or policies of insurance and all premiums and renewal receipts.

'N.B. YOU ARE ADVISED TO ARRANGE IF NECESSARY FOR THE EXTENSION OF YOUR EMPLOYERS LIABILITY AND THIRD PARTY POLICIES TO INCLUDE YOUR CONTRACTUAL LIABILITY HAVING REGARDS PARTICULARLY TO CLAUSE (6) (a) AND (b).'

a Pursuant to those terms of the contract the third party conceded liability to indemnify the defendants. The third party sought relief against Mr Roberts, the negligent truck driver, and brought him into the action as fourth party.

b The claim against the fourth party was formulated thus: (i) he was a joint tort-feasor with his employers, the defendants, and he had broken his contract with the defendants in failing to exercise reasonable care in the performance of his work as their servant; (ii) it followed that the defendants had a right against him to be indemnified against their liability to the plaintiff; (iii) having indemnified the defendants under the terms of the contract between them, the third party was entitled to step into the shoes of the defendants and succeed to their rights against their servant, the fourth party, by way of subrogation.

c The fourth party admitted his negligence, but denied that, in the circumstances, the contract between the defendants and the third party gave rise to any right of subrogation. It was common ground that if there was liability on the part of the fourth party to the third party, it could arise only when the third party had in fact indemnified the defendants. This had not been done at the date of trial. By consent of both the parties involved the hearing was conducted on the basis that the claim against the fourth party was for a declaration that he should indemnify the third party in the event of the third party indemnifying the defendants. The learned judge, in a reserved judgment, held that the third party was entitled to the declaration sought. The fourth party appeals against that decision.

d It has been necessary to consider the foundation on which the principle of subrogation rests and the circumstances which give rise to rights of subrogation. Its origin in the courts of this country is obscure. McCardie J in *John Edwards & Co v Motor Union Insurance Co*¹ stated that it is derived from the system of Roman law. It found a place in the courts of chancery and the common law courts. The circumstances in which the right has been recognised have been carefully limited. To permit a person to stand in the place of another, to have without assignment the rights and remedies of that other and to give the right to enforce those remedies in the name of the other person, is a departure from ordinary principles justifiable only where equity demanded that it should be so or where the courts of law, acting on the basis that the parties must have entered into a relationship in knowledge of the equitable right, applied the same principle.

e The principle was established in the 18th century in relation to those who provided money to a wife or an infant for necessities (*Harris v Lee*² and *Marlow v Pitfield*³). It was applied in contracts of suretyship thus enabling the surety to stand in the place of the creditor (*Re Lord Churchill, Manisty v Churchill*⁴). Where there were more than one surety, though each be bound separately, a contractual term was implied between them so that one could obtain contribution from another who had paid less than his share of the debt or not paid at all (*Craythorne v Swinburne*⁵). Lord Eldon LC said⁶:

h 'It has been long settled, that, if there are co-sureties by the same instrument, and the creditor calls upon either of them to pay the principal debt, or any part of it, that surety has a right in this Court, either upon a principle of equity, or upon contract, to call upon his co-surety for contribution; and I think, that right is properly enough stated as depending rather upon a principle of equity than upon contract; unless in this sense; that, the principle of equity being in its operation established, a contract may be inferred upon the implied knowledge of that principle by all persons, and it must be upon such a ground, of implied

1 [1922] 2 KB 249 at 252

2 (1718) 1 P Wms 482

3 (1719) 1 P Wms 558

4 (1888) 39 Ch D 174

5 (1807) 14 Ves 160, [1803-13] All ER Rep 181

6 (1807) 14 Ves at 164, cf [1803-13] All ER Rep at 183

assumpsit, that in modern times Courts of Law have assumed a jurisdiction upon this subject.' a

And now we come closer to the problems of the present case. The right has become established in what counsel for the fourth party calls 'contracts of insurance which are contracts of indemnity only', and what counsel for the third party calls 'contracts of indemnity only'.

In *Mason v Sainsbury*¹ Lord Mansfield speaking of the nature of the contract of insurance said: 'It is an indemnity. Every day the insurer is put in the place of the insured. . . The insurer uses the name of the insured.' In *Simpson v Thomson*² Lord Cairns LC, dealing with the right of subrogation claimed by the underwriters, said: b

'I know of no foundation for the right of underwriters, except the well-known principle of law, that when one person has agreed to indemnify another, he will, on making good the indemnity, be entitled to succeed to all the ways and means by which the person indemnified might have protected himself against or reimbursed himself for the loss.' c

Lord Selborne LC, in *Burnand v Rodocanachi*³, referred to the 'right by way of subrogation or substitution to which by the true legal result of the contract the insurer is entitled.' Lord Blackburn said⁴: d

'The general rule of law (and it is obvious justice) is that where there is a contract of indemnity (it matters not whether it is a marine policy, or a policy against fire on land, or any other contract of indemnity) and a loss happens, anything which reduces or diminishes that loss reduces or diminishes the amount which the indemnifier is bound to pay; and if the indemnifier has already paid it, then, if anything which diminishes the loss comes into the hands of the person to whom he has paid it, it becomes an equity that the person who has already paid the full indemnity is entitled to be recouped by having that amount back.' e

In the present case both parties seek to draw support from *Castellain v Preston*⁵. f Counsel for the fourth party relies on a passage in the judgment of Brett LJ⁶ expressing that the right of subrogation sprang from the nature of the contract being an insurance contract:

'In order to give my opinion upon this case, I feel obliged to revert to the very foundation of every rule which has been promulgated and acted on by the Courts with regard to insurance law. The very foundation, in my opinion, of every rule which has been applied to insurance law is this, namely, that the contract of insurance contained in a marine or fire policy is a contract of indemnity, and of indemnity only, and that this contract means that the assured, in case of a loss against which the policy has been made, shall be fully indemnified, but shall never be more than fully indemnified. That is the fundamental principle of insurance, and if ever a proposition is brought forward which is at variance with it, that is to say, which either will prevent the assured from obtaining a full indemnity, or which will give to the assured more than a full indemnity, that proposition must certainly be wrong.' g
h

1 (1782) 3 Doug KB 61 at 64

2 (1877) 3 App Cas 279 at 284

3 (1882) 7 App Cas 333 at 335

4 (1882) 7 App Cas at 339

5 (1883) 11 QBD 380, [1881-85] All ER Rep 493

6 (1883) 11 QBD at 386 i

a Counsel for the third party relies on passages in the other judgments as emphasising that it was the feature of indemnity, inherent in the contract of insurance, on which the plaintiff's right to recover rested. Per Cotton LJ¹:

b 'I think that the question turns on the consideration of what a policy of insurance against fire is, and on that the right of the plaintiff depends. The policy is really a contract to indemnify the person insured for the loss which he has sustained in consequence of the peril insured against which has happened, and from that it follows, of course, that as it is only a contract of indemnity, it is only to pay that loss which the assured may have sustained by reason of the fire which has occurred. . . . It is only the amount of the loss, when it is considered as a contract of indemnity, which is to be paid after taking into account and estimating those benefits or sums of money which the assured may have received in diminution of the loss.'

c Per Bowen LJ²:

d 'And subrogation is itself only the particular application of the principle of indemnity to a special subject matter, and there I think is where the learned judge has gone wrong. He has taken the term "subrogation" and has applied it as if it were a hard and fast line, instead of seeing that it is part of the law of indemnity. If there are means of diminishing the loss, the insurer may pursue them, whether he is asking for contracts to be carried out in the name of the assured, or whether he is suing for tort. It is said that the law only gives the underwriters the right to stand in the assured's shoes as to rights which arise out of, or in consequence of, the loss. I venture to think there is absolutely no authority for that proposition. The true test is, can the right to be insisted on be deemed to be on the enforcement of which will diminish the loss? In this case the right whatever it be has been actually enforced, and all that we have to consider is whether the fruit of that right after it is enforced does not belong to the insurers. It is insisted that only those payments are to be taken into consideration which have been made in respect of the loss. I ask why, and where is the authority? f If the payment diminishes the loss, to my mind it falls within the application of the law of indemnity.'

g In *Yorkshire Insurance Co Ltd v Nisbet Shipping Co Ltd*³ the plaintiff insurers sought to recover from the assured, to whom they had paid £72,000 on a total loss basis, the sum of nearly £127,000 which the assured had been paid by the Canadian Government in respect of the loss. It was held that the excess over £72,000 was not recoverable. Diplock J said⁴:

h 'The expression "subrogation" in relation to a contract of marine insurance is thus no more than a convenient way of referring to those terms which are to be implied in the contract between the assured and the insurer to give business efficacy to an agreement whereby the assured in the case of a loss against which the policy has been made shall be fully indemnified, and never more than fully indemnified. . . . In my view the doctrine of subrogation in insurance law requires one to imply in contracts of marine insurance only such terms as are necessary to ensure that notwithstanding that the insurer has made a payment under the policy, the assured shall not be entitled to retain, as against the insurer, a greater sum than what is shown to be his actual loss.'

1 (1883) 11 QBD at 393, cf [1881-85] All ER Rep at 498

2 (1883) 11 QBD at 403, 404

3 [1961] 2 All ER 487, [1962] 2 QB 330

4 [1961] 2 All ER at 490, 491, [1962] 2 QB at 339, 340, 341

The learned judge then cites¹ the words of Cotton LJ in *Castellain v Preston*²:

“... if there is a money or any other benefit received which ought to be taken into account in diminishing the loss or in ascertaining what the real loss is against which the contract of indemnity is given, the indemnifier ought to be allowed to take advantage of it in order to calculate what the real loss is...”

In my judgment the right of subrogation in contracts of insurance depends on the essential element of the contract being one of indemnity. Moreover, I can find no authority for the proposition that the right is restricted to ‘contracts of insurance of indemnity only’. Where there is a contract of indemnity there exists a right in the indemnifier to reimburse himself to the extent that he has paid, and to this end the law provides that he can exercise the personal rights and remedies of the person indemnified by proceeding in that person’s name.

Is this present case one of a contract of indemnity? I think it is. Counsel for the fourth party argues that it is a contract for cleaning services not a contract of indemnity. But what of a covenant in a lease on the part of a tenant to indemnify the landlord against damage to third persons caused by acts of the tenant? It cannot be said that such is no indemnity because it is in a lease. Clause 6, in my judgment, is in its terms a contract whereby the third party agrees to indemnify the defendant company and the nature of the contract does not change because it is one of a number of terms of another contract.

It is argued by counsel for the fourth party that it is not necessary to give business efficacy to cl 6 that a term should be implied that the third party should, on indemnifying the defendants, by subrogation be able to exercise the defendants’ rights and remedies against others. He argues that the facts are such that it cannot be said that such an implied term is so necessary that the parties to the contract must be taken to have contracted on that basis. I am unable to accept those arguments. I do not consider that it is a question of implying a term importing a right of subrogation: the right is there in the nature of the contract of indemnity, unless it can be shown that the contract expressly or by implication excludes the right of subrogation either wholly or in part. It is open to parties to a contract of indemnity to contract on the terms of their choice, and by the terms they choose they can exclude rights which would otherwise attach to the contract.

In relation to counsel for the fourth party’s argument that there is no necessity to imply, and it would be wrong to imply, a term entitling the third party to exercise the defendants’ remedy against the fourth party, in view of the relationship between the defendants and the fourth party, I would look at the matter in a different way. I pose the question, is there evidence which establishes that this contract of indemnity excluded, expressly or impliedly, the right of subrogation to the defendants’ rights and remedies against a servant of the defendants? If there is then the third party is not entitled to the declaration. If there is not, then the ordinary incidents of a contract of indemnity entitle the third party to succeed.

The contract incorporating the indemnity clause was made on 18th February 1969. It was admitted as between the defendants and third party that the contract was for the third party ‘to supply all labour, plant, and to carry out cleaning services at the premises of the defendants’. The terms of cl 6 provided for indemnity to the fullest possible extent and, in particular, refer to losses and claims occasioned by or arising from negligence of servants or agents of the defendants. The third party was required to insure against the liabilities within the scope of the indemnity.

This contract was made some 12 years after the decision in *Lister v Romford Ice & Cold Storage Co Ltd*³ and after the report of the inter-departmental committee

1 [1961] 2 All ER at 491, [1962] 2 QB at 341

2 (1883) 11 QBD at 395

3 [1957] 1 All ER 125, [1957] AC 555

a appointed in 1957 by the Minister of Labour and National Service to study the implications of the judgments in that case as they might affect the relations between employers and workers. The report was published in 1959.

b In *Lister's case*¹ an employee of the company employed to drive a motor vehicle injured his father whom he had taken as his mate. The father recovered damages from the company on the ground of his son's negligence in driving the vehicle. The company then sued the driver on the ground that he was a joint tortfeasor against whom the company was entitled to contribution and on the ground that the company was entitled to damages for breach of an implied term that he would exercise reasonable care in the performance of his duties as servant. It was held, Lord Radcliffe and Lord Somervell of Harrow dissenting, that there was no implied term in the contract of employment that the employers would indemnify the servant (whether the company was insured against the servant's negligence or was required by statute to be insured against that risk or ought, as a reasonably prudent employer, to have taken out a policy of insurance against that risk) and that the company was entitled to recover damages from the driver, their servant. That represents the present law.

c The inter-departmental committee reached the following conclusions:

d 'The decision in the *Lister case*¹ shows that employers and their insurers have rights against employees which, if exploited unreasonably, would endanger good industrial relations. We think that employers and insurers, if only in their own interests, will not so exploit their rights and the evidence we have received as to the action taken by the British Employers' Confederation and the insurance industry seems to us to support this view. We do not therefore think that the decision in the *Lister case*¹ has exposed a practical problem or that there is any need for legislation at present. If in future it should appear that employers or insurers were exploiting their rights unreasonably, the problem would, we think, have to be reviewed; in that event further consideration might be given to the possible legislative measures which we have mentioned in our Report and the various objections to them. Our conclusion does not, however, rule out any further effort to deal with the matter by voluntary methods, such as an extension of the 'gentleman's agreement' within the insurance field, or by collective bargaining in any individual industry.'

e The report and the conclusions of the committee were considered by the legislative committee of the British Insurance Association with the result that the association's then deputy chairman wrote a letter, dated 23rd October 1959, to all members of the association. The letter is an agreed document in the present case. It appears from that piece of evidence that the BIA committee felt—

f 'that Insurers generally would agree that the common interest of all demands that, save possibly in case of collusion or wilful misconduct, no action should come before the Courts which would redirect attention to the issues involved in *Lister's case*¹.'

g The writer of the letter invited the addressees, in their common interest (a) to confirm adherence to a revised 'gentleman's agreement' as follows:

h 'Employers' Liability Insurers agree that they will not institute a claim against the employee of an insured employer in respect of death of or injury to a fellow-employee, unless the weight of evidence clearly indicates (1) collusion or (2) wilful misconduct, on the part of the employee against whom the claim is made. The agreement shall apply in priority to the provisions of any claims agreement operating between Insurers who subscribe to this agreement.'

i The reference to a revised agreement relates to an earlier agreement in 1953.

The letter expressly disavows any intention of interfering with the rights of members to deal with their own claims, and asserted the purpose of affording an opportunity of avoiding action which might damage the interests of insurers as a whole. The proposed 'gentleman's agreement' was limited to claims in respect of 'death of or injury to a fellow employee'. The present cases does not fall within that limited area as the plaintiff was not a fellow employee of the fourth party. a

The evidence, however, goes further. Evidence was given by Mr Davidson, a labour relations officer employed on the central staff of the defendant company. He said that the defendants never sued their servants; that the defendants were aware that to pursue action against an employee for negligence would be to court industrial action in the form of strikes; that serious industrial repercussions would follow if the defendants entered into contracts with others, under the terms of which contracts the employees of the defendants might be sued by the other contracting party, or insurers, in an action brought in the name of the defendants. b

There is no evidence that the defendants' attitude to possible action against their employees was expressly brought to the attention of the third party at the time of contracting. It is, in my judgment, impossible to say that any right of subrogation was expressly excluded by the terms of the contract from the provision for indemnity. What of implied exclusion? The court cannot shut its eyes to the realities of the situation. In 1969 the implications of the law as confirmed and decided in *Lister's* case¹ were well known among employers (the defendants included). Employers' liability insurance, despite the absence of any legal obligation owed by an employer to his employee to insure against liability for negligence, was commonly if not universally used as the means of satisfying the liability of the servant; the industrial repercussions referred to in Mr Davidson's evidence would, as a matter of common knowledge, be of general application and not confined to the defendants. There is an express indication in the terms of the note following cl 6 that the contracting parties recognised that any loss or claim within the indemnity should rest with the third party or their insurers. The defendants had adopted a policy renouncing their entitlement to sue their servants for negligence. c

The point is finely balanced but, in my judgment, the terms of this indemnity in the context of this contract do not give rise to a right of subrogation in the third party. The terms do not give rise to that right because there is to be implied a term whereby it is excluded. The implied term springs from the nature and terms of the contract between these parties. Their agreement was operative in an industrial setting in which subrogation of the third party to the rights and remedies of the defendants against their employees would be unacceptable and unrealistic. d

I would allow the appeal. e

Appeal allowed. Leave to appeal to the House of Lords. f

Solicitors: *A E Wyeth & Co* (for the fourth party); *Weightmans*, Liverpool (for the third party). g

Wendy Shockett Barrister. h

¹ [1957] 1 All ER 125, [1957] AC 555

a

R v Meese

COURT OF APPEAL, CRIMINAL DIVISION
EDMUND DAVIES LJ, WILLIS AND BEAN JJ
13th MARCH 1973

b

Road traffic – Disqualification for holding licence – Separate periods of disqualification – Periods disqualifying concurrently – Whether court having power to impose consecutive periods of disqualification.

c

When a person who has been convicted of a motoring offence is disqualified for holding or obtaining a licence, the period of disqualification starts to run as soon as it is ordered, save where the 'totting-up' provisions of s 93 (3) of the Road Traffic Act 1972 apply. Accordingly, unless the 'totting-up' provisions apply, a period of disqualification runs concurrently with any other period of disqualification ordered by the same court at the same hearing or by the same or another court on a previous occasion; the court has no power to make a period of disqualification consecutive on another period of disqualification.

d

Notes

For disqualification for holding driving licence, see 33 Halsbury's Laws (3rd Edn) 638, 639, para 1080, and for cases on the subject, see 45 Digest (Repl) 117-120, 398-430. For the Road Traffic Act 1972, s 93, see 42 Halsbury's Statutes (3rd Edn) 1744.

e

Cases referred to in judgment

R v Bain (1962) [1973] RTR 213, CA.

R v Graham [1955] Crim LR 319, CCA.

R v Higgins (Note) (1962) [1973] RTR 216, CCA.

R v Johnston (1972) 56 Cr App Rep 859, [1972] Crim LR 647, CA.

f

Appeal

On 13th October 1969 at Sheffield Assizes the applicant, Kelvin Thomas Meese, pleaded guilty to causing death by dangerous driving contrary to s 1 of the Road Traffic Act 1960 and to driving with a blood-alcohol proportion above the prescribed limit contrary to s 1 of the Road Safety Act 1967. He was sentenced by Lyell J to nine months' imprisonment concurrent on each count and also disqualified for holding a driving licence for 2½ years consecutive on each count, making five years' disqualification in all. He applied for leave to appeal out of time against the orders of disqualification. The facts are set out in the judgment of the court.

g

Peter M Baker for the applicant.

h

The Crown was not represented.

j

BEAN J delivered the judgment of the court at the invitation of Edmund Davies LJ. On 31st October 1969 at Sheffield Assizes the applicant pleaded guilty to one count of causing death by dangerous driving and a second count of driving a motor vehicle with excess alcohol in his blood. He was sentenced on each count to nine months' imprisonment concurrent and he was disqualified for 2½ years on each count consecutively, making a total disqualification of five years. He now applies for an extension of time, albeit some three years 1½ months after sentence, and for leave to appeal against sentence. The grounds for extension of time are that he was only recently advised that the order making the orders for disqualification might be invalid and that he had grounds for an appeal.

The facts shortly were that on 22nd January 1969 at about 10.40 p m the applicant was driving his car in Conisbrough. He had a lady sitting in the front passenger seat and as the car approached a sharp right-hand bend at fast speed it mounted the traffic island and crossed the pavement. The car was extensively damaged by hitting a wall, both the occupants were seriously injured and unfortunately the lady suffered fatal injuries. At about 2.35 a m the applicant was interviewed, a breath test was administered and a blood sample was taken from him which on analysis was found to contain 105 milligrammes of alcohol in 100 millilitres of blood. The applicant himself could not remember a single thing about the accident.

It is in those circumstances that counsel for the applicant invites the court to say that in accordance with several recent cases it is manifest that these consecutive periods of disqualification should not be sustained. Disqualification starts to run as soon as it is ordered, save where s 5 (5) of the Road Traffic Act 1962, now replaced by s 93 (5) of the Road Traffic Act 1972, applies. Thus, except where the 'totting-up' provisions under s 93 (3) of the 1972 Act (formerly s 5 (3) of the 1962 Act) apply, disqualifications run concurrently both with those ordered by the same court at the same hearing and with those previously ordered by the same or another court on another occasion. In 1969, when the orders being considered were made, the position under s 5 (5) of the 1962 Act was that a consecutive period of disqualification could also be ordered on conviction for driving while disqualified, but that provision was repealed by s 1 of the Road Traffic (Disqualification) Act 1970. Apart from the exceptions referred to, there is no power to make a sentence of disqualification consecutive on another period of disqualification: see *R v Higgins*¹, a Court of Criminal Appeal case. The two offences to which this applicant pleaded guilty, namely causing death by dangerous driving contrary to s 1 of the Road Traffic Act 1960 and driving a motor car with excess alcohol in his blood contrary to s 1 of the Road Safety Act 1967, do not fall within the exceptions under s 5 (5) of the 1962 Act.

It follows that consecutive orders of disqualification could not be imposed, there being no power, apart from statutory authority, to make a sentence of disqualification consecutive with another period of disqualification: see *R v Graham*², *R v Johnston*³ and *R v Bain*⁴. Accordingly we extend the time for appealing, direct that this hearing be treated as the hearing of the appeal and order that the order of Lyell J be varied by making the two periods of disqualification concurrent, that is 2½ years in all.

Application granted. Appeal allowed. Order of disqualification varied.

Solicitors: *Dawson & Burgess*, Doncaster (for the applicant).

N P Metcalfe Esq Barrister.

¹ (1962) [1973] RTR 216

² [1955] Crim LR 319

³ (1972) 56 Cr App Rep 859

⁴ (1962) [1973] RTR 213

Smith v Automobile Proprietary Ltd

NATIONAL INDUSTRIAL RELATIONS COURT

SIR HUGH GRIFFITHS, MR R BOYFIELD AND MR H ROBERTS

19th MARCH 1973

Industrial tribunal – Procedure – Originating application – Form of application – Contents of application – Address of person or persons against whom relief is sought – Industrial Tribunals (Industrial Relations, etc) Regulations 1972 (SI 1972 No 38), Sch, r 1 (1).

An employee was dismissed by his employers, the Royal Automobile Club, so that his employment was effectively terminated on 21st April 1972. By virtue of r 2 (1)^a of the schedule to the Industrial Tribunals (Industrial Relations, etc) Regulations 1972^b the period within which the employee could present a claim for unfair dismissal expired on 18th May 1972. On 12th May 1972 the employee's solicitors wrote to the Central Office of Industrial Tribunals a letter indicating that, on the available information, the employee had been unfairly dismissed and requesting that the letter be taken as formal notification that the employee wished to bring a complaint before an industrial tribunal. The letter contained the name and address of the employee and the name but not the address of the employers. An industrial tribunal held that the solicitors' letter did not constitute an originating application within the meaning of r 1 (1)^c of the schedule to the 1972 regulations and dismissed the employee's complaint on the ground that it was out of time. The employee appealed.

Held – Rule 1 (1) did not require that an originating application be made in any particular form; it was sufficient if the application contained the information required under r 1 (1). Looked at as a whole the letter from the employee's solicitors did contain all the information necessary in the circumstances; the object of requiring the employer's address to be given was to ensure that the tribunal could thereafter communicate with the party to be named as the respondent to the proceedings; as the RAC were a well-known organisation their address would be known to the tribunal and the omission of it was not a ground for holding that the application was invalid. Accordingly, the appeal would be allowed and the matter would be referred back to the tribunal to determine the substantive issue (see 1107 d to f, post).

Note

For complaints to industrial tribunals of unfair industrial practice, see Supplement to 38 Halsbury's Laws (3rd Edn) para 677F, 10.

Appeal

This was an appeal by Ronald Charles Smith against the decision of an industrial tribunal (chairman Sir John Blagden) sitting in Bury St Edmunds, dated 13th November 1972, that they had no jurisdiction to entertain the appellant's complaint of unfair dismissal against the respondents, Automobile Proprietary Ltd, as it was not presented before the end of the period prescribed by r 2 (1) of the rules of procedure in the schedule to the Industrial Tribunals (Industrial Relations etc) Regulations 1972

^a Rule 2 (1), so far as material, provides: 'In relation to proceedings on complaints under section 106 of the [Industrial Relations Act 1971], a tribunal shall not entertain such a complaint unless it is presented before the end of the period of four weeks beginning—(a) in the case of a complaint relating to dismissal, with the effective date of termination . . . unless the tribunal is satisfied that in the circumstances it was not practicable for the complaint to be presented before the end of that period . . .'

^b SI 1972 No 38

^c Rule 1 (1), so far as material, is set out at p 1106 j to p 1107 a, post

and they were not satisfied that in the circumstances it was not practicable for it to have been presented before the end of that period. The facts are set out in the judgment of the court. a

Robert Turner for the appellant.

Mr N A C Butcher, solicitor, for the respondents.

SIR HUGH GRIFFITHS delivered the following judgment of the court. This is an appeal by Mr R C Smith from a decision of an industrial tribunal sitting at Bury St Edmunds dismissing his application for compensation on the ground of unfair dismissal. The tribunal held that they had no jurisdiction to entertain the application because the appellant had failed to make it in due time. Perhaps I should say at the outset that the respondents, Automobile Proprietary Ltd (more commonly referred to as the 'RAC') expressed no desire to take a technical point and have said throughout that they would rather have the matter determined on its merits. b

The short history of the case is that the appellant was dismissed on 21st April 1972 and thus, in accordance with the Industrial Tribunals (Industrial Relations, etc) Regulations 1972¹, he had 28 days within which to make a complaint of unfair dismissal. That period expired on 18th May 1972. He was a member of a staff association, which retained solicitors in Gloucester to act on its behalf. The appellant was put in touch with the solicitors who, being mindful of the 28 days' time limit, wrote on 12th May 1972 to the Central Office of Industrial Tribunals for the express purpose of preserving the appellant's right to bring a complaint for unfair dismissal. I should read that letter. It reads as follows: c

'Dear Sir,

'We act for Mr. R. C. Smith of 12 Hingham Road, Great Ellingham, Attleborough, Norfolk. Mr. Smith was until recently employed by the Royal Automobile Club through their proprietary company the [Automobile] Proprietary Ltd. as a Road Patrol/Sales Representative. By a letter dated 6th March [1972] Mr. Smith received six weeks' notice to terminate his employment, termination taking effect on Friday the 21st April [1972]. The reasons for Mr. Smith's sudden and peremptory dismissal were not officially given to him and we have not yet been able to obtain a satisfactory statement of the reasons for his dismissal. It was suggested that there may have been some redundancy but as Mr. Smith was the only person dismissed in his area and other reasons have been hinted it does appear to us on the information at present available that this could be a clear example of an unfair dismissal. We have written to the Royal Automobile Club to try and obtain a clear statement for the reasons for Mr. Smith's dismissal, but in view of the time limit imposed under the Industrial Relations Act 1971 we would be obliged if you could take this letter as a formal notification to you on behalf of our client, Mr. R. C. Smith, of his complaint that he therefore wishes to bring his claim before the Industrial Tribunal. We appreciate that you will probably require information and facts from us but in order to preserve our client's rights within the time limits of the Act could you please confirm that this letter will be accepted as formal notification of our client's complaint.' d

Rule 1 of the rules of procedure under the schedule to the Industrial Tribunals (Industrial Relations, etc) Regulations 1972 provides essential elements to be contained in an application to commence proceedings: e

'(1) Proceedings for the determination of any matter by a tribunal shall be instituted by the applicant ... sending to the Secretary of the Tribunals an f

¹ SI 1972 No 38 g

a originating application which shall be in writing and shall set out:—(a) the name and address of the applicant; and (b) the names and addresses of the person or persons against whom relief is sought or of the parties to the proceedings before the court (as the case may be); and (c) the grounds on which that relief is sought ...’

b Subparagraph (1) (d) is not relevant to the consideration of this appeal. Be it observed that there is no requirement that any particular form shall be used. In fact, for the convenience of litigants a form has been prepared and is available throughout the country at employment exchanges and at the offices of the tribunals. In the ordinary course of events, when people become more familiar with these regulations and the practice of the court, one would hope that this form will be used by litigants when commencing their applications; but we repeat that it is not mandatory, and an application will not fail merely because the form is not used, provided such application contains the necessary information required by r 1.

The chairman of the tribunal formed the view that the letter of 12th May 1972 did not constitute an application within the meaning of r 1.

d The letter did not contain the address of the respondents, but to hold that an application should be considered bad merely because it does not give the address of an organisation as well known as the RAC would be mere pedantry. The object of requiring the address to be given is to ensure that the tribunal can thereafter communicate with the party who is to be named as the respondent to the proceedings. The address of the RAC would undoubtedly be known to the tribunal. We cannot regard the omission of the address as a reason for viewing this as other than a proper application. It is to be observed that it was not on that ground that the

e tribunal felt obliged to reject the application.

Looking at the letter of 12th May 1972 as a whole, we have come to the conclusion that the only fair construction that can be put on it is that it was an adequate presentation of a complaint pursuant to r 1 (1) of the Industrial Tribunals (Industrial Relations, etc) Regulations 1972. It refers in its text to unfair dismissal; it is quite clear from the context that the solicitors have in mind that there may well have been an unfair dismissal; and when one reads the final part of the letter it is quite apparent that the only purpose of sending the letter was to preserve their client's rights within the 28 day limit.

f As we have come to the conclusion that the letter of 12th May 1972 is to be regarded as a proper application within the meaning of the regulations, it is unnecessary for us to express any views on the further matters debated in the course of the original hearing. This appeal will therefore be allowed and the matter referred to the tribunal for hearing on the substantive issue.

g *Appeal allowed.*

h Solicitors: *Wellington & Clifford*, Gloucester (for the appellant); *Emmett & Tacon*, Norwich (for the respondents).

Gordon H Scott Esq Barrister.

Taylor v Director of Public Prosecutions

HOUSE OF LORDS

LORD HAILSHAM OF ST MARYLEBONE LC, LORD REID, LORD MORRIS OF BORTH-Y-GEST,
LORD GUEST AND LORD CROSS OF CHELSEA
5th, 6th JUNE, 4th JULY 1973

Criminal law – Affray – Unlawful fighting – Only one person fighting unlawfully – Whether one person alone may be guilty of offence.

Criminal law – Affray – Unlawful fighting – Fight – Meaning — Display of force – Whether violence a necessary element.

Criminal law – Affray – Terror – Bystanders – Proof that bystanders might reasonably be expected to have been frightened – Unnecessary to prove actual fear – Whether necessary to prove presence of bystanders who could have been frightened.

A person may be guilty of making an affray even if, although others are fighting, he alone is fighting unlawfully to the terror of other persons (see p 1109 g, p 1111 g, p 1113 c, p 1114 g, and p 1116 b g and j to p 1117 a, post).

Per Lord Hailsham of St Marylebone LC. An affray involves unlawful fighting, or a display of force, by one or more persons, but the word 'fight' is not to be construed as implying that there must be a reciprocity of blows; it must however include at least an unlawful participation in a violent breach of the peace where the requisite degree of terror is achieved (see p 1112 c, post).

Per Lord Hailsham of St Marylebone LC. The degree of violence required to constitute an affray must be such as might reasonably be expected to terrify a person of reasonably firm character (see p 1112 h, post). Per Lord Reid. It is enough if the circumstances are such that ordinary people like those present would have been terrified; if people were present it is not necessary to prove by their evidence that they were frightened (see p 1114 h, post).

Semble. Where a fight takes place in a private place it is necessary for the prosecution, in order to prove an affray, to establish the presence of bystanders who could have been frightened by the sight or sound of what was occurring. Sed quaere, whether it is necessary to prove the presence of bystanders where the fight takes place in a public place (see p 1113 a to c and p 1114 j to p 1115 a, post).

Quaere. Whether a display of force without actual violence is capable of constituting an affray even though the element of terror is present (see p 1112 d and e, post).

R v Scarrow (1968) 52 Cr App Rep 591 and *R v Summers* (1972) 56 Cr App Rep 604 approved.

Dictum of Lord Goddard CJ in *R v Sharp* [1957] 1 All ER at 580 disapproved.

Decision of the Court of Appeal sub nom *R v Taylor* (Vincent) [1973] 1 All ER 78 affirmed.

Notes

For affray, see 10 Halsbury's Laws (3rd Edn) 584, para 1086, and for a case on the subject, see 15 Digest (Repl) 785, 7360.

Cases referred to in opinions

Button v Director of Public Prosecutions, *Swain v Director of Public Prosecutions* [1965] 3 All ER 587, [1966] AC 591, [1965] 3 WLR 1131, 130 JP 48, 50 Cr App Rep 36, HL; affg sub nom *R v Button and Swain* [1965] 1 All ER 964, [1965] 2 WLR 992, CCA, Digest (Cont Vol B) 189, 7360f.

R v Meade (1903) 19 TLR 540, 15 Digest (Repl) 783, 7352.

R v Scarrow, R v Brown, R v Attlesley (1968) 52 Cr App Rep 591, CA, Digest (Cont Vol C) 244, 7360ea.
R v Sharp, R v Johnson [1957] 1 All ER 577, [1957] 1 QB 552, [1957] 2 WLR 472, 121 JP 227, 41 Cr App Rep 86, CCA, Digest (Cont Vol A) 410, 7360a.
R v Summers (1972) 56 Cr App Rep 604, [1972] Crim LR 635, CA.

Appeal

The appellant, Vincent Taylor, appealed against the order of the Court of Appeal, Criminal Division¹, (Karminski LJ, O'Connor and Forbes JJ) dated 9th October 1972 dismissing his appeal against his conviction of affray on 21st March 1972 in the Crown Court at Nottingham before Phillips J and a jury. The Court of Appeal certified that a point of law of general public importance was involved, namely, 'Whether a person commits the offence of affray if he alone is unlawfully fighting to the terror of other persons'. The facts are set out in the opinion of Lord Hailsham of St Marylebone LC.

Basil Wigoder QC and W H Joss for the appellant.
Charles McCullough QC and J B M Milmo for the Crown.

Their Lordships took time for consideration.

4th July. The following opinions were delivered.

LORD HAILSHAM OF ST MARYLEBONE LC. My Lords, on 21st August 1971 a fight took place at the Strelley Social Club in the city of Nottingham. Tables were overturned. Beer was thrown all over the place. Some of the spectators were screaming and plainly frightened. Among those fighting were the appellant, Taylor, whose name was originally Lowndes, two police officers, who had come to the club to arrest the appellant, and the appellant's two brothers, David and Michael Lowndes.

All three brothers were subsequently tried at the Nottingham Crown Court. The indictment contained a number of counts of which the only one relevant to this appeal was making an affray. The defence of each of the three brothers was self-defence. This, if made good, is a good defence to a charge of affray (see *R v Sharp, R v Johnson*²). There were two trials. At the first, one brother was acquitted, but the jury failed to agree as to the other two, one of whom was the appellant. At the second trial, another brother was acquitted, but, by a majority of ten to two, the jury convicted the appellant. The question then arose whether this conviction could stand in the light of the two acquittals. In other words, can a man be guilty of making an affray if, though others be fighting, he alone is fighting unlawfully to the terror of other persons?

The Court of Appeal¹ (Karminski LJ, O'Connor and Forbes JJ) answered the question affirmatively and dismissed the appeal against conviction. They certified that a question of general public importance was involved, but refused leave to appeal to the House of Lords. Leave was subsequently given by the appeal committee. Thus, the question comes before your Lordships' House.

Only one other factual element in the case needs to be mentioned. After dismissing the appeal against conviction, the Court of Appeal went on to allow an appeal against sentence, reducing an original sentence of three years' imprisonment to one of nine months. In doing so, they explained that they proceeded partly on the basis that the two acquitted brothers had largely instigated the fight, and partly on the basis that, in the light of the defence of self-defence, and the two acquittals, the conviction of the appellant must be taken as meaning that the appellant had started by lawfully defending himself, but ended by using too much force.

¹ [1973] 1 All ER 78, [1972] 3 WLR 961

² [1957] 1 All ER 577, [1957] 1 QB 552

The offence of affray is a very ancient common law misdemeanour for which the penalties are at large. The offence has been brought into extensive use, after a long period of relative desuetude, only since the end of the last war and, since *Button v Director of Public Prosecutions*¹ when your Lordships' House removed the supposed limitation that to be guilty of affray the fighting must occur in a public place, indictments for affray have been successfully brought in respect of fights in private premises of various kinds.

From the first, as was conceded by counsel for the appellant, at least in one class of case, the offence of affray could be committed by a single person, namely, that mentioned in the Statute of Northampton 1328². This statute, however, seems to have been largely declaratory of the common law, but prescriptive of an additional remedy. It forbids amongst other things the carrying or brandishing in public of unusual or terrifying weapons. The Statute of Northampton was relied on to sustain an indictment as recently as 1903 (see *R v Meade*³). The statute itself has been repealed as obsolete or unnecessary by the Criminal Law Act 1967, no doubt partly as the result of the enactment of the Prevention of Crime Act 1953. But, whether or not this example of the common law offence of affray still lives on, the fact that the crime of affray could be committed by a single person at least in this class of case is not without its importance in determining the result of the present appeal. Counsel for the appellant was fain to argue that this class of affray was a separate species, and could be ignored for the purpose of deciding the ingredients necessary to constitute the commoner form in which the offence occurs as the result of a fight between two or more contestants. But, for reasons which will emerge, I do not think it possible to treat it as a totally separate offence in this way.

The classical definition of affray repeated, though not always in precisely the same language, over and over again in the older textbooks was that it was fighting by two or more persons [in some public place] to the terror of the King's subjects⁴ and with the omission of the words in square brackets which he demonstrated to have been added as the result of an error, Lord Gardiner LC adopted this definition in *Button v Director of Public Prosecutions*⁵ when he said: 'The essence of the offence is that two or more fight together to the terror of the Queen's subjects.'

On this, and on some observations of Lord Goddard CJ in *Sharp*⁶ to the effect that affray was essentially a joint offence, counsel for the appellant largely founded his submission which was to the effect that a party could only be guilty of the offence if not only he, but at least some other, was guilty of fighting unlawfully.

As the Court of Appeal⁷ pointed out, this submission cannot live consistently with the decisions in *R v Scarrow*⁸ or *R v Summers*⁹ from which it appears fairly clearly, if they are to be supported, that a person is not to be acquitted of affray simply because his victim acts lawfully, as for instance by retreating, or simply warding off the blows aimed at him by the accused. I cannot myself see how, if this is so, it can fail to follow that if his opponent is actually fighting, but fighting lawfully, for instance, in self-defence or to effect a lawful arrest or rescue, an accused person indulging in unlawful violence against that opponent may be guilty of making an affray. Indeed, at one moment in *Scarrow*¹⁰ Lord Parker CJ is reported as saying in terms:

1 [1965] 3 All ER 587, [1966] AC 591

2 2 Edw 3, c 3

3 (1903) 19 TLR 540

4 Cf Blackstone's Commentaries on the Laws of England (1765), bk IV, p 145

5 [1965] 3 All ER at 590, [1966] AC at 625

6 [1957] 1 All ER at 580, [1957] 1 QB at 561

7 [1973] 1 All ER 78, [1972] 3 WLR 961

8 (1968) 52 Cr App Rep 591

9 (1972) 56 Cr App Rep 604

10 (1968) 52 Cr App Rep at 596

- a 'It may well be that if two people fight and one is acting in self-defence that man cannot be said to be guilty of an affray, but it would appear to this court that there is no reason why his attacker, whether acting alone or jointly with another attacker, should not be held guilty of the affray.'

b That case was expressly followed by Edmund Davies LJ in *Summers*¹, and by O'Connor J in delivering the judgment of the Court of Appeal² in the instant case. I am certain that they were right, and, though I endorse the actual decision in *Sharp*³ to the effect that self-defence is an answer to a charge of affray, I am quite certain that the two passages in Lord Goddard CJ's judgment in that case⁴ to the effect that affray 'is of necessity a joint offence' and that if a man is 'only defending himself . . . that is not a fight and, consequently, not an affray' cannot be supported and do not represent an accurate statement of the law. It is, of course, true that before an affray of the type which consists in a fight can take place at least two persons must be present, but it does not follow from that that each of them is guilty of the affray. Making an affray consists in the unlawful participation in the fight, and one may be participating unlawfully when others are participating lawfully. If this were not so the most ludicrous results would follow. In the first place, it must follow that to prosecute one of a number of defendants to conviction, it would be necessary for the prosecution, in addition to excluding the possibility of a defence of self-defence in the defendant himself would also have to exclude the possibility of such a defence in at least one of his co-defendants. Counsel for the appellant conceded that if two assailants attacked one or more victims who did not retaliate, the offence of affray was complete, but he was driven to argue that if one man had attacked the same victims he would have been innocent of affray, though if one of these victims defended himself with slightly more force than was necessary, the first man became once again guilty of affray. Counsel for the Crown supposed an even more extravagant case. A man runs through the street, waving a sword and terrifying the people, but threatening no particular person. He is guilty of affray because he is brandishing a weapon. He points it at an individual. He ceases to be guilty because there is no fight. The victim defends himself, but uses no more force than is necessary. The assailant remains innocent because there is only one person acting unlawfully. The victim then uses more force than is necessary. The assailant becomes once more guilty of affray because he is no longer alone in fighting unlawfully. The fact is that affray consists in participating unlawfully in a violent breach of the peace to the terror of the lieges. There is no reason in logic or law to enquire whether other participants in the fight are acting lawfully or unlawfully.

g It would, therefore, be enough for me to say in this case that, save for a minor doubt, which I expressed in argument, as to the justice of one comment on *Hawkins*⁵, I agree entirely with the judgment of the Court of Appeal² with the judgments in *Scarrow*⁶ and *Summers*¹ on which it was founded. We were, however, invited by counsel on both sides to discuss more widely the offence of affray and though, in the main, and for reasons which I will develop, I do not think it right to accede to this invitation some account of the way in which the arguments were presented and the extent to which they were found acceptable is, I think, desirable.

h Both counsel drew out attention to the definition of affray in *Smith and Hogan's Criminal Law*⁷ as it was expressly approved in *Summers*¹ and again by the Court of Appeal² in the instant case. This definition is as follows:

- j 1 (1972) 56 Cr App Rep 604
 2 [1973] 1 All ER 78, [1972] 3 WLR 961
 3 [1957] 1 All ER 577, [1957] 1 QB 552
 4 [1957] 1 All ER at 580, [1957] 1 QB at 561
 5 [1973] 1 All ER at 82, [1972] 3 WLR at 965
 6 (1968) 52 Cr App Rep 591
 7 3rd Edn (1973), p 615

'Affray is a common law misdemeanour which, after a long period of desuetude, has not only been brought back into regular use, but greatly expanded in scope by judicial decision. Its elements are (1) fighting by one or more persons: or a display of force by one or more persons without actual violence; (2) in such a manner that reasonable people might be frightened or intimidated.'

This definition was followed by Edmund Davies LJ in *Summers*¹ and O'Connor J² in the present case. I would, however, issue a word of caution lest those who use this definition seek to find verbal inspiration in the actual language in which it happens to be couched.

Thus, in the first place, the word 'fight' needs to be interpreted so as to show that it is not necessary to prove a reciprocity of blows. Without attempting an alternative definition, it must include at least any unlawful participation in a violent breach of the peace where the requisite element of terror is achieved. The typical affray is, of course, a *mêlée* between many participants in which many blows are given and received by the participants. But the violence can be all on one side, and the unlawful character of the violence can be limited to one participant in the *mêlée*.

Secondly, the extent to which the 'display of force . . . without actual violence' constitutes the offence of affray even where the element of terror is present is still not wholly clear. It seems that the brandishing of a fearful weapon does constitute the offence, and has always done so, though in most cases where this is done by an individual, a charge under the Prevention of Crime Act 1953 would now seem preferable. From the older authorities it seems plain enough that mere words, unaccompanied by the brandishing of a weapon or actual violence, are not enough. But all sorts of things are, arguably, a display of force. I am anxious that nothing in this case should be construed as necessarily implying that anything less than an unlawful participation in a violent breach of the peace will be enough to satisfy the requirement. We were invited to consider demonstrations of all kinds, whether in the course of an industrial dispute or some politically motivated procession. It seems to me that there is nothing in the instant case, where all the ingredients of the offence save one were plainly present, to compel us to lay down the law in such a fashion as to extend the definition beyond what the strict circumstances of the case require.

Thirdly, the element of terror required by the second branch of the definition in the passage from *Smith and Hogan*³ requires further commentary and must not be weakened. From the very earliest days the offence of affray has required this element, and all the early textbooks stress the derivation of the word from the French 'effrayer', to put in terror. Thus in *Button*⁴ Lord Gardiner LC says in distinguishing, as the earlier authorities had done, affray from assault:

'... in each case the wrongful act is the same yet the mischief of the act falls on the victim in the offence of assault but on the bystander in the offence of affray.'

To my mind, it is essential to stress that the degree of violence required to constitute the offence of affray must be such as to be calculated to terrify a person of reasonably firm character. This should not be watered down.

Thus, it is arguable that the phrase 'might be frightened or intimidated' may be too weak. The violence must be such as to be *calculated* to terrify (that is, might reasonably be expected to terrify) not simply such as *might* terrify a person of the requisite degree of firmness.

We were invited to express an opinion as to the extent to which persons must be proved to have been present in order to satisfy the ingredient of terror. I do not

1 (1972) 56 Cr App Rep 604

2 [1973] 1 All ER 78, [1972] 3 WLR 961

3 3rd Edn (1973), p 615

4 [1965] 3 All ER at 590, [1966] AC at 625

- a** think that, on the facts of the present case, where many persons were in fact present and some were in fact terrified, it is desirable to explore this in depth. It is possible that where the fight takes place in a public street it is not necessary to prove the actual presence of bystanders, or persons within earshot or that they were actually terrified. It may be enough to show that the violence used was of such a kind as to render the street unusable by persons of reasonable firmness by reason of the terror it was liable to cause.
- b** I am not, for example, prepared to say that a fight between rival gangs on the front of a seaside resort, or a duel with lethal weapons on Putney Heath, would not be an affray if the prosecution failed to establish the presence of bystanders or their actual terror. But in a private place it would be surprising if affray could be complete without the actual presence of onlookers or audience to be frightened by the sight or sound of what was occurring. This must clearly be considered of importance since the decision in *Button*¹. These are matters which must be canvassed in the light of cases where the facts are such as to raise the issues. In the present instance, it is enough to say that, subject to my comments above, I agree with the Court of Appeal² and consider that the cases of *Scarrow*³ and *Summer*⁴ were rightly decided, and that the observations of Lord Goddard CJ in *Sharp*⁵ are not correct. In my view, the question certified as of general public importance should be answered in the affirmative, and the appeal itself should be dismissed.

LORD REID. My Lords, the point of law certified in this case as being of general public importance is:

- e** 'Whether a person commits the offence of affray if he alone is unlawfully fighting to the terror of other persons.'

That may seem to be a short and simple question but it cannot be answered without enquiring into the nature and history of the offence of affray. This offence has a long history going back at least 600 years. From the outset it has been clear that two elements are necessary. There must be violence done or immediately apprehended. And that violence must be such as to create terror.

- f** Until very recently there was practically no judicial authority but the offence is dealt with in every textbook, at least since 1593. The industry of counsel produced more than a dozen of some antiquity and authority. The earlier writers did not try to define the offence: they devoted more space to the rights and duties of constables and private citizens in dealing with an affray when it broke out. My impression is that any violent disturbance of the peace was regarded as an affray if it took place in such circumstances as to cause terror to the King's subjects. There was no need to confine the offence within narrower limits and I find nothing in the early books to suggest that the scope of the offence was more limited.

- g** For some reason which I have not discovered there were few prosecutions for this offence for a very long period before the middle of this century. But then the practical advantages to the prosecution of using this offence must have occurred to somebody. **h** I understand that in recent years it has proved to be a valuable weapon for dealing with the rising tide of violent crime.

- j** Generally the offence was committed by several wrongdoers fighting each other in a street or other public place. So there crept into some of the textbooks suggestions that the offence could only be committed in a public place and could only be committed by two or more persons fighting together. No reasons for this were given.

¹ [1965] 3 All ER 587, [1966] AC 591

² [1973] 1 All ER 78, [1972] 3 WLR 961

³ (1968) 52 Cr App Rep 591

⁴ (1972) 56 Cr App Rep 604

⁵ [1957] 1 All ER at 580, [1957] 1 QB at 561

The first of these misapprehensions was corrected by this House in *Button v Director of Public Prosecutions*¹. We have now to deal with the second. a

One form of the offence consists of brandishing offensive weapons to the terror of the King's subjects. There is no suggestion that there need be more than one wrongdoer in that case. This form of the offence was dealt with in the Statute of Northampton 1328². That statute has now been repealed but it seems to be generally agreed that it did not supersede the common law and that the common law offence still survives. If this form of the offence may be committed by one person acting alone, one would expect to find some special reason to justify a conclusion that other forms of the offence can only be committed by two or more persons. b

The only possible justification that I can see would be if the offence must be limited to two or more persons unlawfully fighting each other. There is no binding authority, requiring us so to limit the offence. Why should it be so limited? Such a limitation would exclude two cases both of which can be just as terrifying. In the first place, one of the combatants may be lawfully acting in self-defence. The fight may be just as real a fight and just as terrifying as if both combatants were wrongdoers. Onlookers will fear that if the unlawful assailant wins he will attack them. And, secondly, one or more violent men may attack innocent and peaceful people and none of them may resist. Why are the assailants to escape punishment because their victims cannot or do not retaliate? Any such limitation would be quite illogical and I can see no justification for it. c

The second of these points was dealt with by the Court of Appeal in *R v Scarrow*³ where it was held that there need not be 'reciprocal violence'. Three men went into an hotel and, as a witness said, 'They were fighting everyone, young and old, punching, kicking and no one retaliated'. They were, in my judgment, rightly held guilty of affray. If three men can be guilty in such circumstances, why not one alone? It had never been suggested that any element of common purpose is essential to constitute an affray. d

The only real difficulty in the present case arises from observations in *R v Sharp*⁴. The main question in that case was whether fighting in self-defence was a good defence to a charge of affray. The court rightly held that it was. But then the question was whether the other party to the fight could be convicted alone. I do not think that this question was properly argued. Counsel is reported⁵ as having said, '... it is conceded that [self-defence] could be a good defence. It would mean there was no fight ...' That seems to me to be a complete non sequitur. A man is entitled to fight strenuously in self-defence if he is in serious danger. e

But this view seems to have been accepted by the court and it was said that affray 'is of necessity a joint offence'. I can see no justification at all for that. If no element of common purpose is required and there is no need for 'reciprocal violence' in what sense could it be a joint offence? In my view, we should make it clear that that part of the judgment in *Sharp's* case⁴ is wrong. f

The question of terror does not arise in this case but as it was much referred to in argument and is an essential element in the offence, I think that I must say a word about it. Undoubtedly if people are present it is not necessary to prove by their evidence that they were terrified. It is enough if the circumstances are such that ordinary people like them would have been terrified. I say 'would' not 'might' have been. But I am much more doubtful about suggestions in some cases that no one but the combatants need be present at all or even within earshot: that it is enough that if someone had been present he would have been terrified. As terror is an essential ingredient of the offence I think that there can be no difference in principle g

1 [1965] 3 All ER 587, [1966] AC 591

2 2 Edw 3, c 3

3 (1968) 52 Cr App Rep 591

4 [1957] 1 All ER 577, [1957] 1 QB 552

5 (1957) 41 Cr App Rep 86 at 89 h

a between violence in a public or a private place. But that is a matter which can be decided when it arises.

I would not seek a rigid definition of a common law offence; that would be an attempt to codify the law piecemeal. If a new point arises the question should always be whether it is within the mischief aimed at and within the principles established by the authorities.

b I would dismiss this appeal.

LORD MORRIS OF BORTH-Y-GEST. My Lords, the hearing of this appeal will have served a valuable purpose if certain doubts in regard to the common law offence of affray are removed. Unhappily in these days prosecutions for offences against the public peace are numerous. It has in recent years often been necessary and desirable to frame indictments for an affray. It will generally be the case that several persons will be accused. But the situation that has given rise to the present appeal may not prove to be exceptional. At the trial of three men on a charge of affray one was acquitted and the jury were unable to agree as to the other two. On the retrial of the two, one of these was acquitted and the other, the present appellant, was convicted. The learned trial judge certified (under s 1 of the Criminal Appeal Act 1968) that there was a fit case for appeal on the question whether, the one having been acquitted, the appellant could properly be convicted of affray. The allegation against the two was that they fought police officers who were questioning the appellant about another offence. It was not alleged that any other persons fought the police officers. The particulars of offence merely set out that the two men 'on the 21st day of August 1971 in the City of Nottingham unlawfully fought and made an affray.'

So on appeal to the Court of Appeal¹, and on appeal from that court, the question has been debated, which is neatly expressed in the point certified by the Court of Appeal as being of general public importance, namely, whether a person commits the offence of affray if he alone is unlawfully fighting to the terror of other persons.

f In the question raised the word 'unlawfully' is of importance. On a first approach the question might be asked: but how can one man alone fight? The answer is that of course one man who is fighting must be fighting or attacking some other person, but it does not follow that such other person becomes engaged in reciprocal fighting; he may not resist at all or, if he does resist and fights back, he may only be reasonably and necessarily defending himself. The fighting that may constitute an affray must be unlawful fighting and one who is only legitimately defending himself will not be guilty of an affray (*R v Sharp*²).

g But it is said that those authoritative writers who over many centuries have described the offence of affray have used such words as 'the fighting of two or more persons' as well as the words 'to the terror of His Majesty's subjects'. In the argument for the appellant there was an insistence that the offence can only be committed by at least two persons. Your Lordships were helpfully referred in sequence of dates to numerous passages from the works of well-known writers. Many of the passages had been mentioned in the arguments addressed to the Court of Criminal Appeal and thereafter to this House in *Button v Director of Public Prosecutions*³ and many were referred to in the speech of Lord Gardiner LC. In that case the previously prevailing error that there could only be a conviction for affray if fighting to the terror of the Queen's subjects was in a public place was corrected. It was said⁴ that the essence of the offence of affray 'is that two or more fight together to the terror of

1 [1973] 1 All ER 78, [1972] 3 WLR 961

2 [1957] 1 All ER 577, [1957] 1 QB 552

3 [1965] 3 All ER 587, [1966] AC 591

4 [1965] 3 All ER at 590, [1966] AC at 625

the Queen's subjects'. It is important to remember that the question then being considered was whether an affray could be other than in a public place. It was not necessary, therefore, to consider the succinct point as now certified by the Court of Appeal¹ or to be specific as to what is meant or as to what may be the result if it is said that two people 'fight together'. Nor did the various writers, who often adhered with a certain measure of fidelity to phrases previously hallowed by usage, have occasion to consider the point now certified. It is essential, therefore, now to make it clear that while there may be circumstances warranting a conviction for affray of each one of two people who are fighting together to the terror of the Queen's subjects there may be a conviction of one only of the two if the other, though apparently fighting, is in no sense fighting unlawfully but is endeavouring not to fight or is only fighting in legitimate self-defence. The need to make this clear is shown by the fact that in *R v Sharp*² where there had been fighting between those two accused persons it was said that affray 'is of necessity a joint offence' and further that it was obvious 'that one cannot be convicted and the other acquitted'. Those expressions of opinion were based on the view that if one man attacks another who merely defends himself then there is no fight. It was said that if two men are found fighting in a street one of them must be entitled to say that the other attacked him and that he was only defending himself. 'If he was only defending himself and not attacking that is not a fight and consequently not an affray'. But if two men are seen to be 'fighting in a street' with the result that terror is caused to the Queen's subjects and if it has all come about because one is an aggressor while the other was merely defending himself I see no reason why the aggressor should be immune from conviction for affray. Those who see the fighting may have no means of deciding how it came about or whose fault it was. They may not be able to appreciate that one man is merely defending himself and doing his best to disengage. The terror and alarm caused to them by the fighting will not be any the less because the fact may be that one man of the two was only of necessity engaged in the fighting.

To such effect was the opinion of Lord Parker CJ when in *R v Scarrow*³ he said:

'It may well be that if two people fight and one is acting in self-defence that man cannot be said to be guilty of an affray, but it would appear to this court that there is no reason why his attacker, whether acting alone or jointly with another attacker, should not be held guilty of the affray.'

The view so expressed seems to me to be both reasonable and logical. It was accepted and followed in *R v Summers*⁴. I see no sound basis for the contention that there must be at least two persons fighting unlawfully before there can be an affray. It is said that the disturbance of the peace assumes a new dimension when more than one person is involved. It is doubtless true that if many people are involved there is likely to be greater disturbance than if only two are involved. But if terror is in fact caused by fighting between two people I can see no logical reason why if one was only defending himself and if the fighting was all the fault of the other that very circumstance should relieve such other person of guilt.

I would give affirmative answer to the point of law as certified and, accordingly, would dismiss the appeal

LORD GUEST. My Lords, I concur in the speech of my noble and learned friend, Lord Hailsham of St Marylebone LC.

1 [1973] 1 All ER 78, [1972] 3 WLR 961

2 [1957] 1 All ER at 580, [1957] 1 QB at 561

3 (1968) 52 Cr App Rep at 596

4 (1972) 56 Cr App Rep 604

- a** **LORD CROSS OF CHELSEA.** My Lords, for the reasons given by my noble and learned friends, Lord Hailsham of St Marylebone LC, Lord Reid and Lord Morris of Borth-y-Gest in their speeches which I have had the advantage of reading, I agree that this appeal should be dismissed.

Appeal dismissed.

- b** Solicitors: *Durrant Piesse*, agents for *Freeth, Cartwright & Sketchley*, Nottingham (for the appellant); *Director of Public Prosecutions*.

S A Hatteea Esq Barrister.

c

Hibernian Property Co Ltd v Liverpool Corporation

d

QUEEN'S BENCH DIVISION

CAULFIELD J

30th NOVEMBER 1972, 2nd APRIL 1973

- e** *Landlord and tenant – Repair – Damages for failure to repair – Diminution in value of reversion – Breach of covenant to leave or put premises in state of repair at termination of lease – Damages not recoverable when it is proposed to demolish building – Local authority as lessee – Local authority declaring premises unfit for human habitation – Premises unfit by reason of local authority's breach of covenant to repair – Premises included in slum clearance order – Premises to be demolished under slum clearance order – Whether landlords*
- f** *entitled to damages for breach of covenant to repair – Landlord and Tenant Act 1927, s 18 (1).*

- The defendants, a local authority, were the lessees of a house. The lease included a covenant that the lessees would keep the building in good and tenantable repair and condition and at the end or sooner determination of the lease would leave the building in such repair and condition. The defendants failed to observe the covenant to repair. At the expiry of the lease they held over, remaining in possession. In 1967 the defendants' medical officer of health certified that the house was unfit for human habitation under s 4^a of the Housing Act 1957. In consequence the house was included in a slum clearance area order under s 42^b of the 1957 Act. A notice to treat and a notice of entry were served on 9th January 1970. The evidence showed that if the defendants had complied with the repairing covenants in the lease the premises would not have been declared unfit for human habitation and in consequence the house would either have been excluded from the clearance order or would have had a greatly enhanced value, being habitable and in good repair. In an action by the landlords for damages for breach of covenant the defendants claimed, however, that, by virtue of s 18 (1)^c of the Landlord and Tenant Act 1927, the plaintiffs were not entitled to recover damages for the breach of covenant because it had been shown that at or shortly after the termination of the lease the house would be pulled down.

^a Section 4, so far as material, is set out at p 1120 b and c post

^b Section 42, so far as material, is set out at p 1119 j to p 1120 a post

^c Section 18, so far as material, is set out at p 1120 e and f post

Held – (i) The plaintiffs had suffered damage by reason of the defendants' breach of covenant in that the value of their reversion had been diminished. The relevant provision of s 18 (1) had no application to the facts of the case since (i) it had not been shown that at or shortly after the termination of the lease, the house would be pulled down, and (ii) in any event s 18 (1) contemplated the lessor making a decision to pull down or so structurally alter the premises that any repairs necessary to comply with the lease would have been nugatory; it could not be construed as enabling a municipal corporation by its own failure to comply with the repairing covenant, so that the house had to be demolished, to claim relief in an action for damages for breach of covenant (see p 1121 h to p 1122 a and d, post).

(ii) It followed that the plaintiffs were entitled to damages assessed at the value of the reversion, if the repairing covenant had been complied with, on the date of the notice of entry, less the site value payable on the compulsory purchase (see p 1122 e and g, post).

Notes

For measure of damages for breach of covenant to leave premises in repair, see 23 Halsbury's Laws (3rd Edn) 590, 591, para 1276, and for cases on the subject, see 31 Digest (Repl) 369, 370, 5005-5012.

For the Housing Act 1957, ss 4 and 42, see 16 Halsbury's Statutes (3rd Edn) 117, 150.

For the Landlord and Tenant Act 1927, s 18, see 18 Halsbury's Statutes (3rd Edn) 462.

Case referred to in judgment

Birmingham City Corpn v West Midland Baptist (Trust) Association (Inc) [1969] 3 All ER 172, [1970] AC 874, [1969] 3 WLR 389, HL, Digest (Cont Vol C) 133, 192d.

Action

By a writ issued on 20th October 1971 the plaintiffs, Hibernian Property Co Ltd, brought an action against the defendants, Liverpool Corporation. By their statement of claim the plaintiffs alleged that they were the owners in fee simple of premises in the city of Liverpool consisting of a dwelling-house known as 2 Uhlan Street, originally demised for a period of 75 years from 25th March 1873; by divers assignments the defendants had become entitled to the residue of the lease on 21st December 1908, and, on the expiry of the lease, had held over on the terms of the lease and remained in possession of the premises; under the terms of the lease the lessee covenanted at all times during the term to keep the buildings erected or standing on the premises and their respective appurtenances in good and tenantable repair and condition and at the end or sooner determination of the term to leave the premises in such repair and condition; in breach of that covenant the defendants had failed to keep or leave the premises in such repair or condition by reason whereof the plaintiffs had suffered loss and damage. The particulars alleged were as follows:

'In consequence of the defendants' aforesaid breaches of covenant the premises became unfit for human habitation within the meaning of the Housing Acts 1957-1969 and was so classified by the defendants. The said dwelling-house was accordingly included in a Clearance Area under section 42 of the Housing Act 1957 and was subsequently made the subject of a Compulsory Purchase Order under the said Act. The plaintiffs will accordingly receive compensation only on the basis of site value in the sum of approximately £135. But for the said classification the market value attributable as aforesaid of the said dwelling-house would have been approximately £1600. The plaintiffs accordingly compute their loss under this head at £1465.'

By their defence the defendants denied that they had failed to keep the buildings

- a* in good or tenantable repair or condition or failed to leave them in such repair and denied that they had committed the breaches of covenant alleged or that the plaintiffs had suffered loss or damage. Furthermore the defendants alleged that, if they were or had been in breach of any of the covenants alleged, the plaintiffs' reversion had not been diminished by reason of such breach. The defendants further alleged that the premises would at or shortly after the termination of the tenancy, have
b been pulled down, in whatever state of repair they might have been, and stated that they would rely on the provisions of s 18 (1) of the Landlord and Tenant Act 1927.

J R Peppitt for the plaintiffs.

Gerson Newman for the defendants.

Cur adv vult

- c* 2nd April. **CAULFIELD J** read the following judgment. Subject to a compulsory purchase order to which I shall refer later, the plaintiffs are the owners in fee simple of a piece of land known as 2 Uhlan Street, Liverpool, together with the buildings erected thereon. The said land was, by a lease dated 17th February 1875, demised by the Earl of Sefton to William Knapman for a period of 75 years from 25th March 1873. By divers assignments, the defendants became entitled to the
d residue of the lease on 21st December 1908. On the expiry of the lease by effluxion of time, the defendants held over on the terms thereof and remained in possession. By the lease, William Knapman, for himself and his successors in title, covenanted at all times during the term to keep all the buildings which then were or should thereafter be erected or standing on the demised premises and their respective appurtenances in good and tenantable repair and condition and at the end or sooner
e determination of the said term to leave the same in such good repair and condition.

The plaintiffs allege that the defendants failed to keep the buildings in good or tenantable repair and, further, failed to leave the same in such repair on the determination either of the said term or of the tenancy created by the defendants holding over.

- f* On 14th February 1967 the medical officer of health of the defendants certified under s 42 of the Housing Act 1957 that a certain area of Toxteth Street—clearance area 196—contained houses which were unfit for human habitation. The premises, 2 Uhlan Street, were designated within that area. The necessary formalities followed this notice. A notice to treat and a notice of entry were served on 9th January 1970. The plaintiffs served a schedule of dilapidations on 19th May 1970.

- g* The plaintiffs' case is that the defendants, in breach of the repairing covenants, allowed the premises to reach such a state that they were declared unfit for human habitation. Because of this unfitness, the premises came to be included in the Toxteth Street clearance area. This designation resulted in compensation being restricted to the site value. The plaintiffs contend that if there had been compliance by the defendants with the covenants the house would not have been so designated and would either have remained as a dwelling-house—that is, would have been
h excluded from the clearance area—or, if included, the site and premises would have had an increased value.

I refer to s 42 (1) of the Housing Act 1957. That section is related to s 4. Section 42 (1) reads:

- i* 'Where a local authority, upon consideration of an official representation or other information in their possession, are satisfied as respects any area in their district—(a) that the houses in that area are unfit for human habitation, or are by reason of their bad arrangement, or the narrowness or bad arrangement of the streets, dangerous or injurious to the health of the inhabitants of the area, and that the other buildings, if any, in the area are for a like reason, dangerous or injurious to the health of the said inhabitants; and (b) that the most satisfactory method of dealing with the conditions in the area is the demolition of

all the buildings in the area, the authority shall cause that area to be defined on a map in such manner as to exclude from the area any building which is not unfit for human habitation or dangerous or injurious to health and shall pass a resolution declaring the area so defined to be a clearance area, that is to say, an area to be cleared of all buildings in accordance with the subsequent provisions of this Part of this Act . . .

Section 4 (1) reads:

'In determining for any of the purposes of this Act whether a house is unfit for human habitation, regard shall be had to its condition in respect of the following matters that is to say—(a) repair; (b) stability; (c) freedom from damp; (cc) internal arrangement; (d) natural lighting; (e) ventilation; (f) water supply; (g) drainage and sanitary conveniences; (h) facilities for preparation and cooking of food and for the disposal of waste water; and the house shall be deemed to be unfit for human habitation if and only if it is so far defective in one or more of the said matters that it is not reasonably suitable for occupation in that condition.'

The defendants say that because they intend to demolish the premises this claim is defeated by the terms of s 18 (1) of the Landlord and Tenant Act 1927 which, so far as it is material, reads:

'Damages for a breach of a covenant or agreement to keep or put premises in repair during the currency of a lease, or to leave or put premises in repair at the termination of a lease, whether such covenant or agreement is expressed or implied, and whether general or specific, shall in no case exceed the amount (if any) by which the value of the reversion (whether immediate or not) in the premises is diminished owing to the breach of such covenant or agreement as aforesaid . . .'

Then comes the part of the section most material to this judgment:

' . . . and in particular no damages shall be recovered for a breach of any such covenant or agreement to leave or put premises in repair at the termination of a lease, if it is shown that the premises, in whatever state of repair they might be, would at or shortly after the termination of the tenancy have been or be pulled down, or such structural alterations made therein as would render valueless the repairs covered by the covenant or agreement.'

The defendants therefore say that no sum is payable by the defendants to the plaintiffs, assuming breaches, other than site value. Secondly, say the defendants, on the facts, however well they had maintained the property, it would still have been designated as unfit for human habitation and if that be the true position the plaintiffs are only entitled to an agreed figure of £135—the site value.

I should now, before dealing with the law, find the facts. The defendants called no evidence. The plaintiffs called two very reputable surveyors, Mr Haig and Mr Sutcliffe. I accept their evidence; indeed, I have no option but to accept it. I need not detail the evidence of Mr Haig, who inspected the unoccupied premises in order to prepare a schedule of dilapidations. I accept his opinions based on his inspection. These opinions were that, if repairs had been carried out in accordance with his specification, the premises would have been fit for human habitation, and further that it would have been a business proposition to have restored the property to a habitable state as required by the lease. I accept, too, the opinions of Mr Sutcliffe.

It follows from these findings that, if the defendants had complied with the covenants in the lease, the premises would probably not have been declared unfit for human habitation in respect of any of the matters set out in s 4 of the Housing Act 1957. I bear well in mind the submission of counsel for the defendants on the facts that the matters, freedom from damp, natural lighting and facilities for food storage,

a are not matters within the repairing covenants and, equally, I can conceive the medical officer of health condemning the house as being unfit for human habitation solely on account of these matters.

Mr Haig dealt in precise terms with the question of dampness, lighting and storage. In particular, Mr Haig said that, although the property was built without a damp course and there was some rising dampness, yet it was not substantial and, given adequate maintenance, the absence of a damp course by itself would not have made the property damp. There were other factors, he continued, which contributed to the degree of dampness, such as the non-occupation of the premises, entry of rain due to disrepair and lack of heating. A prudent householder, he said, would reinstate the defective plaster with sound plaster in which there would be included a waterproofing additive at no substantial cost, a precaution commonly and successfully taken in Liverpool.

c The inadequate lighting and food storage matters were also covered by Mr Haig. Further, it may well be that this property could have been included in the clearance area by reason only of the bad arrangement or narrowness of the street, but, no evidence having been called by the defendants, I should not speculate.

d By my fact findings, I am finding that compliance with the covenant to repair would have resulted either in the property being excluded from the clearance area or in its having a greatly enhanced value because it would have been habitable and in good repair.

e There is a further finding of fact necessary. The defendants served a notice to treat on 9th January 1970 and, on the same day, a notice of intention to enter. It seems to me that nothing happened after that date and the defendants continued to pay rent. Indeed, it is agreed that rent has been paid up to the March quarter day of this year, 1973. No attempt was made at valuation, save for the site value, which was made about ten days before the trial.

f In the light of the findings of fact, I set out the problem of law. This property is condemned by the defendants' own medical officer of health as being unfit for human habitation. The defendants, the lessees and while they are holding over as lessees, are, in my judgment, in breach of their covenant to repair. While the defendants are still holding over, the house is condemned as being unfit for human habitation. The property is included in a clearance area. The necessary formalities are followed and the lessees then, under statute, seek to purchase compulsorily.

g I may be stating too simply the situation as I see it, but, in effect, I think that this is a case where a lessee fails to comply with his covenant to repair, there is indeed continuing breach and, while he is still a lessee, he concludes by reason, on my findings of his own breaches of covenant that the house should be demolished and then proceeds to purchase compulsorily, contending that the purchase price to him should only be site value.

h I come now to deal with the law. I think that the proper test is to define the extent to which the value of the lessor's reversion has been diminished. If the lessor intends to demolish the premises, there is no damage to the reversion. The most common example is that of the landlord who intends to demolish at the expiration of a lease and then to re-erect. The second part of s 18 beginning with the words 'in particular' is not expressed to apply to breaches of a repairing covenant during the currency of the lease. In any event, on my findings of fact, I do not think that the second part of s 18 is applicable to the facts of this case.

i My first reason is that, on the facts, it has not been shown that these premises would at or shortly after the termination of the tenancy have been or be pulled down. Secondly, the last part of s 18 (1) certainly, I think, contemplates the lessor making a decision to pull down or so structurally alter the premises that any repairs that would be shown to be necessary to achieve compliance with the covenants in the lease would be rendered nugatory. I do not, however, think that the section is even capable of being construed as enabling a municipal corporation, by its own

failure to comply with covenants to repair so that the house has to be demolished, to contend that the second part gives it relief in a claim for damages for breach of covenant. a

This is my view, whether the plaintiffs' claim is deemed to be made during the currency of the lease or at its termination. If I am wrong, it would, I think, mean that whenever a corporation was a lessee of property with an obligation to keep the property in repair, it could well find it more profitable to fail to comply with its contractual obligations than to discharge them. This, to my mind, does not make sense and I do not think that it is the law. I am fortified in this view because, if the corporation is satisfied that a certain area should be classified as a clearance area under s 42, it has a statutory duty to exclude from that area any building which is not unfit for human habitation. Obviously, in such a case the compensation to the owner of the property is much greater than site value. b

Can it be the law that a local authority can allow property of which it is the lessee to fall into disrepair in breach of its own covenant, then, having gone through the formalities of compulsory purchase, pay only site value? I do not think that it can be. As I see it, the corporation would be rewarding itself for its breach of its own obligation. c

I therefore conclude that there was damage to the reversion in this case and that the plaintiffs are entitled to recover damages. The final question is to determine the date in reference to which the damages fall to be assessed. d

Certain figures have been agreed for two different dates. If the correct date is the date of the notice to treat—namely, 9th January 1970—the figure is £1,600 less the site value of £135. If the date is the date of trial, it is £2,100 less £135. On this question, I was referred to *Birmingham City Corp'n v West Midland Baptist (Trust) Association (Inc)*¹. The plaintiffs argue that nothing happened after the notices to treat and to enter were served. As far as I can see, that is right. Nothing did happen except that the defendants continued to pay rent. e

Counsel for the defendants emphasised that the plaintiffs averred in para 5 of the claim that the defendants' tenancy terminated with the making of the compulsory purchase order. The defendants in their defence so admitted. Counsel for the defendants argued that the proper date was the date of the notice of entry. It is conceded by the plaintiffs that all the formalities that should follow the making of a compulsory purchase order have been properly followed by the defendants. The procedure is that, after the making of a compulsory purchase order, the Minister has to confirm that order. Thereafter, the notice to treat is served. f

In my judgment, the notice to treat does not alter the relationship of the parties, but the notice of entry does. I think that the date on which damages should be assessed is the date of the notice of entry. It so happens that the notice of entry accompanied the notice to treat. The date of the notice of entry is 9th January 1970. Accordingly, on the agreed figures, the plaintiffs are entitled to recover the sum of £1,465 and there will be judgment accordingly. g

I shall award interest at the rate of six per cent from 9th January 1970 and there will be judgment accordingly. The plaintiffs are to have their costs. h

Judgment for the plaintiffs for £1,465.

Solicitors: *Bower, Cotton & Bower*, agents for *Cuff, Roberts & Co*, Liverpool (for the plaintiffs); *Howlett & Clarke, Cree & Co*, agents for *S Holmes, Town Clerk*, Liverpool (for the defendants). j

Janet Harding Barrister.

¹ [1969] 3 All ER 172, [1970] AC 874

Hutton and another v Esher Urban District Council

COURT OF APPEAL, CIVIL DIVISION

RUSSELL, JAMES LJJ AND PLOWMAN J

5th, 6th APRIL 1973

Public health – Sewerage – Provision of public sewers – Local authority – Power to construct sewer ‘in, on or over’ land on giving reasonable notice – Land – Proposal by local authority to construct sewer through site of plaintiffs’ bungalow – Construction of sewer involving demolition of bungalow – Whether ‘land’ including buildings – Whether authority entitled to demolish building in order to construct sewer – Interpretation Act 1889, s 3 – Public Health Act 1936, s 15 (1).

Public health – Sewerage – Provision of public sewers – Public sewer – Meaning – Pipe constructed to receive flood water from river – Pipe also constructed to drain surface water from buildings and road surfaces – Whether pipe a public sewer – Public Health Act 1936, s 15 (1).

A river which ran through an urban district had in the past proved inadequate to carry away surface water with the result that there had been serious flooding. In order to remedy the situation the district council proposed to construct a large pipe designed to receive, at times of high flood, direct from the river a certain amount of its flood water and also to drain surface water from houses, shops, offices etc, as well as from several miles of road, which would otherwise have found its way into the river. The proposed course of the pipe ran directly through the plaintiffs’ bungalow. It was common ground that the construction of the proposed pipe would necessarily involve the demolition of the bungalow. The plaintiffs claimed that the power conferred on the council by s 15 (1) (i) (b)^a of the Public Health Act 1936 to construct a public sewer ‘in, on or over any land not forming part of a street, after giving reasonable notice’, did not include the power to demolish buildings and that, in any event, the proposed pipe was not a ‘public sewer’ within the meaning of s 15 (1) (i).

Held – (i) By virtue of s 3^b of the Interpretation Act 1889 the word ‘land’ in s 15 (1) (i) (b) of the 1936 Act included ‘buildings’ since no intention appeared to the contrary. Accordingly s 15 (1) (i) (b) empowered the council to construct a public sewer in, on or over land, including houses or buildings (see p 1126 e, p 1128 j and p 1130 c e and g, post).

(ii) The power to construct a sewer conferred by s 15 (1) (i) (b) necessarily included a power to do that which was inescapable if the power was to be exercised. Since the demolition of the plaintiffs’ bungalow was inevitable if the sewer was to be constructed on the proposed line, the power to construct the sewer conferred by s 15 (1) (i) (b) included the power to demolish the bungalow (see p 1129 b to d and p 1130 c and e, post).

(iii) The proposed pipe was a ‘public sewer’ within s 15 (1) (i) of the 1936 Act. Even if two of the three proposed functions of the sewer would not themselves qualify the pipe as a public sewer the fact that the third proposed function, i.e. the drainage of surface water from buildings, did so, was sufficient (see p 1129 j and p 1130 a c and e, post).

(iv) It followed therefore that, on complying with the relevant statutory requirements as to notice and compensation, the council had power to demolish the plaintiffs’ bungalow for the purpose of constructing the proposed sewer.

Decision of Megarry J [1972] 3 All ER 504 reversed.

^a Section 15 (1), so far as material, is set out at p 1126 c, post

^b Section 3, so far as material, is set out at p 1126 d, post

Notes

For the provisions of public sewers, see 31 Halsbury's Laws (3rd Edn) 205-207, paras 298, 299. a

For the Interpretation Act 1889, s 3, see 32 Halsbury's Statutes (3rd Edn) 436.

For the Public Health Act 1936, s 15, see 26 Halsbury's Statutes (3rd Edn) 210.

Case referred to in judgments

Roderick v Aston Local Board (1877) 5 Ch D 328, 46 LJCh 802, 36 LT 328, 41 JP 516, CA, 41 Digest (Repl) 24, 182. b

Appeal

By a writ issued on 24th April 1972 the plaintiffs, Marjorie Gaynor Hutton and John Clifford Holtby, brought an action against the Esher Urban District Council ('the council') seeking various declarations and injunctions. By notice of motion dated 24th April 1972 the plaintiffs sought (1) an order that the council, whether by themselves, their servants, agents, contractors or any of them or otherwise howsoever, be restrained by injunction until judgment in the action or further order from entering on the land and premises of the plaintiffs known as 43 Queen's Drive, Thames Ditton, Surrey, pursuant to notices dated 30th March 1972 served on each of the plaintiffs by the council and alleged by the council to be pursuant to s 15 of the Public Health Act 1936; (2) an order that the council, whether by themselves, their servants, agents, contractors or any of them or otherwise howsoever, be restrained by injunction until judgment in the action or further order from pulling down, demolishing or removing the structure or any part thereof of the buildings erected on the land of the plaintiffs at 43 Queen's Drive, Thames Ditton, pursuant to the notices dated 30th March 1972 served on each of the plaintiffs by the council and alleged by the council to be pursuant to s 15 of the Public Health Act 1936. On 8th May 1972, on the parties agreeing to treat the hearing of the motion as the trial of the action and on the court accepting undertakings by the council in lieu of injunctions, Megarry J¹ declared (i) that the council had no power to enter on the plaintiffs' bungalow situate at and known as 43 Queen's Drive, Thames Ditton, pursuant to the notices served by the council on the plaintiffs and (ii) that the council had no power under s 15 of the 1936 Act to pull down, demolish or remove the structure or any part thereof of the buildings erected on the plaintiffs' land. The council appealed. By a respondents' notice the plaintiffs sought to uphold the judgment of Megarry J on the additional ground that what was proposed to be constructed by the council was not a public sewer but a river re-routing scheme or land drainage improvement scheme commonly known as the River Rythe improvement scheme. The facts are set out in the judgment of Russell LJ. c
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Jeremiah Harman QC and Elizabeth Appleby for the council.

A J Balcombe QC and T R F Jennings for the plaintiffs.

RUSSELL LJ. This is an appeal from a decision of Megarry J¹. He decided, on a motion for interlocutory relief, that the appellant district council was not entitled, for the purpose of constructing a public surface water sewer in fulfilment of its duty of providing such public sewers as might be necessary for effectually draining its district, to demolish the plaintiffs' bungalow, under s 15 of the Public Health Act 1936. The duty that I have referred to arises under s 14 of that Act. h

The River Rythe flows in a generally northern direction under the Kingston by-pass, near where it joins the Esher-Portsmouth road, to join the River Thames a short distance east of the plaintiffs' bungalow which is bordered by the Thames. i

a Due in large measure no doubt to the increase in built-over areas, and in part I dare say to the increase in road surface areas in the district, the river has proved inadequate in the past to carry away the surface water to the Thames and there has in the past been quite serious flooding. Now the district council wants to try to remedy this. Their proposal involves the construction of a large pipe which is designed in a sense to achieve two things: first of all (and I do not put them in order of importance), at times of high flood, to receive direct from the River Rythe a certain amount of its flood water and also to receive from built-up areas and street areas surface water which would otherwise have found its way into the river. The scheme might be described as the provision of a second water route in relief of the river from two points of view, one in times of flood taking water direct from the river, and the other preventing surface water, which would otherwise contribute to the floods, reaching the river.

b Now, the council, acting on the advice of their experts, decided on the layout as being what is (in, I believe, modern jargon) the best on a cost-benefit analysis. Unfortunately, that proposed layout brings the proposed sewer at the end under a street which points substantially straight at the plaintiffs' bungalow and thereafter, for its few remaining yards, straight through the plaintiffs' bungalow to the outfall proposed in the Thames at the plaintiffs' river frontage. It is common ground that if this operation is carried out it necessarily involves, having regard to the size of the pipe and the size of the bungalow, the demolition of the plaintiffs' bungalow.

c Now, I should remark at once that if this is permissible, the plaintiffs will be entitled, under s 278 of the Public Health Act 1936, to full compensation for any damage or loss sustained by them. The plaintiffs will not lose financially. If the course that is proposed under s 15 is not permissible, then if the district council want to carry through this matter, it would seem that it would be necessary for them to seek a compulsory purchase order, involving no doubt a public inquiry. In truth, that is really what the plaintiffs are aiming at. They think that the route chosen is not the best one, in any sense of the word 'best', and they wish to seek to persuade an inspector or a Ministry of that fact, having failed so to persuade the council. Whether they are right in their view as to what is the best, or whether the council is right in its view as to what is the best, is of course not the concern of this court on this appeal.

d Now, initially, the council described the scheme as a scheme to re-route the River Rythe, or a River Rythe improvement scheme; I forget the exact phrase. The council hoped that, if they carried it through as a land drainage project, they would get a government grant of up to 50 per cent of the cost, a cost somewhere between half a million and a million pounds. I state that broad bracket because I cannot at the moment remember the figure. But, unfortunately, the central government refused this grant, and the local authority—the council—were then faced with this situation, if they wanted to carry through the operation. If they purported to do it exercising what might be conveniently labelled 'land drainage powers', they could only borrow money for it within a permitted and limited ceiling of borrowing for a group of projects within what is known as the locally determined sector. They did not want to do this, because it would restrict borrowing powers for other projects within that sector, and indeed we were told that the necessary borrowing would have been impossible, in terms of quantum, within the ceiling for that sector. But if special borrowing approval could be obtained from the government for the scheme as a sewerage scheme within the Public Health Act 1936, that would be within what is known as the key sector, and the problem of the ceiling on borrowing would be solved. That approval they have obtained. That is the explanation for the change in the correspondence from the description of the scheme as a re-routing of the River Rythe or River Rythe improvement scheme, and which was a label designed no doubt particularly to attract a grant as a drainage project, to a description as a new sewerage scheme, which was a change dating from the time when

the central government grant was refused. This seems to me to be quite a reasonable explanation of the course of events. I can see nothing sinister in the mere fact that, had the matter gone through as a drainage project, to the great saving of the ratepayer if the grant was forthcoming, there would have been a compulsory purchase order and a public inquiry, whereas if it goes through (and it is exactly the same scheme in point of works) as a sewerage scheme and s 15 of the 1936 Act allows demolition of the bungalow, there will be no public inquiry, though, of course, as I have said, full compensation.

I should turn directly, I think, to s 15 (1) of the Public Health Act 1936. That provides, so far as at the moment relevant:

'A local authority may within their district ... (i) construct a public sewer—
(a) in, under or over any street, or under any cellar or vault below any street ...
and (b) in, on or over any land not forming part of a street, after giving reasonable notice to every owner and occupier of that land ...'

I think at the moment I need read no more.

The other statutory provision which at the moment I should refer to is s 3 of the Interpretation Act 1889 which provides:

'In every Act passed after the year one thousand eight hundred and fifty, whether before or after the commencement of this Act, the following expressions shall, unless the contrary intention appears, have the meanings hereby respectively assigned to them; namely ... The expression "land" shall include messuages, tenements, and hereditaments, houses, and buildings of any tenure ...'

Now, the first question is: does s 3 of the 1889 Act, which I have just read, apply to s 15 (1) (i) (b) of the 1936 Act? If it does apply, then that paragraph provides that the council may construct a public sewer in, on or over any land, including houses or buildings. The second question, if it does so apply, is this: if there be in terms, by the introduction of the 1889 Act, a power in those words, it is contended for the plaintiffs that the power to construct does not confer a power to damage, let alone wholly demolish, any house or building. It was alternatively argued that if such a power to demolish would be involved in the application of the 1889 Act, then that is itself good ground for holding that the 1889 Act does not apply. The third question for debate was that in any event it was said on behalf of the plaintiffs, on the facts, that this pipe, if constructed as proposed, will not be of the character of a public sewer.

Now, on the first question, whether the Interpretation Act 1889 applies, the learned judge thought that the contents of s 15 showed a contrary intention. He said¹:

'If the word "land" in the last category is to be expanded in accordance with the Interpretation Act 1889, s 3, it must include buildings, so that Parliament is contemplating not merely bare, unbuilt-on land which does not form "part of a street", but also buildings (including "messuages", "tenements" and "houses") which do not form "part of a street"'. The contrast, it seems, is with buildings which do form part of a street. If a building is part of a street, it must, as such, be included under sub-para (a), not requiring reasonable notice; if a building is not part of a street, it must, as such, be included under sub-para (b), requiring reasonable notice. Now I find the concept of houses and other buildings which form part of a street somewhat difficult. I also find some difficulty in perceiving why Parliament should wish to distinguish between the two types of building as regards the giving of notice. These difficulties arise only if "land" is construed as including buildings: they vanish if it does not.'

¹ [1972] 3 All ER at 510, [1972] Ch at 523

a I do not, with respect, find that reasoning sound. There seems to me no need to embody any concept of buildings forming part of a street. There does not seem to me to be any need to refer the phrase 'not forming part of a street' to any part of the extended phrase, 'land including buildings and houses', other than bare land.

b Now, it was urged on us very strongly that, both under this and under what I have referred to as the second question, the demolition point, it was wholly improbable that Parliament should have authorised a local authority, with no greater requirement than a reasonable notice, to damage (let alone demolish) a building for this purpose. But I am bound to say it appears to me that it is quite clearly something which was previously authorised by the Public Health Act 1875. Section 16 of that Act provided:

c 'Any local authority may carry any sewer through across or under [I leave out turnpike road] any street ... or under any cellar or vault which may be under the pavement or carriageway of any street, and, after giving reasonable notice in writing to the owner or occupier (if on the report of the surveyor it appears necessary), into through or under any lands whatsoever within their district ...'

d In s 4 of that Act we have this definition which applies to land and also to the word 'premises': "'Lands" and Premises" [both words being in inverted commas] include messuages buildings lands easements and hereditaments of any tenure'.

e It appears to me that it is inescapable that in the 1875 Act what is proposed to be done, at least to the extent of being undeterred by the presence of a building, would have been perfectly open to the local authority in (say) 1935, before the 1936 Act was passed. It was a view that was expressed, albeit, obiter in *Roderick v Aston Local Board*¹. That was a case of which the headnote reads²:

f 'By the *Public Health Act*, 1875, s. 16, a local authority is empowered to carry any sewer "into, through, or under" any lands within its district, and the Act provides for compensation to all persons sustaining damage by reason of the exercise of the powers of the Act in relation to any matters as to which they are not themselves in default. A local board under this Act proceeded to carry a sewer across the Plaintiff's pleasure grounds on such a level that the bottom of the sewer would be only slightly below the surface, and a permanent embankment about six feet high would be made:—*Held* ... that they were authorized so to do, for that the Act did not confine them to carrying a sewer underground.'

g Now, Sir George Jessel MR said³:

'The only question that I have to decide is, whether, under the powers of the *Public Health Act*, the Defendants, the *Aston Local Board*, have a right to carry a sewer partly under and partly above ground.'

h He then read s 16 and added these words: 'The word "lands," according to the interpretation clause includes buildings.' That, of course, was an obiter dictum. When it came to the Court of Appeal, James LJ affirmed the decision of Sir George Jessel MR. He said⁴:

i 'It is said that great injustice may be done by this construction of the Act; but I think that the compensation clause will be sufficient to give adequate compensation (and there does seem a very strong case for compensation) for

1 (1877) 5 Ch D 328

2 (1877) 5 Ch D at 328

3 (1877) 5 Ch D at 329

4 (1877) 5 Ch D at 334

any damage which may be sustained. It may be said that it is very hard for a piece of a man's land to be taken away without his consent and without the Defendants buying it. On the other hand, if these local authorities were obliged to buy every property with which they required to interfere, it might become impossible to carry out the requisite sanitary arrangements for the district.' a

Bramwell JA was of the same opinion; and Amphlett JA said¹: b

'I feel quite as strongly as [counsel] that there might be cases of extreme hardship under this Act, according to the construction put upon it by the Master of the Rolls. A gentleman's residence might be spoiled by taking a sewer above ground over the centre of his garden or through a part of his house. But I think we cannot vary the plain language of the Legislature by any consideration of such circumstances as those; and perhaps it is a sufficient answer, as regards the hardship, to say that if anything was done vexatiously very heavy damages would be given. But however that may be, I find in the 16th section words that I cannot get over, and to which we are bound to give effect.' c

I observe that those two references to buildings are, of course, obiter; but in a sense it was being said: 'Well, there is nothing so surprising about having your garden ruined if you can have your house ruined too.' d

Another matter to which I should advert on the subject of that case is that it was argued there, as it has been argued here in relation to s 306 of the 1936 Act, that there is good ground for not reading this power into s 15 of the 1936 Act, in that it was open to the local authority to acquire the plaintiffs' property by compulsory purchase. The same argument was advanced in the case to which I have just referred, and failed—and in my view rightly failed—because there is no particular need for the local authority to acquire this land, if all they want to do at the end of it is to lay a sewer through under the surface. The rest of it is no use to them. Indeed, it is suggested that probably, if the plaintiffs fail in this appeal and the bungalow has to be demolished, they will be compensated under the relevant section on an equivalent reinstatement basis and would be permitted by the local authority to rebuild over the sewer, which of course is a perfectly feasible thing. e

So, in my judgment, on the first question, it is not right to arrive at the conclusion that a contrary intention appears, within the meaning of the 1889 Act, in s 15. I see no reason for supposing that it was intended in 1936—although it is not only a consolidating Act but also partly an amending Act—to depart from what in my judgment was clearly the law up to 1935. f

It was pointed out that under the 1875 Act there was, so to speak a double definition because the Interpretation Act 1850 had a provision about the meaning of 'land' in public statutes comparable with that in 1889. But I think it is attributing far too great importance to a minor change in definition in the Public Health Act to say that thereby it was meant to exclude the applicability of the Interpretation Act 1889. g

It was further argued that, even if the 1875 Act would have permitted what is now proposed, there has been a change of language in the relevant sections, the 1875 Act using the phrase 'carry into, through or under' and the 1936 Act containing the phrase 'construct in, on or over'. I cannot myself see that there is any relevant significance in that change of language. It seems to me that if you carry a sewer into or through a house, you construct the sewer in the house; so that I cannot myself attach any significance to that change of language. h

I therefore conclude that the Interpretation Act 1889, s 3, is applicable; and I turn to the next point in argument: that even so, it does not entitle the local authority, in the construction of the sewer, to do any damage to any building, let alone damage j

¹ (1877) 5 Ch D at 335

a amounting to demolition of the building. Below, it was argued on behalf of the council that in some sense this was a power to be regarded as ancillary to the power to construct the sewer. It was not so said in this court, and it does not seem to me that that is really the way to put it. It certainly led Megarry J¹ into saying in effect: 'Really, it is a bit much to describe the demolition of a house as something which is ancillary to the laying or construction of the sewer.' It seems to me that it is not that, and it is not an implied power. If there is a power, as I think, on the construction of the 1936 Act under s 15, to construct a sewer in the line that is proposed by the local authority in this case, and if the pipe and the bungalow are of such respective sizes that the construction of the sewer on that line necessarily involves demolition, then they must have, as it seems to me, as part of the power to construct, that which is inescapable if they do construct, which in this case it is common ground is unfortunately the demolition of the bungalow. I do not regard that as an implied power. I do not regard that as an ancillary power. It is just part and parcel of the power to construct.

Accordingly, for my part, I do not see how it can be successfully argued that somehow there is to be no ability in a local authority to damage any building, however small, though every ability to damage any garden, however big. There does not seem to be any logical distinction between the two propositions. I would conclude that the Interpretation Act 1889 applies and is necessarily involved in the reading of s 15; that if it is unavoidable, as it is, in the carrying out of this scheme, then there must follow the right to demolish, either in whole or in part, to the extent that is necessary to carry through the construction, the bungalow.

Then the final point taken for the plaintiffs was that anyway this is not a public sewer. As I understand, at the end the proposition was this, that insofar as the proposed pipe will not carry foul sewage, then for the purpose of the description of a public sewer it can only be that insofar as it provides for surface water drainage from buildings, and not from roads, and not insofar as it is designed to take water direct from the River Rythe.

Now, the first part of this project, the part which concerns the plaintiffs, starts on a map exhibited to an affidavit of Mr Harris, a surveyor, at point B. At that point B it is proposed that in times of flood (which, of course, are relatively rare) part of the River Rythe will be diverted into this pipe system, ultimately finding its way out along the pipe into the Thames. But, not only in times of flood but at all times, the rest of the length from B to C will take in the surface water drainage not only of some five miles of road, which would not qualify it in the argument for the title of 'public sewer', but also the surface water drainage from, according to the evidence, some 750 existing houses and also from future houses to be built in the area, and will also immediately provide for the surface water drainage from an unstated number of shops, offices, etc.

Now, it is argued by counsel for the plaintiffs that, that being the situation, the proposed pipe cannot be dignified (if that is the right word) by the name 'public sewer'; it does not qualify because two out of its three functions are not those which qualify it for the name. This is the argument, and I am prepared to assume that two out of the three functions are not such as would qualify it for the title of 'public sewer'. But I look at it in the other way. Undoubtedly the function of draining this very large number of houses, shops, offices, etc, of their surface drainage does or would qualify it for the title of 'public sewer', and the fact that it also for convenience will absorb drainage from several miles of road and also for convenience will take some water directly out of the river in times of flood, cannot really sensibly be said to deprive it of that title. This is a point which below was not pressed, because, as was explained below, it was a point which perhaps is not an easy one and was not a very suitable one to argue on an interlocutory motion. I should have said,

of course, at an early stage that after the judge had heard the matter below¹, the parties consented to treat the motion as the trial of the action. I agree with the plaintiffs that it was not an easy point to take on an interlocutory motion. I would go further. I do not think it was a very easy point to take on the trial of the action or on the appeal. I do not think it is a sound point. It seems to me, quite plainly, that what is proposed is the construction of a public sewer.

I hope I have not dealt too cavalierly with the points that have been taken. I summarise: it seems to me that there is no ground for excluding the applicability of the Interpretation Act 1889, s 3. Once it is applicable, I can see no ground for drawing a distinction between the ability to damage a man's garden or his tennis court and an ability to damage a building on the man's land. As I put it (I hope not too flippantly) in the course of argument, the argument which says that you can ruin the 18th green but you must not touch the pro's shop does not seem to me to be logical. And, the final point, it is a public sewer.

For these reasons, I would allow the appeal and set aside the judgment below.

JAMES LJ. I also would allow the appeal. I agree with the judgment of Russell LJ on each of the three issues which the plaintiffs have raised. I would only add this: understandably, much of the argument for the plaintiffs has referred to the exercise of this power being possibly a gross interference with individual rights of ownership and occupation of land and buildings. There is the other side of the coin as well to be remembered in such a case as this. That which the council seeks to do is pursuant to a statutory duty that is laid on it; and if the power does exist in the statute—and I have no doubt myself that it does—it is important that the local authority is not restrained from the exercise of the power which it is its duty to exercise.

PLOWMAN J. I also agree; and, since we are differing from the learned judge, perhaps I may add a few words of my own. If his decision was right, then it seems to me that the Public Health Act 1936 has radically altered the law. Before the 1936 Act, it is, I think reasonably plain that the council could have done that which they are proposing to do in the present case, as a result of s 16 of the Public Health Act 1875, taken in conjunction with the definition of 'lands' in s 4 of that Act. This is borne out by the observations, it is true only obiter, of the Court of Appeal in *Roderick v Aston Local Board*² to which Russell LJ has referred.

Now, s 16 of the 1875 Act was repealed by the 1936 Act, and s 15 has taken its place; and the question is: does s 15 alter the law? If the Interpretation Act 1889 applies, it clearly does not alter the law, because the definition of 'lands' as including buildings is brought in. Prima facie, the Interpretation Act does apply unless, as the Act says, the contrary intention appears. Speaking for myself, I can see no contrary intention in s 15, and I conclude that the Interpretation Act does apply to it.

I think that to some extent that conclusion is reinforced by the fact that the 1936 Act is a consolidating Act, although it is true that it is said to be 'An Act to consolidate with amendments certain enactments relating to public health'. But I have seen nothing in the 1936 Act to suggest that Parliament was intending to amend the law in the particular respect.

I agree that this appeal succeeds.

Appeal allowed. Order of Megarry J set aside; undertakings discharged. Leave to appeal to the House of Lords granted.

Solicitors: *Sharpe, Pritchard & Co*, agents for *A E Gilbert, The Clerk*, Esher Urban District Council; *Prentis, Seagrove & Co*, agents for *Chas D Mason*, Surbiton (for the plaintiffs).

S A Hatteea Esq Barrister.

a Stiffel v Industrial Dwelling Society Ltd and another

COURT OF APPEAL, CIVIL DIVISION

EDMUND DAVIES, BUCKLEY AND SCARMAN LJJ

b 1ST MAY 1973

County court – Transfer of action – Transfer to High Court – Plaintiff's right to transfer action in contract or tort – Application when reasonable ground for supposing amount of damages recoverable to be in excess of amount recoverable in county court – Discretion of judge – Judge bound to order transfer when reasonable expectation that damages would exceed county court limit established – County Courts Act 1959, s 43.

c On an application by a plaintiff under s 43^a of the County Courts Act 1959 for an order to transfer an action from a county court to the High Court, the plaintiff must establish clearly that there is a reasonable expectation that damages in excess of the county court's jurisdiction will be awarded if the action is transferred to the High Court. Once the judge is satisfied that there is such a reasonable expectation he has no discretion in the matter; he must order the action to be transferred. In particular the judge is not entitled, in deciding whether to make the order, to take into account the fact that, for good or bad reasons, the plaintiff originally chose the county court as his forum (see p 1132 e and g, p 1133 e and h and p 1134 b c e to g and j to p 1135 b, post).

e Notes

For transfer of actions in tort from the county court to the High Court, see 9 Halsbury's Laws (3rd Edn) 243, para 558.

For the County Courts Act 1959, s 43, see 7 Halsbury's Statutes (3rd Edn) 330.

f Interlocutory appeal

The plaintiff, Margaret Stiffel, started proceedings in the Shoreditch County Court against the defendants, Industrial Dwelling Society Ltd and C H James, claiming damages for negligence. On 15th February 1973 she applied for an order transferring the action to the High Court. His Honour Judge Willis refused the application and the plaintiff appealed. The facts are set out in the judgment of Edmund Davies LJ.

g Diana Cotton for the plaintiff.

J Mullick for the first defendants.

S C Desch for the second defendant.

h EDMUND DAVIES LJ. This is the plaintiff's appeal from an order of his Honour Judge Willis made at the Shoreditch County Court on 15th February 1973. The plaintiff, a spinster lady in her late sixties, who had sustained an accident on 13th April 1970, started proceedings in the county court for negligence against both defendants. The claim was launched by particulars dated 7th December 1971 and she then limited her damages to the maximum amount recoverable in the county court, namely, £750. Thereafter certain medical reports were furnished to her solicitors and to the solicitors acting for the other side. As a result of the material in that way becoming available to the plaintiff's legal advisers, on 15th February 1973 she applied to the learned county court judge under s 43 of the County Courts Act 1959

a Section 43 is set out at p 1132 c and d, post

that the action be transferred to the High Court. The learned judge refused that application and it is from that refusal that the plaintiff now appeals. a

It may be convenient at this stage to read the short note of the judgment of the learned county court judge. He said:

‘Having read the medical reports of Mr Stewart Prince for the plaintiff and Mr Fermont for the defendants I am entitled to exercise my own discretion as to the value of this claim. The plaintiff has chosen her forum and should not now be allowed to move from it. I therefore dismiss this application.’ b

Section 43 of the Act is entitled ‘Plaintiff’s right to transfer action of contract or tort from county court to High Court so as to increase his claim’. It provides as follows:

‘(1) Where there is commenced in the county court an action founded on contract or tort wherein the plaintiff claims damages, the plaintiff may at any time apply to the judge for an order to transfer the action to the High Court, on the ground that there is reasonable ground for supposing the amount recoverable in respect of his claim to be in excess of the amount recoverable in the action in the county court. c

‘(2) If, on any such application, the judge is satisfied that there is reasonable ground as aforesaid, the judge shall make an order that the action be transferred to the High Court.’ d

I do not find this section, which appears not to have been the subject-matter of any reported decision, wholly easy to interpret. On two points, however, I am satisfied. First, no exercise of discretion is involved, for if the ‘reasonable ground’ referred to is established, the judge *must* order a transfer. Second, if the learned judge was of the opinion that the question whether the plaintiff should be allowed to transfer her action to the High Court turned in any respect on the fact that she had originally launched her proceedings in the county court, he misdirected himself. Section 43 postulates that proceedings have been commenced in the county court and its sole *raison d’être* is to deal with that situation. A person may start proceedings in the county court for a variety of reasons, some good originally but no longer good, or maybe for reasons which were never adequate. But where the plaintiff’s right to have an action transferred from the county court under s 43 is under consideration, the judge must reject from his mind the fact that the plaintiff originally launched proceedings in the county court. The sole task he has to perform (and I do not think the wording of the section makes the performance of that task any easier) is that of deciding whether there is reasonable ground for supposing that the amount recoverable in respect of the claim is in excess of the amount recoverable in an action in the county court. e

The medical reports now available are conflicting. There are two reports of Dr Prince furnished to the plaintiff’s advisers on 1st December 1971 and 18th July 1972, and by a letter of 15th November 1972 he added that he thought the plaintiff’s condition was permanent. The incident which gave rise to the action may be described in a couple of sentences. When some plumbing work was being done by the second defendant, acting on behalf of the first defendants, in the flat occupied by the plaintiff some caustic material spurted out of one of the pipes in the flat and inflicted on the plaintiff what were described as superficial first-degree burns. In my judgment, the reports furnished by Dr Prince, if they stood alone, afford grounds for thinking that the plaintiff had a reasonable expectation that (but for the limitation on the amount which the county court could award) she would recover more than £750. The report of Dr Fermont, furnished to the defendants, is less favourable to her than those of Dr Prince; but I am not persuaded that even that report establishes beyond any doubt that (if it stood alone) the plaintiff would be bound to recover f

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a less than £750. I say that because, while expressing the view that the lady's physical condition rapidly cleared up following the accident, Dr Fermont said there was a certain amount of nervous tension induced by the accident still enduring at the time of his report of 25th February 1972. He ended by saying:

'I therefore feel that she will be fully restored to her pre-accident state of health in the course of the next 4-6 months with no residual ill-effects remaining.'

b In other words he was saying that she would not be wholly clear of all consequences of the accident under about two years and a couple of months after the accident, which is a substantial period of time. Having regard to the sort of awards which are current in these days for personal injuries, I therefore cannot say that I am convinced that if Dr Fermont's evidence were on its own it would establish that the plaintiff
c had no reasonable expectation of recovering more than £750, though I would be somewhat surprised if she did.

On the other hand, Dr Prince's reports induce in me the expectation, which I hope is a reasonable one, that if his testimony received complete acceptance by the court of trial the plaintiff would recover more than £750. Counsel for the plaintiff suggested that the amount recovered might be as much as £1,500, but I deliberately abstain
d from expressing any view about the latter. Indeed, it would be most undesirable in this interlocutory appeal for me to do anything of the kind.

What is meant by the words in s 43 (1) of the Act—

'... on the ground that there is reasonable ground for supposing the amount recoverable in respect of his claim to be in excess of the amount recoverable in the action in the county court'

e They render it incumbent on the plaintiff to establish with clarity that she has brought herself within the subsection. Unless she does that, unless she convinces this court that there are reasonable grounds for supposing the amount recoverable to be in excess of £750, she must fail. Then what is meant by the word 'supposing'?
f It does not, as I think, involve the process of *deciding*. The judge cannot embark on the process of deciding between rival and conflicting medical reports furnished by potential witnesses whom he has not seen and whose evidence he has not heard. Of course, if the reports point all one way, that is to say, without conflicting as between themselves, and they indicate clearly that the claim is not worth more than £750, or if they establish that it is clearly worth more than £750, then no difficulty arises: in the former case the application for transfer should be dismissed, in the latter case
g it should succeed. The difficulty arises in a case such as this—it is one which I have not met before—where there are conflicting reports, some pointing towards an award in excess of £750 and others in the opposite direction. The learned judge cannot, as I have said, be expected (nor would it be proper for him to attempt) to decide which of those reports would be likely to find favour with the court of trial. But there must be reasonable grounds for supposing the amount recoverable to be in excess of that
h recoverable in the action in the county court. I think that this means and can mean no more than that, when the county court judge is confronted with an application under s 43, he must ask whether the plaintiff has clearly demonstrated that there is a reasonable expectation that if the action were transferred to the High Court the damages awarded to her would turn out to be more than £750.

i The Act recognises that it would be manifestly unjust that a person entitled to recover a sum in excess of that which can be awarded under the county court jurisdiction should be denied proper compensation because, as it happens, that is the forum that she has chosen. The Act provides an escape from that situation of injustice, provided always that the plaintiff establishes reasonable grounds for the transfer. I think that in the present case reasonable ground was established. Notwithstanding the conflicting views expressed by Dr Fermont, the reports of Dr Prince pointed with

sufficient clarity to the view that this plaintiff had a reasonable expectation of recovering more than £750. Accordingly, I would be for allowing this appeal and making the order of transfer sought by the plaintiff. a

BUCKLEY LJ. I agree. If the learned judge intended, by the language which is used in the very short note of his judgment which we have, to suggest that he was exercising a discretionary jurisdiction under s 43 I think with due respect to him that he was mistaken. The duty cast on the judge by an application under the section for transfer of an action from the county court to the High Court is first to decide whether he is or is not satisfied on the material before him that there is reasonable ground for supposing that the amount that the plaintiff will recover will be in excess of the limits of the county court's jurisdiction. Once he is satisfied one way or the other the course which he must take is not a discretionary one but is clear under the section. If he is satisfied that there is no reasonable ground for supposing that the claim will be in excess of the limit of the county court's jurisdiction, then he will leave the action to be tried in the county court: but if he is satisfied that there is reasonable ground for supposing that it will be in excess of the limit of the county court's jurisdiction he is bound to transfer the action into the High Court. That is made plain by the use of the word 'shall' in sub-s (2). b
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The learned judge also apparently took the view that the plaintiff's choice of the county court as the forum in which she would bring her action was one relevant consideration in deciding whether or not to order a transfer. In my judgment the only effect of the fact that the plaintiff has chosen the county court as the forum in which to initiate her action is that the burden is thrown on her if she wishes to get it transferred to the High Court of making out a case under s 43. Ex hypothesi every applicant under s 43 must have chosen the county court as the court in which he or she should initiate his or her action. As Edmund Davies LJ has said, that may have been a choice made for good reason at the time when it was made, but matters may have come to light or may have come to the fore since the plaint was issued which suggest that it would be right to transfer the case into the High Court, or the choice may have been an ill-advised one in the first place, in which case the plaintiff ought not to be hampered by that unhappy choice from getting his or her proceedings into the court in which they can be properly tried and disposed of. e
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The policy underlying the section, as I ventured to suggest during argument, appears to me to be to ensure that an action is tried in a jurisdiction in which the plaintiff will be able to recover whatever is the full measure of the damages to which he is entitled without being restricted by a statutory limit on the jurisdiction of the court in which the proceedings are tried. If on the material before the court when the application is brought before it under s 43 the court is satisfied that there is a reasonable expectation that the plaintiff will at the trial recover more than the amount recoverable in the county court, it is right that the action should be transferred into the High Court where that limit will not inhibit the plaintiff's ability to recover what is his due. The difficulty arises really on the language of s 43 (1) and particularly on the words, 'on the ground that there is reasonable ground for supposing the amount recoverable in respect of his claim to be in excess of the amount recoverable in the action in the county court'. Emphasis has naturally been placed on the use of the words 'to be'. The subsection does not use the language 'on the ground that there is reasonable ground for supposing that the amount recoverable may be', but says 'to be'. Reading the language of the phrase as a whole, in my judgment it is clear that the court before whom the application comes does not have to be satisfied to the degree of certainty that the plaintiff will recover more than the limit of the county court jurisdiction. The court has to be satisfied that there is a reasonable expectation that the plaintiff will recover more than that. That is I think really indistinguishable from saying that the amount he will recover may turn out g
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to be more; but it has got to be a reasonable expectation, a real one and not a fanciful one. It may be that the probable or possible excess has got to be sufficiently substantial for the court to say that it is really satisfied that there is this likelihood. On the facts in the present case, for the reasons that Edmund Davies LJ has elaborated in his judgment, I think this is a case which should have been transferred into the High Court and accordingly I think the appeal should be allowed.

SCARMAN LJ. I agree.

Appeal allowed.

Solicitors: *T V Edwards & Co* (for the plaintiff); *Beddington, Hughes & Hobart* (for the first defendants); *Hewitt, Woollacott & Chown* (for the second defendant).

Ilyas Khan Esq Barrister.

Practice Direction

SUPREME COURT TAXING OFFICE

Costs – Taxation – Counsel’s fees – Voucher – Receipt – Signature of counsel – RSC Ord 62, App 2, Part X, para 2.

RSC Ord 62, App 2, Part X, para 2, requires receipts for counsel's fees signed by counsel to be produced before the certificate of taxation is signed. The practice for many years has been to require the receipt to be signed by counsel to whom the fees relate. This practice is now causing considerable delay, particularly where counsel is absent overseas or for some other reason. Accordingly, in future, where for good reason it is not possible to obtain counsel's signature immediately, the signature of the head of chambers or his deputy designated as such may be accepted as a sufficient receipt for the purposes of the rule when submitted in the following form, namely:

'Received the sum of £ in settlement of the above fees.

[Signature]

HEAD OF CHAMBERS (DEPUTY)

for and on behalf of Mr

GRAHAM J GRAHAM-GREEN
Chief Master.

5th July 1973

Re Lowe's Will Trusts More and another v Attorney-General

COURT OF APPEAL, CIVIL DIVISION

RUSSELL, BUCKLEY AND ORR LJJ

26th, 27th FEBRUARY, 27th MARCH 1973

Administration of estates – Interest of Crown – Order for sale – Power of court – Application of Attorney-General – Power to order sale in any proceedings in High Court when it appears to court that Crown entitled to estate or interest in hereditament – Scope of power – Escheat to Crown – Freehold estate devised by testator in 1851 – Estate subject to lease – Rents collected by solicitors – Solicitors unable to trace any person claiming to be beneficially entitled to freehold reversion – Solicitors seeking directions of High Court as to disposal of accumulated rents – Crown appearing to have interest by escheat – Title of Crown not established for purpose of proceedings – Whether court having power to order sale – Intestates Estates Act 1884, s 5.

The testator died in 1851 and by his will devised certain premises to his sons and their issue. A firm of brewers were subsequently granted a tenancy of the property which they had occupied ever since. From 1903 a firm of solicitors had collected the rent. The solicitors had no record of any title deeds and no one had ever appeared to claim the rents. Accordingly the partners of the firm as trustees issued an originating summons, joining the Attorney-General as defendant, seeking the directions of the court. An enquiry was ordered; the enquiry was conducted in chambers and, following advertisements, the master certified that 'No person has come in and established before me a claim to be beneficially entitled in priority to the Crown' to the rents. In the same proceedings, and before the judge had considered the adequacy of the enquiry, the Attorney-General applied for an order for the sale of the property under s 5^a of the Intestates Estates Act 1884 on the ground that 'it appears to the court that Her Majesty is entitled' to the property. The judge held that s 5 only applied to proceedings where the Crown's title was established for the purposes of and in the course of the action and not to proceedings where the ascertainment of the title of the Crown was purely incidental and outside the scope of any relief claimed by the plaintiff. Accordingly he dismissed the summons and the Attorney-General appealed.

Held – It was sufficient for the purposes of s 5 that the proceedings were such as to involve a conclusion as to the Crown's title to the realty either directly, or as a step towards or as a consequence of the outcome of the proceedings. The same matters which properly would lead to a conclusion that the Crown was entitled to the accumulated rents would lead to the same conclusion in relation to the Crown's entitlement to the realty by escheat. Consequently, as a matter of procedure, the proceedings were such as would enable an application such as that made by the Attorney-General to be entertained. Accordingly the appeal would be allowed and the case remitted to the judge to decide whether it appeared to him that the Crown was entitled to the property by escheat and, if so, whether to exercise the power under s 5 to order a sale (see p 1139 g and h and p 1140 a and b, post).

Per Curiam. If the power of sale were exercised and a claimant appeared after execution of the sale it would be open to him to recover the proceeds of sale from the Crown by proceedings under the Crown Proceedings Act 1947 provided the claim was not statute-barred (see p 1140 e to g, post).

^a Section 5 is set out at p 1138 h to p 1139 a, post

Notes

- a** For the power of the court to order the sale of the Crown's interest in the estate of a deceased person, see 7 Halsbury's Laws (3rd Edn) 496, para 1056.

The Intestates Estates Act 1884 was repealed in relation to deaths occurring after 31st December 1925 by the Administration of Estates Act 1925, ss 56, 58 (2), Sch 2, Part I.

b Cases referred to in judgment

Benjamin, Re, Neville v Benjamin [1902] 1 Ch 723, 71 LJCh 319, 86 LT 387, 22 Digest (Repl) 163, 1483.

Ministry of Health v Simpson [1950] 2 All ER 1137, [1951] AC 251, HL, 47 Digest (Repl) 535, 4843.

- c** *Pratt's Trusts, Re* (1886) 55 LT 313, 34 WR 757, 47 Digest (Repl) 215, 1795.

Appeal

This was an appeal by the Attorney-General, the defendant in proceedings commenced by originating summons by the plaintiffs, Richard Westray More and Roland Knight, against an order of Goulding J dated 7th November 1972 whereby he dismissed the Attorney-General's application for an order under s 5 of the Intestates Estates Act 1884 for the sale of certain freehold premises known as the Phoenix Inn, Stratford-upon-Avon. The facts are set out in the judgment of the court.

- d** *Ian Edwards-Jones QC and P L Gibson for the Attorney-General.*
R J S Thompson for the plaintiffs.

e *Cur adv vult*

- 27th March. **RUSSELL LJ** read the following judgment of the court. This appeal from Goulding J touches a subject nowadays rarely discussed and even more rarely encountered in practice, escheat to the Crown of realty propter defectum sanguinis, or for want of heirs. By a happy chance the topic has arisen from the past in connection with premises known as the Phoenix Inn in Stratford-upon-Avon. In certain pending proceedings later described the Crown sought, under s 5 of the Intestates Estates Act 1884, an order for the sale of those premises, subject, of course, to the current tenancy, and the consequent payment of the proceeds of sale to the Treasury Solicitor, on the ground that it should have appeared to the court that the Crown was entitled thereto by such escheat. Goulding J dismissed the application on the ground that the proceedings in question were not such as were envisaged by the section as appropriate for such an order as was sought, and that if the Crown wished to proceed with its wish to have the property sold it must look for other procedure, perhaps by the process of inquisition and office found.

- g** The pending proceedings were of this nature. In 1851 one Septimus Lowe died, having by his will devised the property in question first to his son Joseph for life with remainder to Joseph's children in equal shares absolutely, with no requirement of attainment of any age or survival of their parent; failing that devise then to his son Charles for life and similarly to Charles's children; and failing those devises to his eldest son John absolutely. It is not known when Joseph died; he was born in 1828; he emigrated to Peru and a letter from him in 1863 indicated that he then had a daughter. Nothing is known of him or any child of his. Charles was born in 1830 and died in 1880; nothing is known of any children of Charles. John died in 1896 and nothing is known of any children. Nothing is known of any will of any of these people.

- j** Many years ago a firm of brewers was granted a tenancy from year to year of the property by John acting under a power of attorney from Joseph. That firm or its successors in business have remained in occupation under that tenancy ever

since. A firm of solicitors has for many years collected the modest rent, their records going back to 1903. Obviously they have so collected the rent on behalf of, and are trustees for, whomsoever might be entitled to the property under the provisions of Septimus Lowe's will or on the intestacy or through the will of someone who became so entitled. The solicitors have no record of any title deeds. No one appeared to claim these rents in the solicitors' hands, and the funds representing them having reached a total approaching £4,000, partners in the firm, as trustees thereof for someone, issued an originating summons in the Chancery Division joining the Attorney-General representing the Crown as defendant, asking for the directions of the court. On this the court ordered an enquiry to be made—

'What persons are now entitled to the above-mentioned fund representing accumulated rents of the Phoenix Inn . . . settled by the will of Septimus Sutton Lowe deceased and in what shares and proportions.'

The enquiry was conducted in chambers, with advertisements in this country and Peru, with no result at all. On 10th November 1971 the master certified that—

'No person has come in and established before me a claim to be beneficially entitled in priority to the Crown to the above mentioned fund . . .'

There has as yet been no further consideration of the matter by the judge, whether the enquiry has been sufficiently extensive, whether, for example, it might be relevant to see whether the two sons who died in England left wills. Let us say that we were not invited to consider the adequacy of the enquiry. In the same proceedings the Attorney-General then applied for an order for sale of the property under s 5 of the 1884 Act. Before reading that Act we would remark that without an inquisition and office found the Crown, in the case of a supposed escheat for want of heirs, could by statute make a regrant of the land to persons with good *ex gratia* or moral claims (see the Crown Land Act 1819) or enter and hold the land (see the Queen's Remembrancer's Act 1859: but the Crown could not sell the land without inquisition and office found.

The 1884 Act is entitled:

'An Act to amend the Law respecting the administration of the Personal Estate and the Escheat of the Real Estate of Deceased Persons; and for other purposes.'

Section 2 concerns personal estate of a deceased person when administration is granted to a nominee of the Crown, and s 3 concerns limitation of actions by or against the Crown in respect of personal estate of a deceased person. Section 4 extends escheat to any legal or equitable estate or interest in an incorporeal hereditament and to any equitable estate or interest in any corporeal hereditament. Section 5 is in the following terms:

'(1) Where in any action or other proceeding in Her Majesty's High Court of Justice or in the Court of Chancery of the County Palatine of Lancaster it appears to the court that Her Majesty is entitled to any hereditament, corporeal or incorporeal, or to any estate or interest, legal or equitable, therein, such court may, on the application or with the consent of the Attorney-General, notwithstanding that no office has been found and no commission issued or executed, order a sale of the hereditament, estate, or interest, and such portion of the net proceeds of any such sale as represents the interest of Her Majesty shall be paid, invested, transferred, sold or disposed of in manner provided by section four of the Treasury Solicitor Act, 1876.

'(2) Section one of the Act of the session of the fifteenth and sixteenth years of the reign of Her present Majesty, chapter fifty-five, intituled "An Act to extend the provisions of the Trustee Act, 1850," shall apply on any such sale in

a like manner as if any estate or interest of Her Majesty comprised in the sale were vested in a subject.'

Section 6, to some extent, extends and regulates the power in the Crown to regrant escheated land, but is not, we think, directly relevant.

Goulding J took the view that in those proceedings there was no jurisdiction to order a sale of the land. He said this in the course of his judgment:

b 'The third objection is of a more radical character. It is common ground that the plaintiffs have no interest whatever in the real estate as such and no locus standi to make application in respect thereof to the court. Therefore, if it appears to the court in the course of these proceedings as they stand or as amended by the plaintiffs that the Crown has become entitled to the Phoenix Inn, that can only
c be incidental to and not the necessary foundation or consequence of anything the court has to determine at the suit of the plaintiffs. In the absence of authority and on a cursory look at the 1884 Act to see its general scope it appears to me that Parliament did not intend such a consequence as the Attorney-General suggests. The words "Where in any action or other proceeding in Her Majesty's
d High Court of Justice or in the Court of Chancery of the County Palatine of Lancaster it appears to the court that Her Majesty is entitled" mean that the Crown's title should be established for the purposes of and in the course of such action although the action may be directed to other matters relating to the property. The action must have the property as its subject-matter. The only reported case that has been found where s 5 applies is not inconsistent with this view: *Re Pratt's Trusts*¹. There persons beneficially entitled to a share
e of certain land that had escheated at law sought the appointment of new trustees and a vesting order in favour of those trustees. The Attorney-General intervened and requested a sale under s 5 which was duly ordered. The case throws therefore no decisive light on the present question. The procedure is not applicable where the ascertainment of the title of the Crown is purely incidental and outside the scope of any relief claimed by the plaintiffs. The reason for the present
f application is to avoid the inconveniences of the alternative procedure mentioned in s 5 of the 1884 Act itself. Whether at present it would be open to the Attorney-General as an alternative to the old procedure to initiate proceedings under the Rules of the Supreme Court for a declaratory judgment is a matter on which I express no view either way. The summons of 13th June 1972 should therefore be dismissed.'

g In our judgment, this takes too limited a view of the section. In our judgment, it is sufficient that the proceedings are such as to involve a conclusion as to the Crown's title to the realty either directly, or as a step towards or as a consequence of the outcome of the proceedings. It appears to us that the same matters which properly would lead to a conclusion that it appears that the Crown is entitled to the accumulated
h rents would lead to the same conclusion in relation to the Crown's entitlement to the realty in question by escheat. We consider that the only points that might be relevant to the latter question, but perhaps not to the former, are two. First, the hypothetical possibility that the testator was not the freeholder but only the owner of a very long lease at a peppercorn; but this is *prima facie* negated by the clear references in the will to the property as 'hereditaments' devised to devisees.
j Second, the theoretical possibility of escheat to some mesne lord, a factor which apparently weighed considerably in the judge's mind; but our attention was drawn to passages in learned works which satisfy us that the possibility of the emergence of the mesne lord in respect of this estate of (in 1851) freehold is one that is so remote

that it may be wholly ignored for present purposes. (We refer, for brevity, only to *The Law of Real Property* by Megarry and Wade¹.)

Consequently in our judgment, as a matter of procedure—which was the only ground on which the decision went—the proceedings were such as would enable an application such as that of the Attorney-General to be entertained, and we therefore set aside the order of the learned judge. But that, of course, is by no means to substitute for it an order for sale; the matter must be remitted to the judge for him to arrive at a conclusion whether 'it appears to the court' that the Crown is entitled to the property by escheat, and whether, if so, to exercise the power to order a sale. As we have said, the form of the certificate of the master and the enquiries and evidence on which it was based have not yet been considered by the judge, and we are not asked to express an opinion on those matters. It might, however, be of service if we were to express an opinion on some points.

It would, we apprehend, be open to the judge, if satisfied that every reasonable step had been taken in an attempt to trace individuals entitled to the fund, and that it was most improbable that any individual would ever establish a title, either to direct payment to the Crown or to authorise payment to the Crown on the footing that no individual was entitled (see *Re Benjamin*²). In either of those cases if an individual subsequently established a title, not barred by any limitation period, we apprehend that he could sue the Crown for payment of his share: see *Ministry of Health v Simpson*³ without having to trace the moneys received. In the case of sale of the realty by order under s 5 of the 1884 Act and consequent receipt by the Crown of proceeds of sale the situation procedurally is different. We were told on behalf of the Attorney-General that in such a case an heir subsequently appearing could have no claim against the Crown. We do not believe this to be so, if he be not barred by limitation of action. The Crown would have wrongly received assets of the deceased's estate, and in principle the case last cited would be applicable. We see nothing in the reference in s 5 of the 1884 Act to s 4 of the Treasury Solicitor Act 1876 to contradict this. Robertson on Civil Proceedings by and against the Crown⁴ discusses in the case where there has been inquisition and office found, whether a claimant can proceed by petition of right or whether he must proceed by traverse of the office, and concludes that he may proceed by petition of right; this assumes that some remedy is available even after office found; and proceeding by petition of right would now be proceedings under the Crown Proceedings Act 1947. If a claimant could recover land after office found by petition of right we do not see why he could not have recovered the proceeds of sale if the land had been sold after office found. (As to claims to personal estate of a deceased person received by the Crown see Robertson⁵.) In those circumstances, it may well be that the judge will in the end find that it appears sufficiently to him that the Crown is entitled to the land, and will order a sale.

Accordingly, the order below will be set aside and the matter remitted to the Chancery Division.

Appeal allowed. Case remitted to Chancery Division to decide whether it appeared to the court that the Crown was entitled to the property by escheat and if so to exercise the power to order a sale.

Solicitors: *Treasury Solicitor* (for the Attorney-General); *Gregory, Rowcliffe & Co*, agents for *Slatter, Son & More*, Stratford-upon-Avon (for the plaintiffs).

S A Hatteea Esq Barrister.

1 3rd Edn (1966), pp 33, 39

2 [1902] 1 Ch 723

3 [1950] 2 All ER 1137, [1951] AC 251

4 (1908), p 333

5 *Op cit*, p 342

R v Breeze

COURT OF APPEAL, CRIMINAL DIVISION

LORD WIDGERY CJ, JAMES LJ, NIELD, WILLIS AND BEAN JJ

30th MARCH 1973

b Trade description – False or misleading statement – Provision of services – False statement as to provision in the course of trade or business of any services – Qualification to provide services – Statement made by person that he is properly qualified to provide services – Whether ‘statement . . . as to . . . provision . . . of services’ – Trade Descriptions Act 1968, s 14 (1) (i).

c Trade description – False or misleading statement – Provision of services – Statement in the course of any trade or business – Trade or business – Profession – Statement made by professional man in course of providing professional services – Whether ‘trade or business’ including profession – Trade Descriptions Act 1968, s 14 (1).

d The accused carried on business as an architect. He advertised himself as a qualified architect. A client engaged the accused to draw up plans for large scale alterations to the client’s house on the strength of a representation by the accused that he was a qualified architect. In fact he was not qualified; he was an architectural student who had not completed the examinations necessary to qualify as an architect. The accused was convicted of knowingly making a false statement as to the provision of services in the course of a trade or business, contrary to s 14 (1)^a of the Trade Descriptions Act 1968. He appealed against conviction contending (i) that the words ‘statement . . . as to . . . the provision . . . of services’ in s 14 (1) (i) referred to the nature of the services performed and not to the identity or qualifications of the person who performed them, and (ii) that s 14 only applied to services supplied in the course of a trade or business and not to professional services.

f **Held** – (i) A person who carried on a business consisting of the provision of services and who falsely represented that he was properly qualified to perform those services had made a false ‘statement . . . as to . . . the provision of services’ within s 14 (1) (i) since his qualifications would be relevant to the likely quality of the services to be provided. It followed therefore that the false statement made by the accused to his client came within the terms of s 14 (1) (see p 1143 j and p 1144 a to d, post).

g (ii) Whether or not s 14 (1) applied to the performance of professional services, it was not open to the accused to say that he was performing professional services when he lacked the qualifications necessary for carrying on that profession (see p 1144 e, post).

(iii) Accordingly the accused had been properly convicted and the appeal would be dismissed.

h **Semle.** Section 14 (1) of the 1968 Act applies to statements made by professional men in the course of providing professional services (see p 1144 f, post).

Notes

For false and misleading statements as to services, see Supplement to 10 Halsbury’s Laws (3rd Edn) para 1314c, 3.

j For the Trade Descriptions Act 1968, s 14, see 37 Halsbury’s Statutes (3rd Edn) 959.

Cases cited

Barker (Christopher) & Sons v Inland Revenue Comrs [1919] 2 KB 222.

Carr v Inland Revenue Comrs [1944] 2 All ER 163, CA.

a Section 14 (1) is set out at p 1143 d and e, post

Currie v Inland Revenue Comrs [1921] 2 KB 332, CA.

Inland Revenue Comrs v Marine Steam Turbine Co Ltd [1920] 1 KB 193.

Stuchbery & Son v General Accident Fire and Life Assurance Corp'n Ltd [1949] 1 All ER 1026, [1949] 2 KB 256, CA.

Williams' Wills Trusts, Re, Chartered Bank of India, Australia and China v Williams [1953] 1 All ER 536, [1953] 1 Ch 138.

Appeal

On 28th March 1972 in the Crown Court at Preston before his Honour Judge Openshaw the appellant was convicted of making a false statement as to the provision of services contrary to s 14 (1) (a) of the Trade Descriptions Act 1968 on a prosecution initiated by the Architects' Registration Council. The particulars of the offence were that on 26th April 1970 in the county of Lancaster in the course of business with Dennis Vincent Armitage and Iris Armitage the appellant had made a statement, which he knew to be false, as to the provision of his services in relation to proposed alterations to the house of Mr and Mrs Armitage, namely, that he was an architect. He was sentenced to a fine of £200 and was ordered to pay £200 towards the cost of the prosecution. He appealed against conviction, inter alia, on the following grounds: (i) that the alleged false statement was not one made in the course of any trade or business within the meaning of the Trade Descriptions Act 1968, in that the appellant provided services of a professional character, namely architectural services, and (ii) that the appellant's statement was not a false statement as to the 'provision' of any services, accommodation or facilities, in that he provided such services, namely surveying, drawing plans and obtaining planning permission; the false statement alleged by the prosecution related to the professional qualifications of the appellant rather than the provision of any services. The appellant also appealed against sentence. The appeal first came before the court (Cairns LJ, Caulfield and Forbes JJ) on 9th February 1973, when it was adjourned for hearing before a full court of five judges. The facts are set out in the judgment of the court.

George Carman QC and *Richard Henriques* for the appellant.

John Wilmers QC and *Philip Goodenday* for the Crown.

LORD WIDGERY CJ delivered the judgment of the court. On 28th March 1972 at the Preston Crown Court, the appellant was convicted of making a false statement as to the provisions of services contrary to s 14 (1) (a) of the Trade Descriptions Act 1968; he was fined £200 and ordered to pay £200 towards the costs of the prosecution. He appeals to this court by leave of the single judge against conviction and sentence, and the matter has been heard by five judges because it seems to raise a point of significance on an Act which is frequently before this court, namely the Trade Descriptions Act 1968.

What happened is no longer in dispute, because the jury have already pronounced on it. A gentleman called Armitage who was living with his wife and family at 8 Princes Way, Cleveleys, decided that they would like to make some fairly substantial alterations to their house, and for this purpose they required someone to draw up plans; it is quite evident that they needed a qualified architect for that purpose. They had apparently had experience before with an unqualified architect, and it is beyond dispute that a qualified architect was what they wanted. They looked at the yellow pages of the telephone directory, and under the generic description 'Architects' they found the name of the appellant. Moreover, in the ordinary pages of the telephone directory he had seen fit to describe himself as 'ARIBA'. He was in truth an architectural student who had passed his intermediate examination, and who may one day qualify as an architect and become entitled to those letters after his name; but at the time these offences occurred, he was no more than a part-trained architect, and was not entitled to describe himself as an architect. Nevertheless he

a did, and when Mr Armitage made it quite clear that they wanted a qualified architect for the purpose, he said 'I am an architect, just the sort of person you are looking for'. He then proceeded to draw up plans, and it is not necessary to pursue the early stages of the history of this matter. There was a disagreement between himself and Mr Armitage as to the nature of the plans drawn; there was a county court action in which the appellant sued Mr Armitage for his fees, and indeed in which the
b appellant was successful. It was in the course of those proceedings that his lack of proper qualifications came to light.

The Trade Descriptions Act 1968, which is the lineal successor to the Merchandise Marks Act 1887, contains certain features which did not appear in the earlier legislation, and in particular contains provisions designed to protect the consumer, if that is not an inappropriate word, who makes a bargain with a person carrying on a trade or business in the provision of services. In other words s 14 under which
c this charge was laid, is not concerned with the sale of goods, matters which find their place earlier in the Act, but with the provision of services. I shall read the whole of s 14 (1) because I think it necessary in order to get this matter in its proper perspective:

d 'It shall be an offence for any person in the course of any trade or business—
(a) to make a statement which he knows to be false; or (b) recklessly to make a statement which is false; as to any of the following matters, that is to say,—(i) the provision in the course of any trade or business of any services, accommodation or facilities; (ii) the nature of any services, accommodation or facilities provided in the course of any trade or business; (iii) the time at which, manner in which or persons by whom any services, accommodation or facilities are so
e provided; (iv) the examination, approval or evaluation by any person of any services, accommodation or facilities so provided; or (v) the location or amenities of any accommodation so provided.'

One might be permitted the observation that given that the man in question is carrying on a trade or business in the provision of services, then those various categories
f are extremely wide both individually and in total and cover a very large area in which false statements may give rise to prosecution under the Act.

In this case the prosecution relied on s 14 (1) (a) (i), that is to say, they said that by calling himself an architect when he was not, he in the course of a trade or business made a false statement as to the provision in the course of any trade or business of any service. It seems to this court that the first question logically for consideration,
g and perhaps the most difficult and fundamental question, is whether if a man carrying on a trade or business in the provision of services falsely gives himself a personal qualification which he does not possess, the giving of that personal qualification can fairly be said to come within the words which I have read of s 14 (1) (a) (i), namely whether the giving himself of that qualification is a false statement as to the provision of any services.

h It has been argued forcefully by counsel for the appellant, to whom the court is indebted for his argument, that the phrase which I have just read, that which refers to the provision of any services, is a phrase concerned with the nature of the services performed, not with the identity or qualifications of the person who performs them. In other words, he says that given that the appellant was doing the work of an architect, the fact that he falsely described himself as an architect does not amount to
j a false statement as to the provision of the services.

The court has given careful consideration to this matter, because it clearly is one of considerable importance, and it has come to the conclusion that there is no reason for saying that a man carrying on business whose business is the provision of services does not commit an offence under s 14 (1) (a) (i) if he adopts to himself a personal qualification which he does not enjoy.

For example, and one quotes it only as an example, suppose that a motor mechanic sets up in business to repair motor cars, and suppose that he announces to his prospective customers that he did a five year apprenticeship with Rolls-Royce when that is not the fact. We think that in a case of that kind it could perfectly properly be said that the man in question, in the course of a trade or business, had made a statement which he knew to be false and that it was a statement as to the provision of services which he offered, because it goes without saying that a qualified man is likely, in general, to do a better job than an unqualified man, and the fact that a man has qualifications, such as an architect or an apprentice with five years experience with Rolls-Royce, is the sort of factor which goes to the likely quality of the service which he will perform, and is, we think, without any straining of language, properly to be taken to be within the term that the statement is made as to the provisions of services, to quote the actual statutory words.

There is no doubt in our judgment in this case that the appellant was carrying on what on the face of it was a business. He was carrying on a continuous activity with a view to gain and profit by drawing plans for people who wanted them. There is no doubt he made this false statement in the course of that activity, and for the reasons which I have already given, we think it comes within the terms of s 14 (1) (a) (i).

However, it has been argued that s 14 has no application to professions, but only to businesses. It has therefore been submitted that the activity in this case should not be regarded as being in the course of a trade or business, because it is in the course, so the argument goes, of a profession, and therefore not struck at by s 14 at all.

The first answer to that submission, and the one on which we would wish to rely, is that it does not lie in the mouth of this appellant to say that he is conducting an activity of a professional character when he lacks the professional qualifications necessary for the carrying on of that profession. We are quite unable to see how, given that the appellant's activity is of a commercial and business character, he can escape from the obligation under the section by saying that his work was really professional when at the same time he lacked the professional qualification necessary. That in itself in our judgment is enough to dispose of the argument that this case is concerned with profession and not business, and we do not, therefore, find it necessary today finally to decide whether s 14 has application to genuine professional men or not. All we would say is that we do not wish anything which is said in the course of this judgment to suggest that professional men are not within the ambit of s 14.

Accordingly, it seems to us that this conviction was properly entered as a matter of law, and that the appeal against conviction must be dismissed.

[Counsel for appellant then addressed the court on sentence.]

LORD WIDGERY CJ. We take the view, having regard to the nature of this offence and to the maximum penalty to which he would have been liable under the professional legislation, and further having regard to the state of his means at the present time, that the financial penalty was too heavy. I pause to observe that whenever imposing a financial penalty, regard must be had to a man's means to pay. If he is ordered to pay more than he can possibly pay, the sentence is inevitably in effect a sentence of imprisonment. Having said that, we shall allow the appeal as to sentence, set aside the orders made below, order that the costs of the prosecution below be paid out of central funds, and not out of the pocket of the appellant, and reduce his fine from one of £200 to one of £100.

Appeal against conviction dismissed. Appeal against sentence allowed and fine varied.

Solicitors: *Blackhurst, Parker & Yates*, Blackpool (for the appellant); *Edwin Coe & Calder Woods* (for the Crown).

a

R v Deacon

COURT OF APPEAL, CRIMINAL DIVISION

LORD WIDGERY CJ, NIELD AND WILLIS JJ

30th MARCH, 13th APRIL 1973

b

Criminal law – Appeal – No miscarriage of justice – Power to substitute alternative verdict – No miscarriage of justice if jury had convicted of alternative offence – Finding by jury of facts essential to establish alternative offence – Conviction of murder – Evidence of accused's wife – Wife only eye-witness – Wife's evidence inadmissible – Ample other evidence to support a conviction of manslaughter – Whether court having power to substitute verdict of manslaughter – Criminal Appeal Act 1968, ss 2 (1) proviso, 3 (1).

c

An argument took place between the appellant, his wife and the wife's brother, H. The appellant took a shot gun and levelled it at H's head. It went off and killed H. A further struggle developed between the appellant and his wife, during which the gun went off twice, the first time missing the wife and the second wounding her in the hand. The appellant was charged with the murder of H (count 1) and with the attempted murder of his wife (count 2). No application was made to sever the indictment and no application was made to call the wife on the appellant's behalf. The wife was the sole eye-witness of what had happened and gave evidence to the effect that the appellant had deliberately shot H. The appellant gave evidence that he had bought the gun to shoot himself, and that it had gone off accidentally killing H. The jury returned a verdict of murder on count 1, but were discharged from returning a verdict on count 2. On appeal it was common ground that the wife was a competent witness on count 2 but was not a competent witness for the Crown on count 1 except on the application of the appellant.

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Held – Although there was a good deal of evidence on which the jury could have convicted of murder if the wife had not given evidence, her evidence was of such weight and importance that it was impossible to say that the verdict of the jury would have been the same if either the wife had not been called or the jury had been given a direction to exclude her evidence. On the other hand there was no doubt that the jury, if properly instructed, would at least have convicted the appellant of manslaughter. However in considering whether to apply the proviso to s 2 (1) of the Criminal Appeal Act 1968 the court had no power to substitute a verdict for a different offence on the footing that no miscarriage of justice would have occurred if the jury had convicted of that offence. Furthermore the court only had power to substitute a conviction of an alternative offence under s 3 (1)^a of the 1968 Act when it appeared from the finding of the jury that the facts essential to establish the alternative offence had been proved. Since the wife's evidence had coloured the entire findings of the jury it was impossible to say that the jury had found facts appropriate to a verdict of manslaughter except on the footing that they had received support in their finding from the evidence of the wife. It followed that there was no power to substitute a verdict of manslaughter, and accordingly the conviction of murder should be quashed and the appeal allowed (see p 1147 j to p 1148 c and g h, post).

Notes

For the powers of the Court of Appeal, Criminal Division, on hearing an appeal, see 9 Halsbury's Laws (3rd Edn) 447, 448, para 1019.

^a Section 3 (1) is set out at p 1148 d, post.

For the power to amend a sentence or alter a verdict, see 10 Halsbury's Laws (3rd Edn) 539, 540, para 990, and for cases on the subject, see 14 Digest (Repl) 677, 678, 6904-6931.

For the Criminal Appeal Act 1968, ss 2, 3, see 8 Halsbury's Statutes (3rd Edn) 690, 691.

Cases cited

R v Algar [1953] 2 All ER 1381, [1954] 1 QB 279, CCA.

R v Audley (Lord) (1631) Hut 115, 3 State Tr 401.

R v Boucher (1952) 36 Cr App Rep 152, CCA.

R v Mount, R v Metcalfe (1934) 24 Cr App Rep 135, CCA.

Appeal

On 25th February 1972 at the Central Criminal Court before Forbes J and a jury the appellant, William Roland David Deacon, was convicted, on count 1 of an indictment, of the murder of his brother-in-law, Ronald Huxley, and sentenced to life imprisonment. The jury were discharged from giving a verdict on count 2, which charged the appellant with the attempted murder of his wife. He appealed against conviction with leave of O'Connor J. The facts are set out in the judgment of the court.

Sir Elwyn Jones QC and *David Gibson-Lee* (neither of whom appeared at the trial) for the appellant.

Brian Leary for the Crown.

Cur adv vult

13th April. **LORD WIDGERY CJ** read the following judgment of the court. On 25th February 1972 at the Central Criminal Court, the appellant was convicted on count 1 of an indictment charging the murder of his brother-in-law, one Ronald Huxley, and the jury were discharged from giving a verdict on a second count which alleged attempted murder of the appellant's wife. He was sentenced to life imprisonment, and now appeals against conviction by leave of the single judge.

The appellant and his wife had lived for some time at the matrimonial home in East London, but differences had arisen between them. The wife left home for a period and took the children to her mother's house. The appellant said that he wanted his wife and family to return. The brother-in-law became involved in the discussion and suggested that the sensible thing would be, in the first instance, for the appellant to move out of the house and let the wife and children return there to live. The appellant seems to have agreed to this general proposal and a date was set for the move which was to be 13th October 1971.

On that day the brother-in-law drove the wife with the children to the matrimonial home. The appellant was there, looking at some photographs, and in a very short time arguments developed. The wife's account of the affair was that she turned round and saw that her husband had a double-barrelled gun which was aimed at the level of his brother-in-law's head. Angry words were exchanged, and the appellant taxed his wife with having said that he had been with another woman, and in the midst of this altercation the appellant, according to his wife, raised the gun and shot the brother-in-law, injuring him fatally. The wife said that thereafter the appellant told her to get up to bed; he put the gun down, seized her by the neck and threatened to strangle her. In the course of the struggle he picked up the gun again, they wrestled for it, and it went off, which was, of course, the second time that the gun had fired in the course of this episode. The second shot did not hit the wife, and according to her the appellant then went out into the passage, loaded the gun again, returned to the sitting room, accused her of having 'grassed' him, pointed the gun at her from a distance of three or four feet and shot her through the hand which she was holding in front of her body for purposes of protection. In her evidence

a before the trial court, the wife maintained that the appellant had deliberately shot the brother-in-law.

The appellant's case was that he had bought the gun about a week before the incident, intending to use it to shoot himself. He said that he had placed the gun in a cupboard loaded and cocked, and when his wife and brother-in-law arrived at the matrimonial home on 13th October he thought he would shoot himself, and he walked into the room carrying the gun with this intention. He said that in the course of the altercation which followed, he was smoking a cigarette and that the cigarette fell from his mouth. Stopping down to pick up the cigarette he said that the gun fired accidentally, and it was this shot which killed the brother-in-law. He then went on to describe how his wife grabbed the barrel of the gun; he tried to repel her but in the course of the struggle the gun fired a second time, and he says that he went into the passage and 'must have loaded the gun' before he returned and fired the third shot.

c At the trial the defence ran three lines; first, provocation; second, diminished responsibility, and, third, accident. It was conceded by counsel for the defence that the verdict on count 1 must at least be manslaughter, and no attempt was made to secure an acquittal on that count.

d The grounds of appeal against conviction in this court are, first, that the learned trial judge erred in law in not severing the indictment and trying the two counts separately, and, secondly, that he similarly erred in allowing the wife of the appellant to give evidence for the Crown in relation to count 1 when she was an incompetent witness for the Crown.

e It is common ground in this court that the wife was a competent witness on count 2 in respect of the attempted murder of herself, but that she was not competent for the prosecution on count 1 except on the application of the person charged. No application was made to sever the indictment, nor was any formal application made by the defence for the wife to be called, though it was suggested in argument that certain advantages accrued to the defence in having the two counts tried together with the wife giving evidence on both.

f Exactly on what basis the trial proceeded is not easy to discover, but at least it is clear that it was accepted by the judge and by both counsel that it should be conducted in the way in which it was, notwithstanding the incompetence of the wife on count 1. No criticism is made of the judge's conduct of the trial in other respects, or of the summing-up, and it can be said at once that if the wife's evidence had properly been admitted the case against the appellant on count 1 would be absolutely overwhelming. Even if one expunges the wife's evidence, and looks at the rest of the case, there was substantial evidence against the appellant on this count. He himself had made a number of admissions, and there was the evidence of a forensic science expert as to the height at which the gun must have been held when the shot which killed Huxley was fired to show that that shot could not have been fired when the appellant was in a kneeling attitude.

h We have accordingly, of course, considered whether this is a case in which it is possible to apply the proviso to s 2 of the Criminal Appeal Act 1968, on the footing that no miscarriage of justice had actually occurred by reason of the fact that the two counts were tried together and the jury were not given any direction to exclude the evidence of the wife when considering their verdict on count 1. In our view this is not a case in which the proviso can be applied. It is perfectly true that there was a good deal of other evidence on which the jury might well have convicted if the wife had not given evidence, but the wife was the sole eye-witness to the scene, and her evidence that the appellant had deliberately shot at her brother, was evidence of such weight and importance that we cannot bring ourselves to say that the verdict of the jury would have been the same if either the wife had not been called or if they had been given a direction to exclude her evidence when considering their verdict on count 1.

We have no doubt, however, that without the evidence of the wife the jury, if properly instructed, would at least have returned a verdict of manslaughter. The appellant's own evidence goes a long way to show that he was handling the gun in a wholly reckless fashion, and that the killing of the brother-in-law could hardly have been justifiable or excusable homicide in the circumstances. If, therefore, there is power in the Criminal Appeal Act 1968 for us to substitute a verdict of manslaughter on the footing that this is the verdict which the jury must inevitably have reached had the case been tried in accordance with law we should have substituted that verdict. Our difficulty is to find authority within the Act for such a conclusion.

When the court is required to apply the proviso to s 2, it asks itself whether any miscarriage of justice has actually occurred, and if satisfied that there has been no such miscarriage it simply dismisses the appeal. There is no power in s 2 to substitute a verdict for a different offence on the footing that no miscarriage of justice would have occurred if the jury had convicted of that offence.

The power to substitute a verdict for a different offence is to be found in s 3 (1) which reads:

'This section applies on an appeal against conviction, where the appellant has been convicted of an offence and the jury could on the indictment have found him guilty of some other offence, and on the finding of the jury it appears to the Court of Appeal that the jury must have been satisfied of facts which proved him guilty of the other offence.'

The section goes on to provide that in those circumstances a verdict for the alternative offence may be recorded by this court. The basis of the power to substitute a verdict for a different offence must, it is to be observed, be based on the finding of the jury. It is only when it appears to the court from the finding of the jury that the facts essential to establish the alternative offence were proved, that the court may substitute the alternative verdict. Unlike s 2, s 3 (1) does not authorise the court to act on the footing that the court is satisfied that the jury would have brought in the alternative verdict if properly instructed. What is necessary is that the findings of the jury themselves must establish the appropriate facts to support the alternative offence. In the instant case the jury were satisfied that the appellant had murdered his brother-in-law, but we cannot do other than assume that they were influenced in that finding by the wife's evidence. The improper admission of the wife's evidence seems to us to colour the entire findings of the jury, and we are unable to say that the jury found facts appropriate to a verdict of manslaughter, except on the footing that they received support in their finding from the evidence of the wife. It may be that there is a lacuna in the Act, and that this court ought to be given power to substitute a verdict on more general grounds when it is satisfied that the alternative verdict would have been inevitable had the case been properly presented to the jury. But the section taking the form which it does, and there being no reliable findings of the jury on which any conclusion would be based, we are reluctantly compelled to take the view that there is no power for us to substitute a verdict of manslaughter. In these circumstances all that we can do on count 1 is to allow the appeal and quash the conviction. We have not found it possible in this case to say that the wife's evidence was called on the application of the defence, when there was no such application made. Mere silence by the defence in the face of the calling of the wife cannot in our judgment amount to an application for this purpose.

If the jury had returned a verdict of guilty on count 2 there would be no reason for suspecting the validity of that verdict. The wife was undoubtedly a competent witness on that count, and the fact that the indictment was not severed would not be a ground for questioning the validity of the conviction. Unhappily, and for reasons which this court does not understand, the jury's verdict was not taken on count 2, and in those circumstances there is nothing which we here can do to remedy that failure. Whether or not the appellant is now liable to be tried again in regard to the

- a offence alleged in count 2 is a matter which we do not decide. So far as the proceedings before us are concerned we can do no more than quash the conviction on count 1. Insofar as this matter is concerned, of course, the appellant is entitled to be discharged.

Appeal allowed. Conviction on count 1 quashed.

- b 16th April. At the Central Criminal Court counsel for the Crown applied for leave for an indictment to be preferred against the appellant charging him with the attempted murder of his wife (count 2 of the original indictment). Counsel for the appellant, relying on *Connelly v Director of Public Prosecutions*¹, successfully opposed the application, and Talbot J ordered that the trial should not proceed.
- c Solicitors: *Lloyd, Raymond & Co* (for the appellant); *Director of Public Prosecutions*.

N P Metcalfe Esq Barrister.

d Mizel v Warren

QUEEN'S BENCH DIVISION

LORD WIDGERY CJ, ASHWORTH AND BRIDGE JJ

- e 12th, 13th APRIL 1973

- f Customs – Forfeiture – Imported goods – Goods on which duty chargeable and unpaid – Onus of proof – Proceedings by customs and excise officer – Burden on other party where question whether goods of ‘description’ alleged in information – Secondhand goods bought by accused seized – Complaint preferred by customs and excise officer – Complaint alleging goods of foreign manufacture and duty unpaid – Accused unable to produce evidence goods manufactured in England – Whether reference to foreign manufacture matter concerning ‘description’ of goods alleged in complaint – Customs and Excise Act 1952, ss 44, 275, 290 (2) (b), Sch 7.

- g M bought a secondhand white gold and platinum bracelet from C in England. It was subsequently detained by an officer of the Commissioners of Customs and Excise from M and then seized by the officer as liable to forfeiture under s 44 (a)^a of the Customs and Excise Act 1952. The officer thereupon preferred a complaint against M, pursuant to s 275^b of, and Sch 7^c to, the 1952 Act, claiming, inter alia, that the bracelet had been found to be of foreign manufacture, that it must therefore have been imported, with the consequence that it was chargeable with customs duty, but that no evidence of payment of duty and purchase tax had been produced by M. M could produce no positive evidence that the bracelet had been manufactured in England but he contended that the onus was on the customs and excise officer to prove that the bracelet was of foreign manufacture.

- i [1964] 2 All ER 401, [1964] AC 1255
- j a Section 44, so far as material, is set out at p 1152 c and d, post
- b Section 275, so far as material, provides: ‘(1) Any thing liable to forfeiture under the customs or excise Acts may be seized or detained by any officer or constable or any member of Her Majesty’s armed forces or coastguard . . .’
- c Schedule 7, so far as material, provides: ‘6. . . the Commissioners shall take proceedings for the condemnation of [any thing seized] . . . and if the court finds that the thing was at the time of seizure liable to forfeiture the court shall condemn it as forfeited . . .’

Held – The question whether the bracelet was of foreign manufacture was, within the meaning of s 290 (2) (b)^d of the Act, a question which concerned the ‘description’ of the goods as alleged in the information and accordingly the onus of proof lay, by virtue of that subsection, on M; as he had failed to show that the bracelet was not of foreign manufacture, it must be condemned as forfeit (see p 1154 e h and j, post).

Notes

For onus of proof in respect of offences under the Customs and Excise Acts, see 33 Halsbury’s Laws (3rd Edn) 46, 47, para 95, 261, para 466.

For the Customs and Excise Act 1952, ss 44, 275, 290, Sch 7, see 9 Halsbury’s Statutes (3rd Edn) 90, 181, 192, 217.

Cases cited

Comptroller of Customs v Western Llectric Co Ltd [1965] 3 All ER 599, [1966] AC 367, PC.

Denton v John Lister Ltd [1971] 3 All ER 669, [1971] 1 WLR 1426, DC.

Patel v Comptroller of Customs [1965] 3 All ER 593, [1966] AC 356, PC.

Case stated

This was a case stated by his Honour Judge Trapnell and justices for the Inner London Area in respect of their adjudication at the Middlesex Crown Court, on an appeal from the Clerkenwell Magistrates’ Court, on 13th and 18th April 1972.

1. On 13th September 1971 a complaint was preferred by the appellant, Douglas Victor Warren, an officer of customs and excise, against the respondent, George Gershon Mizel, pursuant to s 275 of, and Sch 7 to, the Customs and Excise Act 1952 claiming (a) that a white gold and platinum bracelet was detained from the respondent of 40 Greville Street, London, EC1, (b) that such bracelet was found to be of foreign manufacture and therefore chargeable with duty and purchase tax, (c) that by virtue of s 44 of the Act any imported goods, being goods chargeable with a duty of customs, that were without payment of that duty removed from their place of importation were liable to forfeiture; (d) that on 1st December 1970 the bracelet had been seized as liable to forfeiture because no evidence of payment of duty and purchase tax was produced by the respondent and (e) that the Commissioners of Customs and Excise had ordered proceedings for condemnation of the bracelet pursuant to s 275 of, and Sch 7 to, the Act.

2. The complaint was heard on 10th December 1971 by Christopher Lea Esq, metropolitan stipendiary magistrate sitting at a magistrates’ court at Clerkenwell, who adjudged that the complaint was true and ordered that the bracelet be condemned as forfeit.

3. From that decision the respondent appealed to quarter sessions for the Inner London Area by notice of appeal dated 20th December 1971 on the grounds (a) that the learned magistrate failed to give due weight to the evidence of the respondent and to that of his witnesses; (b) that the decision given was wrong in law.

4. The Crown Court heard the appeal pursuant to the Courts Act 1971 on 13th and 18th April 1972 when they found the following facts. (a) The bracelet had been purchased by the respondent in about 1962 from one William Costello for £925 in England in respect of which Mr Costello gave a receipt dated 20th October 1961. (b) The bracelet was secondhand, of common pattern of poor quality and might have sold retail in a shop for more than the price paid though the possible price range on such a transaction was wide. The present day retail value of the bracelet was assessed by the appellant at £3,452 and by the respondent at about £1,600; no adverse inference was drawn against the respondent from the price he paid or the circumstances in which he purchased it. (c) The bracelet was made of platinum or white

^d Section 290 (2) is set out at p 1153 e and f, post.

- a gold and diamonds. (d) The bracelet had been detained by an officer of the Commissioners of Customs and Excise from the respondent on 16th November 1970 and was seized by such an officer as liable to forfeiture under s 44 of the Act on 1st December 1970 on the ground (and as was the fact) that no evidence of payment of duty and purchase tax was produced by the respondent. (e) The Commissioners of Customs and Excise had ordered proceedings for the condemnation of the bracelet.
- b (f) There was no evidence that duty or purchase tax were paid on the bracelet. (g) If the bracelet had been imported into the United Kingdom it would have been chargeable with import duty and purchase tax. (h) The Crown Court found it was quite impossible to say whether the bracelet was of foreign or English manufacture. They accepted the evidence tendered by the respondent to that effect and rejected that of the appellant.

- c 5. Evidence was given on behalf of the respondent that the bracelet could be of English or foreign manufacture and that it was not possible to say where it was manufactured. Evidence was given on behalf of the appellant that the bracelet was of Belgian manufacture. There was no positive evidence that the bracelet was made in England.

- d 6. It was contended on behalf of the respondent (i) that the onus was on the appellant to prove that the bracelet was of foreign manufacture and then, if the appellant proved that, the burden passed to the respondent to prove that duty had been paid under s 290 (2) (a) of the Act; (ii) that in this case the appellant had not discharged the onus of showing that the bracelet was of foreign manufacture. Accordingly it was contended that the appeal should be allowed.

- e 7. It was contended on behalf of the appellant (i) that the burden of showing where the bracelet was manufactured did not lie on the appellant but lay on the respondent; (ii) that the Act was concerned with importation and the onus was on the respondent to show that the bracelet was made in England and, if not, that duty had been paid.

- f The Crown Court were referred by counsel for the respondent to the following cases: *Patel v Comptroller of Customs*¹, *Comptroller of Customs v Western Electric Co Ltd*² and *Denton v John Lister Ltd*³.

- g 9. The Crown Court were of the opinion that the fundamental question was where the burden of proof lay to establish the place of manufacture of the bracelet, i.e. whether English or foreign. They considered that (as was contended on behalf of the respondent) the country of origin was different from the country of importation and that, whereas the burden of proving the place from which the bracelet was brought lay on the respondent, there was no such presumption in the case of the country of origin. They concluded, therefore, that the onus of proving that the bracelet was of foreign manufacture lay on the appellant who had failed to discharge that onus. There was no other evidence to show that the bracelet had been abroad and, therefore, at some time imported into this country. The Crown Court accordingly allowed the appeal and awarded the respondent his costs before them and in the magistrates' court.
- h

Gordon Slynn for the appellant.

W R Rees-Davies for the respondent.

- j **LORD WIDGERY CJ.** On 13th September 1971 a complaint was preferred by the appellant an officer of customs and excise, against the respondent pursuant to s 275 of, and Sch 7 to, the Customs and Excise Act 1952 claiming—

1 [1965] 3 All ER 593, [1966] AC 356

2 [1965] 3 All ER 599, [1966] AC 367

3 [1971] 3 All ER 669, [1971] 1 WLR 1426

'(a) that a white gold and platinum bracelet was detained from [the respondent]; (b) that such bracelet was found to be of foreign manufacture and therefore chargeable with duty and purchase tax; (c) that by virtue of section 44 of the Act any imported goods, being goods chargeable with duty of customs that are without payment of that duty, removed from their place of importation are liable to forfeiture; (d) that on 1st December 1970 the said bracelet had been seized as liable to forfeiture because no evidence of payment of duty and purchase tax was produced by [the respondent] and (e) that the Commissioners of Customs and Excise had ordered proceedings for condemnation of the said bracelet.'

The situation underlying the laying of that complaint is that under s 44 of the Customs and Excise Act 1952 it is provided:

'Where—(a) except as provided by or under this Act any imported goods, being goods chargeable with a duty of customs, are without payment of that duty unshipped in any port, unloaded from any aircraft in the United Kingdom, unloaded from any vehicle in, or otherwise brought across the boundary into, Northern Ireland, or removed from their place of importation or from any approved wharf, examination station or transit shed [and I leave out the remaining paragraphs], those goods shall be liable to forfeiture . . .'

The same Act in Sch 7 provides for the procedure to be adopted when an officer of customs and excise seeks to exercise his right of forfeiture, and in brief the schedule provides for the bringing of condemnation proceedings, the first step in which is the laying of a complaint such as that to which I have referred. The white gold and platinum bracelet was undoubtedly detained from the respondent and the appellant officer of customs and excise was seeking by his complaint to justify the forfeiture of the bracelet under the section to which I have referred.

The matter first came before one of her Majesty's metropolitan stipendiary magistrates sitting at Clerkenwell; he having heard such evidence as was put before him adjudged that the complaint was true and ordered that the bracelet be condemned as forfeit.

I go back for a moment to s 44 to remind myself that in order that the complaint be true and that forfeiture shall result, two particular conditions have to be satisfied, first that the goods are imported goods, and secondly that they have been brought into this country without payment of the appropriate duty. We are not told exactly what considerations passed through the mind of the magistrate but he was evidently satisfied that those conditions were present in this case.

From the magistrate's decision the respondent appealed to quarter sessions (now the Crown Court), and it is by way of appeal by case stated from the Crown Court that the matter comes before this court today. When the matter was before the Crown Court in April 1972 they found that the bracelet in question had been bought by the respondent as long ago as 1962 in England, and that the seller had given a receipt dated 20th October 1961. The Crown Court found that—

'the said bracelet was secondhand, of common pattern of poor quality and might have sold retail in a shop for more than the price paid though the possible price range on such a transaction was wide',

and they went on to find the present day retail value of the bracelet, a matter which is not of particular relevance to the issue we have to decide. They state as a fact that no evidence was put before them as regards the payment of duty or purchase tax, and they came to consider what in effect is the vital issue in this case, namely whether the bracelet was, as alleged in the complaint, of foreign manufacture.

The reason why that issue is really the dominant issue in the proceedings before us is because if it was of foreign manufacture, then inevitably it had been imported into

a this country at some time, whereas if it was not of foreign manufacture there was no ground for saying that it had ever been in any country other than this. Counsel for the appellant leaves us in no doubt that the allegation in the complaint that the bracelet was of foreign manufacture was intended to deal with the important issue of whether as a result it could be considered that the bracelet had been imported at some time.

b On that issue, namely the origin of the bracelet, evidence was called by both parties before the Crown Court. Evidence was called on behalf of the appellant, suggesting that the bracelet was of Belgian origin. Evidence was called on behalf of the respondent which indicated that there really was no basis on which firm conclusion as to its origin could be reached at all. Having heard those two experts, I think the Crown Court preferred the evidence of the expert called by the respondent, and therefore concluded that there really was no firm basis on which the country of origin of this particular piece could be determined, and in these circumstances of course everything turned on the onus of proof.

c The facts which support a forfeiture are importation plus failure to pay duty. If it was for the respondent to prove that the duty had been paid, or alternatively that the bracelet was not of foreign extraction, then he failed to prove it, and consequently the forfeiture was right. On the other hand, if it was for the officer of customs and excise to prove these matters, he had failed to prove them also and so it follows everything really turns in this case on where the onus of proof lay.

d That is dealt with in s 290 of the Act, a provision which has survived more or less in its existing form through a number of versions of this legislation. Section 290 (2) provides:

e 'Where in any proceedings relating to customs or excise any question arises as to the place from which any goods have been brought or as to whether or not—(a) any duty has been paid or secured in respect of any goods; or (b) any goods or other things whatsoever are of the description or nature alleged in the information, writ or other process; or (c) any goods have been lawfully
f imported or lawfully unloaded from any ship or aircraft [I omit the next three paragraphs], then, where those proceedings are brought by or against the Commissioners, a law officer of the Crown or an officer [which means an officer of customs and excise], the burden of proof shall lie upon the other party to the proceedings . . .'

g So that reading that section one sees that in the proceedings of the kind which were begun before the magistrate and eventually have come before this court here, where any question arises as to the matters that I have read out, then the burden of proof shall lie not on the customs but on the other party, in this case the respondent.

h Accordingly the task of the Crown Court and in turn our task is to decide whether the matters in issue today are covered by this section or not. If they are then the onus of proof is on the respondent and he must lose; if they are not, the onus is on the customs, and as I see it, they must lose.

j Some time was spent in the Crown Court in considering the opening words of s 290 (2) dealing with the place from which any goods have been brought; but it is obvious to me, and I think is really accepted in argument before us, that that is not the point with which we are concerned today. The argument is concerned with their place of manufacture, because that may give rise to grounds for saying that there has been a subsequent importation. So we are not interested in the place from whence the goods have been brought; we are very much concerned in whether they have been imported in the sense they began life in a foreign country.

So far as para (a) of s 290 (2) is concerned it is quite clear that if the respondent were trying to say that duty had been paid on this piece of jewellery, the onus would clearly lie on him under s 290 (2) (a), and no argument really turns on that. The vital

issues are whether in s 290 (2) (b) or (c) the onus lies on him to show that these goods were not of foreign origin. Counsel for the appellant has relied primarily on s 290 (2) (b) which I will read again:

'any goods or other things whatsoever are of the description or nature alleged in the information, writ or other process.'

The question therefore really resolves itself into this: when the complaint in this matter recited as it did that the bracelet was found to be of foreign manufacture, is that a matter of description or nature of the article, because if it is, then it would seem that the onus lies on the respondent in respect of it.

Most of the argument has really turned on the meaning of 'description' in this context. Counsel for the respondent has left us in no doubt, if we were in doubt before, about the consequences which can flow from a wide interpretation of this section. He points out, and for my part I readily accept the value of the comment, that under this section if the customs are right in their argument, anybody in possession of a piece of jewellery or a camera or binoculars or something of that kind can be approached, in theory at any rate, by an officer of the customs and asked whether duty has been paid on the article and if the possessor of the article has no idea whence it came or whether duty has been paid, the onus will be on him to do the impossible, with the result that grave injustice might follow.

I am sure all of us have listened to what counsel for the respondent said with care, and I am much impressed by the consequences which might flow from this extremely wide section if it were exercised in an oppressive way. On the other hand, we must not shrink from accepting that Parliament under its supreme power has determined that the law in regard to customs and excise shall be as laid down in s 290, and if that is the will and intention of Parliament, we in this court have to observe it and support it as much as anybody else. For my part I have come to the conclusion in the end that one cannot say that the reference in this context to the bracelet being of foreign manufacture is other than a matter concerning the description of the goods as alleged in the information. It is abundantly clear that the country of origin will be a vital part of the description of an article in many cases (one need only speak of Havana cigars or wine from Bordeaux); the word is in its natural and ordinary meaning quite wide enough to include the country of origin in the context if this case and I do not find it possible so to restrict the word 'description' as to allow it to apply in this context to the more obvious cases of Havana cigars and prevent it from applying in the instance with which we are now concerned.

I take some comfort from the fact that whatever we say in this case today, many of the difficulties of which counsel for the respondent spoke will still apply, because there will be plenty of people with binoculars, cameras and so on which are obviously of foreign origin, and the difficulties in which they could theoretically be placed if customs officers approached them and insisted on proof of payment of duty are obvious and are not affected by the decision we arrive at today.

My conclusions on the facts of this case is that the onus lay on the respondent, that the judgment of the Crown Court was wrong, and that we should allow the appeal, set aside the decision of the Crown Court and restore the decision of the magistrate.

ASHWORTH J. I agree.

BRIDGE J. I also agree.

Appeal allowed. Leave to appeal refused.

Solicitors: *Solicitor, Customs and Excise* (for the appellant); *Matthew Morris* (for the respondent).

N P Metcalfe Esq Barrister.

^a St Edmundsbury and Ipswich Diocesan Board of Finance and another v Clark

CHANCERY DIVISION

^b MEGARRY J

13th, 16th APRIL 1973

^c Practice – Place of trial – Adjournment of trial – Adjournment to such place as court thinks fit – Witness – Examination – Witness too infirm to travel to London – Witness fit to be examined at village where she lived – Village not a place authorised for trial of proceedings in Chancery Division – Power of court to adjourn trial to village for purpose of hearing witness's testimony – RSC Ord 33, r 1 – RSC Ord 35, r 3.

^d The plaintiffs brought an action against the defendant, claiming a right of way for vehicles over a disputed strip of land at Iken, a small village in Suffolk. The action was tried in the Chancery Division at the Royal Courts of Justice. On day 15 of the trial, after it had been agreed that the judge should view the disputed strip when the evidence had closed, and after some 40 witnesses had been heard, the plaintiffs applied under RSC Ord 39, r 1^a, for an order that one of their witnesses, a Mrs M, be examined on oath at Iken. Mrs M was 84 years old and because of her poor health it was highly undesirable that she should come to London to give evidence; on the other hand she could give evidence at Iken without any real risk or undue distress. The defendant objected to the application on the ground that it had been made too late and further contended that the court had no power to adjourn the trial to Iken under RSC Ord 35, r 3^b, because Iken was not a place authorised as a place of trial under RSC Ord 33, r 1^c, and the Courts Act 1971, s 2^d.

^f Held – (i) In the circumstances it would be better for the court to sit at Iken to hear Mrs M's evidence than to make an order under RSC Ord 39, r 1, for her examination at Iken by an examiner (see p 1158 a b and e, post).

^g (ii) The court had an inherent power to adjourn a trial begun in a place authorised under RSC Ord 33, r 1, to some other suitable place, provided that proper publicity was given to the adjournment; that power was fortified by RSC Ord 33, r 3, empowering a judge to adjourn a trial 'to such place . . . as he thinks fit'; the power was not limited to adjournment to such places as were authorised under RSC Ord 33, r 1 (see p 1158 g to j, post).

^h (iii) In the circumstances it was 'expedient in the interests of justice' that Mrs M's evidence should be taken at Iken and accordingly, at the conclusion of the evidence, the case would be adjourned to Iken for the purpose of hearing her evidence. Any disadvantage to the defendant occasioned by hearing her evidence after the evidence for the defendant would be met by intimating that it would be open to the defendant to make an application to call further evidence to meet Mrs M's testimony (see p 1159 j and p 1160 b to e, post).

^a Order 39, r 1, is set out at p 1157 e and f, post

^j ^b Order 35, r 3, is set out at p 1157 g, post

^c Order 33, r 1, provides: 'Subject to the provisions of these rules, the place of trial of a cause or matter, or of any question or issue arising therein, shall be determined by the Court and shall be either the Royal Courts of Justice or one of the other places at which sittings of the High Court are authorised to be held for the trial of those proceedings or proceedings of the class to which they belong.'

^d Section 2 is set out at p 1159 d and e, post

Notes

For the determination of the place of trial, see 30 Halsbury's Laws (3rd Edn) 375, 376, para 699. a

For the Courts Act 1971, s 2, see 41 Halsbury's Statutes (3rd Edn) 289.

Cases referred to in judgment

Green v Sevin (1879) 13 Ch D 589, [1874-80] All ER Rep 831, 49 LJCh 166, 41 LT 724, 44 JP 282, 12 Digest (Reissue) 383, 2775. b

McPherson v McPherson [1936] AC 177, [1935] All ER Rep 105, 105 LJPC 41, 154, LT 221, PC, 16 Digest (Repl) 147, 295.

Application

The plaintiffs, St Edmundsbury and Ipswich Diocesan Board of Finance and the Parochial Church Council of the Parish of Iken, Suffolk, brought an action against the defendant, Gabriel Bertram Clark, claiming, inter alia, an order that the defendant should forthwith take down and remove all obstructions put up by him on an accessway leading from the highway known as Church Road or Church Lane at Iken to the churchyard and church of the parish of St Botolph, Iken. On 13th April 1973, day 15 of the trial of the action, the plaintiffs applied for the evidence of one of their witnesses, a Mrs Mael, to be taken by an examiner at Iken on the ground that she was too infirm by reason of age and recent illness to travel to London. The facts are set out in the judgment. c
d

John Vinelott QC and Spencer G Maurice for the plaintiffs.

Jeremiah Harman QC and Gavin Lightman for the defendant. e

MEGARRY J. It is now for me to rule on an application made by the plaintiffs in the course of a hard-fought and somewhat protracted trial relating to land at Iken, a small Suffolk village lying a few miles inland from Aldeburgh. The real bone of contention between the parties is whether or not there exists the right claimed by the plaintiffs for vehicles to run over a disputed strip of land which lies between a highway and the churchyard at Iken; the right for pedestrians to pass over the disputed strip is not in issue. So far, I have heard nearly 40 witnesses, some of them of advanced years, and today is the sixteenth day of the trial. The point on which I have to rule is whether and in what circumstances the plaintiffs should be able to adduce the evidence of another witness, a Mrs Mael. Counsel for the plaintiffs (whom I may briefly describe as the church authorities) has applied to have Mrs Mael's evidence heard at Iken on the score of her ill-health; and counsel for the defendant has vigorously opposed this application. f
g

The matter arises in this way. On day 9, 22nd March 1973, counsel for the plaintiffs sought to put in a statement by Mrs Mael under the Civil Evidence Act 1968. He attempted to support his application by a letter which referred to Mrs Mael as being aged 81, and certified that she was 'too infirm by reason of age and recent illness to be safely transported to London and to withstand the rigours of the trial'. Counsel for the plaintiffs accepted that this letter, unsupported by any affidavit which even purported to show that the writer was a registered medical practitioner, was one to which counsel for the defendant was entitled to object as not constituting any evidence of Mrs Mael's unfitness by reason of her bodily condition to attend as a witness; and in any case the letter was wholly lacking in particularity. Counsel for the defendant also challenged the unfitness of Mrs Mael, and said that he wished to cross-examine the writer of the letter. During the argument on this point, I referred to the fact that for other reasons there was going to be an adjournment of a fortnight, during which matters might be agreed or regularised. I also mentioned the fact that as it had already been agreed by both sides that it would be desirable for me to have a view of the disputed strip and its environs, it might be h
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a possible for me to hear Mrs Mael's evidence at Iken. In the end, counsel for the plaintiffs closed his case subject to any application that he might make with regard to Mrs Mael; and I rejected the application that counsel for the plaintiffs had already made under the Civil Evidence Act 1968 as being insufficiently established, though I noted his words as to a possible future application.

b I heard no more of the matter until I raised it on day 14, 12th April. After some discussion, it was then arranged that the matter should be argued the next morning; and on day 15 it was debated for most of the morning. Counsel for the defendant was critical of the way in which the matter had been dealt with by the plaintiffs, and, in particular, their failure to have Mrs Mael's evidence taken by an examiner in advance of the trial for use in case she proved unable to come to London to testify; and he again challenged the assertion of her unfitness. The plaintiffs then called her doctor, Dr Simpson, a registered medical practitioner, who had written the letter to which I have referred. His evidence was that Mrs Mael was just 84 (the 81 in the letter that I have mentioned seems to have been an error), that she had had an attack of bronchitis at the end of January, that she was now convalescing from it, but that she was unlikely to be better until the warm weather came. His evidence satisfied me that at all material times it was at least highly undesirable from a medical point of view for Mrs Mael to come to London to give evidence, but that she could give evidence in her locality without any real risk or undue distress. Dr Simpson's evidence was clear, frank and specific, and I found it wholly convincing.

d After the evidence had been given, I heard further argument. Initially, when challenged by counsel for the defendant on the score that he had failed to reveal any authority for making such an application, counsel for the plaintiffs had said that his application was made under RSC Ord 39, r 1. This reads as follows:

e '(1) The Court may, in any cause or matter where it appears necessary for the purposes of justice, make an order (in Form No. 32 in Appendix A) for the examination on oath before a judge, an officer or examiner of the Court or some other person, at any place, of any person.

f '(2) An order under paragraph (1) may be made on such terms (including, in particular, terms as to the giving of discovery before the examination takes place) as the Court thinks fit.'

g During the argument I enquired whether to make such an order was the only course open to the court, or whether it would be possible for the hearing before me to be adjourned to Iken for me to hear Mrs Mael's evidence; and the registrar helpfully referred me to RSC Ord 35, r 3. This reads as follows:

'The judge may, if he thinks it expedient in the interest of justice, adjourn a trial for such time, and to such place, and upon such terms, if any, as he thinks fit.'

h Counsel for the defendant then contended that this rule had no application. He said that the words 'to such place' did not mean any place, but only a place authorised for sittings of the High Court under the Courts Act 1971, s 2, and RSC Ord 33, r 1, and that Iken was not such a place, as indeed is the case. His contention was that I had no power to sit as a judge of the High Court at Iken, whereas counsel for the plaintiffs contended to the contrary.

i I pause there. The difference between the two modes of proceedings is marked. RSC Ord 39, r 1, requires an order to be made. The examination is normally in private before an examiner. The examination and cross-examination are duly recorded in depositions or by a shorthand writer; and at the trial of the action the depositions or transcript are then read as part of the evidence. If I made an order under this provision, primarily the order would be that there should be an examination on oath before me, with the depositions or transcript to be filed at the Central

Office in accordance with Appendix A, Form 32. The transcript or depositions would then be read to me when the trial was resumed, and thus what previously had been testified merely in private would be made public. a

I may say at once that this procedure seems to me to be quite inappropriate. No doubt it could be modified to some extent, but I really do not see why the evidence should be given in private and then read in public if any better course is available. The examination could, of course, be before an examiner and not before me; but then what I would have would be merely the still life of a transcript instead of the sight and sound of a living witness. b

The alternative course seems to me to be preferable in almost every way. Of course, much judicial time can be saved by taking evidence before an examiner, in place of the judge going to where the witness is; but judicial time is not everything, and here, as I shall in any case be going to Iken to view the site, there would not even be any saving of judicial time. Any objections to the admissibility of evidence, too, could be dealt with forthwith, instead of having to be reserved for subsequent argument on the transcript. Further, the evidence would be given *viva voce* and in public. The only possible disadvantage that I can see is on the score of expense: the registrar need not be present at an examination or a view, but ought to be present at a sitting of the court, though I understand that the only extra expense to the parties in respect of the attendance of the registrar would be that of his railway fare. As to the presence of a shorthand writer, a hearing before me could in fact effect an economy, in that under RSC Ord 68, r 1, I have power to dispense with the shorthand note, although that, of course, is a matter on which I would hear counsel. Nor would there be any fee to be paid to an examiner. c
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The matter stands thus. First, I am satisfied that there is ample medical evidence to justify Mrs Mael not being required to come to London to testify. Second, it seems clear that it would be better for the court to sit at Iken rather than for me to make an order under RSC Ord 39, r 1, for the taking of evidence at Iken by an examiner, whether myself or anyone else. Third, I must then consider whether I have power to sit at Iken for the purpose of hearing Mrs Mael's evidence. Fourth, if I have, I must then consider whether in all the circumstances it would be right for me to exercise the power. e
f

It seems to me that I have an inherent power to sit at Iken, and that this power is fortified by RSC Ord 35, r 3. I cannot read that rule in the narrow way for which counsel for the defendant contends. I do not think that the power of a judge to adjourn a trial 'to such place . . . as he thinks fit' is confined to an adjournment to only those places which are authorised under RSC Ord 33, r 1. The rule does not say so, and I do not see why it should be implied. Whatever may be the position as to the commencement of a trial, I cannot see that the power of adjournment is fettered. The power, of course, is a power that must be exercised judicially, and doubtless no judge would adjourn a trial to a place which he considered unfit for the purpose: but subject to the place being reasonably fit for the purpose, I regard the power as being unfettered by any such limitation as that for which counsel for the defendant has contended. It is possible, I suppose, that the law is that a trial can be commenced only at an authorised place, although it is unnecessary for me to decide this, and I do not do so. It is important that justice should be done in public, and so trials should no doubt normally be commenced in some place to which the public is accustomed to resort for such purposes. Thus there springs readily to mind the objection to the proceedings for divorce that in 1931 took place before a judge in Alberta in the judges' law library in the law courts, behind closed but not locked doors, one of them bearing the word 'private': *McPherson v McPherson*¹. But if a trial has begun in an authorised courtroom under normal conditions of publicity, I cannot see what objection there is to the trial being adjourned to some other suitable place, provided proper publicity is given to the adjournment. g
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¹ [1936] AC 177, [1935] All ER Rep 105

- a* Counsel for the defendant founded some argument on RSC Ord 35 being somewhat narrow in its scope. I do not think that it is. It covers a wide range of matters connected with proceedings at a trial, and, indeed, it is r 8 of the order that provides, inter alia, for a judge to inspect any place or thing with respect to which any question arises in the proceedings, a power which it has been agreed that I should exercise. There is ample authority for saying that an inspection by a judge is evidence of what he perceives, even though the inspection takes place outside a courtroom.
- b* Real evidence is real evidence, whether the res is small and portable and is brought to court for the judge to see, or whether it is large or immovable and the judge goes to see it. The process whereby the judge's perception of objects takes place on a view outside the court must, as it seems to me, form part of the trial: and if a judge may leave the courtroom to receive evidence of objects which cannot be carried before him, I do not see why in principle he should not also, while away from the courtroom, receive evidence for a witness too ill to come to court, provided, of course, appropriate safeguards are observed.
- c*

Although I have no doubts about my jurisdiction to sit at Iken, I wish if possible to avoid leaving matters in a state in which the contrary might be arguable in a higher court. The Courts Act 1971, s 2, on which counsel for the defendant relied, reads as follows:

- d*
- '(1) Sittings of the High Court may be held, and any other business of the High Court may be conducted, at any place in England or Wales.
- '(2) Subject to rules of court—(a) the places at which the High Court sits outside the Royal Courts of Justice, and (b) the days and times when the High Court sits outside the Royal Courts of Justice, shall be determined in accordance with directions given by or on behalf of the Lord Chancellor.'
- e*

Iken is not one of those five places at which sittings of the High Court for the trial of chancery proceedings are at present authorised to be held: see the *Practice Direction*¹. However, I think that one of the objects of the Courts Act 1971 is to facilitate the hearing of cases outside London, and I see no reason why an ad hoc direction should not be given by or on behalf of the Lord Chancellor for the trial of all or part of a particular matter at a particular place if there is sufficient reason for it. I have accordingly caused steps to be taken to obtain such a direction in respect of this case, so that if I consider it proper to hear Mrs Mael's evidence at Iken, there can be no possibility of it being argued that I lack jurisdiction to do so. Accordingly I turn to the fourth and last point, namely, whether it would be right for me to do this.

- g* It seems to me that there is considerable force in counsel for the defendant's objections to the course on this point pursued, or perhaps not pursued, by the plaintiffs. The matter has been left until late in the day, the precaution of obtaining Mrs Mael's evidence before an examiner has not been taken, even though there was ample time and ample warning, and the plaintiffs have dealt with the whole matter in what may with justice be described as a somewhat casual way. Nevertheless, the criterion laid down by RSC Ord 39, r 1, for ordering evidence to be given before an examiner is that it should appear 'necessary for the purposes of justice'. Under RSC Ord 35, r 3, the criterion for adjourning a trial to another place is that it is 'expedient in the interests of justice'. Does justice, then, require that Mrs Mael's evidence should be heard at Iken?
- h*

- j* I think it does. The case is unlike *Green v Sevin*², upon which counsel for the defendant relied, in that before counsel for the plaintiffs closed his case he had reserved his right to apply in respect of Mrs Mael's evidence, whereas no such question arose in *Green v Sevin*². Of course, counsel for the plaintiffs could not give himself any

¹ [1972] 1 All ER 103, [1972] 1 WLR 1

² (1879) 13 Ch D 589, [1874-80] All ER Rep 831

right to call the evidence, and the longer he left matters before he made his application, the more ammunition for resisting the application he put into the not unwilling hands of counsel for the defendant. But the suggestion had been made that it might be possible to hear Mrs Mael at Iken on the same day as the view (though this was not accepted by counsel for the defendant), and in any case I cannot see what injustice will be done to the defendant if the evidence is heard, subject to proper safeguards, whereas a real injustice to the plaintiffs may be done if the evidence is shut out. I bear in mind that this is a dispute of long standing in which feelings have run high, and justice is likely to be best served by hearing all the evidence that either side desires to tender, and hearing it in public. I do not consider that it would promote justice to penalise the plaintiffs for their procedural shortcomings by excluding the evidence. Accordingly, I think that counsel for the plaintiffs' application should succeed, and that subject to the terms that I shall mention I should adjourn this case to Iken at the conclusion of the other evidence for the purpose of hearing Mrs Mael's evidence on the same occasion as that on which, by agreement, I exercise my power to hold a view under RSC Ord 35, r 8.

Apart from the place of hearing, the only practical difference in hearing Mrs Mael's evidence in this way is that instead of the defendant being able to hear the whole of the plaintiffs' evidence before calling his own, there will be one witness (out of over 20) whose evidence for the plaintiffs will be given after all the defendant's witnesses have been heard. I think that any disadvantage to the defendant that this may occasion will be amply met by my intimating that if the defendant has any good reason for wishing to call any further evidence to meet Mrs Mael's testimony, whether by recalling a witness who has already testified or by calling further evidence, I will listen to any application for the purpose. The defendant saw a proof of Mrs Mael's proposed testimony weeks ago in connection with the application under the Civil Evidence Act 1968, and it may well be that the defendant will make no application in this respect: but if he does, I shall hear it. I will also, if either side so requires and the arrangements can be made, hear Mrs Mael's evidence before holding the view, so that in this respect her evidence will be in no different case from the other evidence.

The matter is somewhat unusual, and the occasions on which a judge of the Chancery Division has sat outside London have, I believe, been few indeed; I am not now speaking of deputy judges appointed under the Courts Act 1971. At all events, it would not surprise me to hear that no sitting of the High Court has taken place at Iken before. One practical reason for sitting in London is that a high percentage of chancery cases involve questions of law that call for the resources of well-stocked law libraries. Such considerations do not apply, of course, to the mere hearing of evidence: and it may indeed be that in future chancery judges will sit outside London less infrequently. Without for a moment suggesting that it will become common for judges of this Division to sit in temporary accommodation outside the normal authorised places, I think that a degree of flexibility is desirable in cases where there is good reason for relaxing the accustomed ways.

Be that as it may, the unusual circumstances of this case make it appropriate that I should mention certain practical details. The date, time and place of the sitting at Iken will be announced in open court before I adjourn the case for the purpose. The place of hearing will for the time being become a place at which a sitting of the High Court will be taking place, so that the normal provisions relating to sittings of the High Court will apply. A registrar of the Chancery Division will be present in court as is customary.

On the other hand, I think it would be unduly burdensome to all concerned if they were required to be robed in the usual way merely for the purpose of hearing the evidence of one witness; and there may well be difficulties in such matters as the provision of suitable robing rooms. Accordingly, I shall not robe, and I direct that the registrar and counsel shall similarly not be robed. Robes are convenient in

- a normal circumstances as an indication of the functions of those engaged in the proceedings, and as enhancing the formality and dignity of a grave occasion. In their appearance they also lessen visual differences of age, sex and clothing, and so aid concentration on the real issues without distraction. But robes are not essential, and the court may dispense with them where there is good reason. Jurisdiction is neither conferred nor excluded by mere matters of attire or locality, and I need not discuss the numberless occasions on which judges have exercised a variety of judicial functions in unusual places without the aid of robes for them or for counsel, from Lord Lyndhurst LC in a box at the opera to Sir Lancelot Shadwell V-C while bathing in the Thames and Sir Samuel Evans P in a dressing-gown in his bedroom.

Accordingly, on the footing that I have mentioned, I rule that I can and should hear the evidence of Mrs Mael at Iken; and at the appropriate time I shall adjourn the court for this purpose.

Ruling accordingly.

1st May. Following the ruling given on 16th April the court sat in the village hall at Iken and heard the evidence of Mrs Mael. At the sitting of the court the judge stated that a direction on behalf of the Lord Chancellor authorising the court to sit at Iken had been given in a letter dated 18th April 1973 from the Circuit Administrator.

Solicitors: Christopher & North, agents for R J Winyard, Southwold, Suffolk (for the plaintiffs); Cameron, Kemm, Nordon & Co (for the defendant).

R W Farrin Esq Barrister.

R v Smith (Donald)

COURT OF APPEAL, CRIMINAL DIVISION
EDMUND DAVIES LJ, WILLIS AND BEAN JJ
29th MARCH, 17th APRIL, 1st MAY 1973

Customs – Importation of prohibited goods – Knowingly concerned in fraudulent evasion – Importation of drugs – Importation – Meaning – Cannabis – Cannabis sent by air from Nairobi to Bermuda via London – Cannabis unloaded at London airport, transferred to another aircraft and flown to Bermuda – Cannabis not taken outside customs area at London airport – Accused knowing cannabis being sent from Nairobi to Bermuda – Intention merely to use London as pipeline between Nairobi and Bermuda – Whether cannabis ‘imported’ into, and ‘exported’ from, United Kingdom – Customs and Excise Act 1952, ss 44, 45, 56, 79, 304.

A consignment of cannabis was sent by air from Nairobi to Bermuda via London airport. At London airport it was unloaded from an East African aircraft and held within the customs area until it was transferred to another aircraft and flown to Bermuda. S was a party to the arrangement whereby the consignment of cannabis was being sent from Nairobi to Bermuda and knew that the most likely route from Nairobi to Bermuda was via London. A letter referring to ‘the shipment from Bermuda’ and telling him that he could make enquiries about it at London airport was found in S’s possession. He was charged with, and convicted of, being knowingly concerned in a fraudulent evasion of the prohibition against the importation of cannabis, contrary to s 304 (b) of the Customs and Excise Act 1952, and of being knowingly concerned in a fraudulent evasion of the prohibition on the exportation

of cannabis, contrary to s 56 (2) of the 1952 Act. He appealed contending (i) that the cannabis had neither been 'imported' into, nor exported from, the United Kingdom within the meaning of the 1952 Act; ss 44^a and 45^b of the Act showed that there was a distinction between merely 'unloading' and 'importing'; and (ii) in any event there was no evidence that S was knowingly concerned in the importation or exportation (if any) of the cannabis; no *actus reus* on his part in the United Kingdom had been established.

Held – The appeal would be dismissed for the following reasons—

(i) on the true construction of ss 44 and 45 'goods unloaded' could not be excluded from the categories of 'goods imported'; the provisions of the 1952 Act, and in particular s 79^c, showed clearly that goods entering the United Kingdom by air could be 'imported' before they were even unloaded, and the consignment of cannabis was imported when it was landed at London airport, and exported when it was placed on the aircraft bound for Bermuda; it was quite irrelevant to the question of importation that it remained between loading and reloading in the customs area (see p 1167 b to e, post).

(ii) for a person to be convicted of being knowingly concerned in the fraudulent evasion of the prohibition it was sufficient if it was shown that he was a party to the importation of prohibited goods into the United Kingdom as a staging post for their onward transmission to another country (see p 1167 g and h, post);

(iii) there was ample evidence on which the jury could convict S of the offences charged (see p 1167 h, post).

Notes

For the application of the Customs and Excise Act 1952, see 33 Halsbury's Laws (3rd Edn) 58, 59, para 118.

For the Customs and Excise Act 1952, ss 44, 45, 56, 79, 304, see 9 Halsbury's Statutes (3rd Edn) 90, 91, 101, 113, 201.

Cases referred to in judgment

Director of Public Prosecutions v Doot [1973] 1 All ER 940, [1973] 2 WLR 532, HL.
R v Berner (1953) 37 Cr App Rep 113, CCA.

Application

On 4th October 1972 at the Crown Court, London SW3, before Mr Recorder Murray Buttrose and a jury the applicant, Donald Sydney Smith, was convicted on three counts of fraudulently importing cannabis (counts 1, 5 and 12), on one count of fraudulently exporting it (count 13), one count of assaulting a customs officer (count 2) and one count of possessing cannabis (count 3). He was sentenced to a total of 6½ years' imprisonment. The court ordered a recommendation for deportation. The applicant applied for leave to appeal against conviction and sentence. The facts are set out in the judgment of the court.

B A Payton for the applicant.

R E Auld for the Crown.

Cur adv vult

17th April. **WILLIS J** read the judgment of the court at the request of Edmund Davies LJ. On 4th October 1972 at the Crown Court, London SW3, after a trial

^a Section 44, so far as material, is set out at p 1166 a and b, post

^b Section 45, so far as material, is set out at p 1166 d and e, post

^c Section 79, so far as material, provides: ' . . . (2) The time of importation of any goods shall be deemed to be . . . (b) where the goods are brought by air, the time when the aircraft carrying them lands in the United Kingdom or the time when the goods are unloaded in the United Kingdom, whichever is the earlier . . . '

a lasting seven days, the applicant was convicted on three counts of fraudulently importing cannabis (nos 1, 5 and 12), one count of fraudulently exporting it (no 13), one count of assaulting a customs officer (no 2) and one count of possessing cannabis (no 3). He was sentenced to two years and two years' imprisonment consecutive on counts 1 and 5: one year and one year concurrent but consecutive to the above on counts 12 and 13: six months and nine months both consecutive on counts 2 and 3 respectively. He was, therefore, sentenced to six years and three months in all, with one offence taken into consideration. The applicant was also recommended for deportation and ordered to make a legal aid contribution of £200.

A co-accused, Thompson, was convicted on count 1 and pleaded guilty to count 4 (possessing cannabis) and was sentenced to 18 months and six months consecutive. This made two years in all, and he was recommended for deportation.

c A third man, Sequeira, pleaded guilty to seven counts (nos 1 to 6 and 11) of fraudulently importing cannabis and was sentenced to six months consecutive on each, making $3\frac{1}{2}$ years in all. Pleas of not guilty were accepted on counts 12 and 13. He was then called as a witness for the prosecution against the applicant and Thompson.

The applicant now applies for leave to appeal against conviction and sentence. The facts according to the Crown are as follows.

d *Counts 1, 2 and 3*

On 10th May 1972 an airmail parcel arrived at Heathrow Airport from Nairobi addressed to Mr D Thomas, 9 Draycott Place, London. It was examined by customs officers on the same day, and found to contain 4,830 grammes of cannabis. On 27th May the parcel was collected from Chelsea sorting office by Thompson, who said he was collecting it on behalf of Thomas. An attempt had been made to deliver e the parcel to the addressee on the previous day. It failed because the landlady said no one of the name of 'Thomas' lived at her house: Thompson, however, was staying there.

Having collected the parcel, Thompson took it to a waiting car of which the applicant was the driver. Both men were then arrested by police officers. When cautioned, Thompson said, 'Yes, all right then. We won't struggle'. The applicant f remained silent, but later at the police station he said to Thompson, 'You didn't know what was in the parcel did you? You were only collecting it for a friend, weren't you?' He gave a false address. When his hotel room was searched a further 114 grammes of cannabis were found (count 3). He admitted it was his and that he used it.

The sender of the parcel was Sequeira, who said that the applicant had introduced g him to a man named Kamel in Nairobi in March 1972 and, when he returned to London in April, had written to ask him (Sequeira) to see Kamel and ask him about certain flight numbers. He did so, and as a result wrote the applicant a letter on 6th May. Kamel gave Sequeira the name and address of Thomas. Sequeira also said that he provided the names and addresses for other parcels of cannabis to be sent, for which service the applicant had offered him £2,000. It was in relation to h parcels sent by Sequeira in accordance with this arrangement that counts 6 to 11 arose. In the letter which the recorder described, with justification, as the key to the whole case on counts 1, 12 and 13, the following passages occur:

i 'As we arranged on the telephone last night I have mailed the gift to Mr Thomas in London . . . I have sent the other parcel to-day by airmail addressed to Mr Thomas so it should be in your hands by next week. Keep your fingers crossed everything will be all right.'

The prosecution said these were references to the parcel.

The letter was found in the applicant's hotel by police and customs officers on 27th May. When he was being interviewed later in the day in his cell by customs officers about the letter and his diary, he snatched the letter from the officer, tried

to put both down the lavatory, and, when foiled in that, he contrived to swallow the letter. He also bit the officer's finger and threw him against the wall of the cell. Asked to explain swallowing the letter he said, 'I had to. It made things look bad'.

What had happened was that one customs officer, while questioning the applicant, read the letter aloud to him, a paragraph at a time, while the other officer made notes. The reading had concluded before the letter was snatched and it was reconstructed from the contemporaneous notes. Sequeira in evidence confirmed the substantial accuracy of the reconstruction, as did two police officers who had seen and read the original.

The reverse of the airmail letter read 'Sender Vincent & Maria Sequeira P.O. Box 10723 Nairobi Kenya'. There was an entry in the applicant's diary 'Maria Sequeira P.O. Box 10723'. The applicant said that the diary entry was a Canadian address and at that point snatched the letter.

In his defence on count 1, the applicant said he had known Thompson some ten years, and had met him on 27th May to go shopping. He knew nothing of the parcel collected by Thompson and had no reason for thinking it contained cannabis. He denied Sequeira's evidence about Kamel and the sending of parcels. He admitted receiving the letter of 6th May but said he did not open it or know of its contents until he was shown it in the cell. He said it began 'Hi Don' and not 'Dear Donald' (his name) as the prosecution witnesses averred. He admitted grabbing the letter 'as things looked bad', but said he could not understand what was being said to him on account of the echo in the cell. He denied the assault and said the bite was accidental.

Count 5 'the Birmingham count'

The main prosecution witnesses were George Thomas, who had an off-licence in Birmingham and Mr Gillett, a customs officer. Thomas said that Smith, the applicant, was introduced to him by a mutual friend, as 'John Clark'. In January or February 1972 Clark (Smith) told Thomas he was expecting a parcel and asked if it could be sent to Thomas's address as he was staying at an hotel and did not want it stolen. An attempt by a postman to deliver a parcel addressed to 'John Clark' at Thomas's address failed on 8th February, but on 14th February this parcel, sent by one Masserrias from Kenya, was examined by customs and found to contain 4,820 grammes of cannabis. On 3rd March this parcel was shown by Mr Gillett to Thomas who said he knew Clark and the parcel was very like one which had arrived in mid-February and had been collected by Clark (Smith). He later identified the applicant from 12 photographs as the man he knew as Clark.

In his defence to count 5, the applicant said he had been introduced to Thomas as Donald Smith. He had never used the name Clark, and knew nothing of any parcels delivered to Thomas's address: he denied much of Thomas's evidence and in particular the time of introduction which Thomas at one point in his evidence put as about Christmas 1971, which was manifestly wrong since the applicant was admittedly away from the United Kingdom from November 1971 to 27th January 1972.

Counts 12 and 13

The letter also contained the following passage: 'The shipment to Bermuda went on 2 April on flight EC 772. You can make enquiries about it at BOAC at HEATHROW AIRPORT.' The letter also made clear that there was no way of getting an airmail consignment from Nairobi to Bermuda save via London. Documentary evidence showed that East African Airways flight number EC 772 left Nairobi on 2nd April arriving at Heathrow the same day. On it were three packets described as gifts of material and wood carving, consigned by 'Mr Charles Miller' of Nairobi to 'Mr Michael Seymour' of Bermuda, which on arrival in Bermuda were found to contain 35,334 grammes of cannabis and 13,590 grammes of cannabis resin. The

a three packets were in one consignment, on a single airway bill, and were transhipped at London airport on 3rd April on BOAC Flight BA 875. This consignment was the only one in the files of either airline which was consigned from Nairobi to Bermuda via London on the date in question.

At the end of the prosecution case counsel for the applicant made a legal submission that there was no case to go to the jury on counts 12 and 13. This was overruled, and when the applicant gave evidence he denied all knowledge of the consignment, the subject of those two counts.

b In his submission to this court counsel has renewed his argument on counts 12 and 13 which involves a consideration of the appropriate sections of the Customs and Excise Act 1952: he has also made a serious attack on the conduct of the trial by the learned recorder in a number of respects and he further complains of misdirection. It must be said at once that we have taken time to consider our decision solely on the issues which arise as to counts 12 and 13, which raise questions on which the considered judgment of this court was expressly requested by counsel for the Crown. It will be convenient, therefore, to deal first with the other matters of complaint which have been briefly mentioned.

c [His Lordship then outlined the allegations made about the conduct of the trial and complaints of misdirection, reviewed the evidence and concluded:] On counts 1, 2, 3 and 5, therefore, there is nothing to indicate that the applicant did not have a fair trial or that the jury was misdirected. There was abundant evidence on which the jury, properly directed, could convict, and the application on these four counts is, accordingly, refused.

d We pass, therefore, to the real point in this application, namely, the questions arising on counts 12 and 13. Count 12 was laid under s 304 (b) of the 1952 Act, which makes it an offence in relation to any goods to be '... in any way knowingly concerned in any fraudulent evasion of ... prohibition ... applicable to those goods'—in this case the importation of cannabis. Count 13 was laid under s 56 (2) of the same Act, which similarly makes it an offence to export cannabis. Thus the prosecution case was that the consignment was imported into the United Kingdom via the East African aircraft and was exported when it left by BOAC for Bermuda, and that in both these operations the applicant was 'knowingly concerned' in getting the consignment into the United Kingdom and out again in breach of the prohibition.

e It is important to observe that counsel for the applicant concedes that there was evidence on which the jury could find that the parcel was sent from Kenya by the applicant, Kamel and Sequiera acting together, and that the applicant knew that the most likely route to Bermuda was via London. Nonetheless, he submits (1) f that the goods were neither imported into nor exported from the United Kingdom when all that happened was that they were unloaded from one aircraft at Heathrow, remained throughout their stay within the customs area, and were then loaded into another aircraft, and (2) that there was no evidence that the applicant was knowingly concerned in the import or export (if any) despite the concession he felt bound to make on the evidence. He submitted that the evidence went no further h than the establishment of knowledge of the transaction, and participation in its inception in Kenya, but that it fell short of proof of any *actus reus* on the applicant's part in this country.

i Counsel's first submission on count 12 was to the effect that the goods were merely 'unloaded' at London airport, their ultimate destination being Bermuda and not the United Kingdom, and further that they were not 'goods in transit'. He also questioned, on grounds which were not altogether clear to the court, whether the area of Heathrow where the goods were unloaded, kept and reloaded was part of the United Kingdom for the purposes of the Act. This latter part of the submission we find quite untenable. It was on the distinction which he sought to draw between 'unloading' and 'importing' that counsel really based his first submission, and he relied for this on ss 44 and 45 of the 1952 Act. Section 44, so far as material, reads:

'Where—(a) except as provided by ... this Act any imported goods ... are without payment of ... duty ... unloaded from any aircraft in the United Kingdom ... or removed from their place of importation or from any approved ... transit shed; or (b) any goods are imported, landed or unloaded contrary to any prohibition or restriction for the time being in force ... or (c) ... (d) ... (e) ... (f) ... those goods shall be liable to forfeiture. Provided that where any goods the importation of which is for the time being prohibited ... are on their importation either—(i) reported as intended for exportation in the same ... aircraft [see s 26 (3) (ii)] ... or (ii) entered for transit or transshipment [see s 28 (2) (c)]; or (iii) entered to be warehoused for exportation [see s 28 (2) (b) (d)] ... the Commissioners may, if they see fit, permit the goods to be dealt with accordingly.'

Prohibited goods can, thus, be imported without liability to forfeiture, at the commissioners' discretion, where the ultimate destination is foreign and a temporary accommodation is needed in the United Kingdom.

It is provided by s 45:

'(1) If any person unships or lands in any port or unloads from any aircraft in the United Kingdom ... or removes from their place of importation or from any approved ... transit shed ... (a) any goods chargeable with a duty which has not been paid; or (b) any goods imported, landed or unloaded contrary to any prohibition ... for the time being in force ... with respect to those goods, or ... is otherwise concerned in such unshipping, landing, unloading or removal, or if any person imports or is concerned in importing any goods contrary to any such prohibition ... whether or not the goods are unloaded [then follow the penalties].'

As to s 79 (2) (b) of the Act which provides that the time of importation of any goods shall be deemed to be, where the goods are brought by air, 'when the aircraft carrying them lands in the United Kingdom or the time when the goods are unloaded in the United Kingdom, whichever is the earlier', counsel submits that its purpose is merely to provide an exact time by reference to which budgetary and analogous customs dues can be related or calculated.

Counsel for the Crown has referred us to the scheme of importation in the Act provided by s 26 (report inwards) and s 28 (entry of goods by importer), and to the definition of 'importer' and 'transit goods' in s 307:

'"importer" in relation to any goods at any time between their importation and the time when they are delivered out of customs charge, includes any ... person for the time being ... beneficially interested in the goods.'

'"transit goods" means imported goods entered on importation for transit or transshipment'.

A 'transit shed' is defined by s 17 as being a place approved by the commissioners for the deposit of goods imported but not yet cleared from customs charge, including goods not yet reported and entered. It thus appears that there can be a time when goods are imported and in customs charge earlier than that arising from the normal procedure of reporting inwards and entry under ss 26 and 28.

Counsel for the Crown finally submitted on this aspect of the case that there is no distinction to be drawn between importation on the one hand and unloading on the other, contrary to the contention of counsel for the applicant. He submitted that the proper interpretation of s 45 (i) (b) is that it provides by means of an omnibus form of drafting for all possibilities which may arise in relation to improper importation, and in particular includes the situation where goods are permitted to be imported within the discretion of the commissioners under s 17 or the proviso to s 44

a so that their subsequent handling had to be restricted by creating a further offence, e.g. the removal of prohibited goods from a transit shed while they are there at the commissioners' discretion.

b We do not find s 45 altogether easy to construe, although we think that the approach of counsel for the Crown may well be right. However, it is to be observed that ss 44 and 45 are concerned with the improper importation of goods, and provide by s 44 for the forfeiture of goods improperly imported, and by s 45 for penalties for persons improperly importing. It seems quite clear that the Act contemplates that goods c can be imported before they are either landed from a ship or unloaded from an aircraft. If, as we think, s 79 is not concerned only with budgetary matters, it is plain that goods entering the country by air are imported before they are unloaded, as are goods brought by sea before they are landed. In a fasciculus of sections dealing with the improper importation of goods, whether by evading the payment of duty on customed goods or the prohibition on the importing of prohibited goods, it would be strange indeed for Parliament to have excluded from the various categories of 'goods imported' a category of 'goods unloaded' without such an intention being d precisely indicated. We cannot think that ss 44 (b) and 45 (1) (b) should be construed in the way contended for by counsel for the applicant, namely, as indicating that there can be a category of goods which are simply 'unloaded' and not 'imported' when they are taken off an aircraft at e.g. Heathrow and held in a customs area until reloaded for onward transmission outside the country. It is sufficient to say that in this case we have no doubt that the cannabis in question was imported when the aircraft bringing it landed at Heathrow, and was exported when it was placed on board the BOAC aircraft and that it is quite irrelevant to the question of importation that it remained between unloading and reloading in a customs area.

e We now pass shortly to counsel for the applicant's second submission. It suffices to say that, on the question of the necessary dishonest intent, if the jury accepted (as they undoubtedly did) that the applicant was a party to the importation of cannabis into the United Kingdom as a staging post for its onward transmission to Bermuda, the charges in counts 12 and 13 were fully proved. It was quite unnecessary f to prove that the applicant did anything to further the transaction in this country. This view, we think, receives some support from the two cases to which we have been referred by counsel for the Crown, although neither is exactly in point. In *R v Berner*¹ it was held that exportation did not cease to be prohibited merely because the person taking the goods out of the United Kingdom intended to bring them back. By the same process of reasoning we think that goods deliberately introduced into the United Kingdom are nonetheless imported because the intention is to pass them through this country to another terminus. If this were not so g we cannot think that an argument to the contrary effect would not have been advanced in *Director of Public Prosecutions v Doot*². There is no suggestion in any of their Lordships' speeches that the conspiracy to import cannabis in that case might have been invalidated by the accepted intention to use the United Kingdom simply as a pipeline between Africa and the United States.

h In our view there was ample evidence on which the jury, properly directed as they were, could find that the applicant was knowingly concerned in the fraudulent evasion of the prohibition. The application for leave to appeal against the convictions on counts 12 and 13 likewise is refused.

i As to sentence criticism is made by counsel for the applicant only of those on counts 2 (assault) and 3 (possessing cannabis), which he submits are excessive. The applicant is 36 and has a number of convictions in Bermuda, including more than one for violence. This court can find nothing wrong in principle with the sentences

1 (1953) 37 Cr App Rep 113

2 [1973] 1 All ER 940, [1973] 2 WLR 532

imposed and they are certainly not excessive. This application is, therefore, also refused. a

[1st May 1973. The court considered an application for leave to appeal to the House of Lords.]

EDMUND DAVIES LJ. On 4th October 1972 Donald Sydney Smith was convicted inter alia on counts 12 and 13 of an indictment alleging fraudulent importation and exportation of cannabis, contrary to ss 304 (b) and 56 (2) respectively of the Customs and Excise Act 1952. He applied for leave to appeal against his conviction and sentence on those two counts and indeed on other counts to which it is not necessary for us to refer. On 17th April we purported to dismiss his application for leave to appeal, but as a question of law was involved in the conviction on those two counts, the proper order that we should have made was to grant leave to appeal against conviction and to proceed with the substantive appeal. Immediately this was realised, we gave directions that the order of this court should not be drawn up, and it has not been. b

We now grant the application for leave to appeal against the conviction of the applicant on counts 12 and 13, and with the concurrence of counsel for the applicant we treat the hearing before us as the hearing of the appeal itself. For the reasons given in the judgment of the court delivered by Willis J, we dismissed the appeal against conviction on all counts in the indictment including of course counts 12 and 13, and as he stated, the application in relation to sentences is refused. c

He now applies under s 33 of the Criminal Appeal Act 1968 for the certificate of this court that a point of law of general public importance is involved in the decision, and for leave to appeal to the House of Lords against this court's decision dismissing his appeals in respect of the convictions under counts 12 and 13. We certify that the following points of law of general public importance are involved in our decision relating to those two convictions: d

'If goods, the subject of prohibitions upon importation into and exportation from the United Kingdom, are sent by air mail from Kenya to Bermuda, and the goods are in fact flown to London (Heathrow) Airport in the United Kingdom and without leaving the customs security area are there transferred to another aircraft and flown to Bermuda: (a) are such goods "imported" into the United Kingdom within the meaning of the Customs and Excise Act 1952? and (b) are such goods "exported" from the United Kingdom within the meaning of the said Act.' e

But, having certified, we refuse leave to appeal to the House of Lords, leaving the appellant to take such course thereafter as he thinks appropriate. f

We are grateful to counsel for the assistance they have given us in framing the question we have certified. g

Application for leave to appeal against convictions on counts 1, 2, 3 and 5 dismissed. Application for leave to appeal against conviction on counts 12 and 13 granted; appeals dismissed. Application for leave to appeal against sentence dismissed. h

The court having certified that points of law of general public importance were involved in its decision in relation to counts 12 and 13, leave to appeal was refused. i

Solicitors: Harold Weston & Co (for the applicant); Solicitor, Customs and Excise.

Jacqueline Charles Barrister.

a Alfred Crompton Amusement Machines Ltd v Commissioners of Customs and Excise (No 2)

HOUSE OF LORDS

b LORD REID, LORD MORRIS OF BORTH-Y-GEST, VISCOUNT DILHORNE, LORD CROSS OF CHELSEA AND LORD KILBRANDON
26th JUNE, 4th JULY 1973

c *Discovery – Production of documents – Privilege – Legal professional privilege – Documents coming into existence after litigation anticipated – Documents not prepared primarily with view to litigation – Commissioners of Customs and Excise – Purchase tax – Documents coming into existence for purpose of fixing wholesale value of taxpayer's goods – Commissioners anticipating that valuation would be disputed by taxpayer and that arbitration proceedings would follow – Documents also for use of legal advisers in anticipated arbitration proceedings – Whether documents subject of legal professional privilege.*

d *Discovery – Production of documents – Privilege – Crown privilege – Privilege on ground of public interest – Confidential documents – Documents containing information obtained under statutory powers – Confidential information obtained from third parties – Commissioners of Customs and Excise – Purchase tax – Information obtained from customers of taxpayers – Knowledge of third parties that information could be disclosed likely to hamper future exercise of statutory duties by commissioners.*

e *Discovery – Production of documents – Privilege – Confidential documents – Documents obtained in confidence from third parties for purposes of litigation – Documents copies of documents belonging to third parties – Whether confidential nature of documents a ground of privilege.*

f The appellants were a company which manufactured amusement machines. They supplied the machines to an associated company for sale to retailers and operators. Up to July 1967 the appellants had paid purchase tax calculated on a formula agreed in 1964 with the Commissioners of Customs and Excise as to the wholesale value of the machines. On 31st July 1967, however, the appellants' solicitors wrote to the commissioners challenging the 1964 agreement. Their letter stated that they had advised the appellants that the amount of tax payable under the agreement was incorrect, and that the amount correctly payable was less; and it asked the commissioners to accept the appellants' cheque for some £30,000 enclosed with the letter as paid to the commissioners by way of deposit, and to regard the letter as a request for a reference to arbitration under the Purchase Tax Act 1963. For the next 2½ years the commissioners sought to fix the wholesale value of the machines; they investigated the appellants' affairs and obtained information from their customers. h That information was given voluntarily but the commissioners were empowered by s 24 (6) of the 1963 Act to compel its disclosure when necessary. Eventually, in a letter dated 8th December 1969, the commissioners, in accordance with s 3 of the 1963 Act, gave their opinion as to the wholesale value of the machines in respect of which the appellants were accountable for purchase tax during the period 1st April 1967 to 31st December 1968. The appellants objected to the commissioners' i assessment of the wholesale value and duly served notice under s 36 of the 1963 Act requiring a reference to arbitration. Pleadings were delivered by the appellants contesting the commissioners' assessment. The commissioners put in a defence disputing the appellants' contentions and made an affidavit of documents in which they claimed privilege in respect of a large number of documents listed in three classes. The privilege was claimed for (class 2 (a)) communications between the

commissioners and their solicitor to obtain advice; (class 2 (b) (i)) communications between the commissioners and their solicitor in anticipation of litigation so as to provide evidence and information for the arbitration; (class 2 (b) (ii)) memoranda, notes, minutes, correspondence, reports and schedules passing between the commissioners and their officers, servants and agents, and between the commissioners' officers, servants and agents, which had been prepared, sent or received confidentially for the purpose of obtaining or furnishing information and evidence for the purposes of the arbitration during the period (i.e. from 31st July 1967) when, in the commissioners' view, the arbitration was contemplated or pending; (class 2 (c)) documents received from third parties in confidence as information and evidence for the purposes of the arbitration; those documents were described in the affidavit as orders, invoices, confidential price lists, credit notes, extracts from ledgers, correspondence between third parties, agreements between third parties, and information supplied to the commissioners by persons other than the appellants relating to the purchase and sale of amusement machines manufactured by the appellants at a time when arbitration between the appellants and the commissioners was contemplated or pending. The commissioners claimed that all the documents listed were the subject of legal professional privilege and further that disclosure of documents listed in classes 2 (b) and (c) would be contrary to the public interest. Forbes J^a dismissed the commissioners' claims but, on appeal, the Court of Appeal upheld the claims for legal professional privilege in respect of classes 2 (a) and (b) and upheld the claim for privilege in respect of class 2 (c) on the ground that they were copies of documents belonging to third parties which had been entrusted to the commissioners in confidence for the purposes of the litigation. On appeal by the appellants it was not disputed that the class 2 (a) documents were the subject of legal professional privilege.

Held – (i) The commissioners were entitled to claim legal professional privilege in respect of documents in class 2 (b) (i) even if, which was doubtful, the existence of privilege depended on the reference to arbitration having been anticipated when they were written, for the commissioners had, on the receipt of the letter of 31st July 1967, formed the reasonable view that any value which they fixed would almost certainly be challenged and there was nothing in the subsequent correspondence to make them think otherwise (see p 1172 f, p 1175 b, p 1182 d and e and p 1185 f, post).

(ii) (Viscount Dilhorne dissenting) The commissioners were not however entitled to claim legal professional privilege in respect of classes 2 (b) (ii) and 2 (c). Although it might be the case that privilege could be claimed for documents which had been produced for two quite separate purposes, one of which was the submission of the information contained therein to a legal adviser for advice in the event of a claim being made by a third party, the documents in classes 2 (b) (ii) and 2 (c) were not in that category; the two purposes for which they had come into existence were parts of a single wider purpose, i.e. the ascertainment of the wholesale value of the appellants' goods, the sole immediate purpose being to help the commissioners to fix what in their opinion was the true value. The mere fact that the commissioners knew that their opinion might be challenged did not itself enable them to claim that the documents were the subject of privilege. The documents had first to be used by the commissioners to enable them to form an opinion as to value before arbitration proceedings became possible and before their solicitor would use them for the purpose of defending their opinion in the anticipated arbitration (see p 1172 f, p 1183 g to p 1184 c and p 1185 f, post); *Jones v Great Central Railway Co* [1919] AC 4 applied; *Ogden v London Electric Railway Co* [1933] All ER Rep 896 and *Seabrook v British Transport Commission* [1959] 2 All ER 15 distinguished.

- a* (iii) There was no basis for a claim to privilege in respect of the class (2) (c) documents on the ground that they were documents, or copies of documents, which belonged to third parties and had been entrusted to the commissioners in confidence. Privilege against disclosure could not be claimed on the ground that documents, whether confidential or not, belonged to a third party and the confidential nature of a document was not itself a ground of privilege (see p 1172 f, p 1180 j, p 1181 b and c, p 1182 b and p 1185 f, post); *Enthoven v Cobb* (1852) 2 De GM & G 632 distinguished.
- b* (iv) The commissioners were however entitled to claim 'Crown' privilege, i.e. privilege on the grounds of public interest, in respect of documents in classes 2 (b) (ii) and 2 (c). Although 'confidentiality' was not a separate head of privilege, it might be a very material consideration to bear in mind when privilege was claimed on the ground of public interest. In the circumstances there was a strong possibility that the third parties who had supplied the information to the commissioners because of the existence of their statutory powers would very much resent its disclosure by the commissioners to the appellants and it was not at all fanciful to say that knowledge that the commissioners could not keep such information secret might be harmful to the efficient working of the 1963 Act. Accordingly, although the considerations for and against disclosure were fairly evenly balanced, the courts should uphold the claim to privilege on the ground of public interest and trust the head of the department concerned to do what he could to mitigate the ill-effects of non-disclosure. The appeal would therefore be dismissed on that ground (see p 1172 f, p 1175 b, p 1184 d to f and p 1185 c to f, post); *Norwich Pharmacal Co v Commissioners of Customs and Excise* p 943, ante, distinguished.
- c* Decision of the Court of Appeal [1972] 2 All ER 353 affirmed on different grounds.
- d*

e Notes

For privilege of documents prepared with a view to litigation, see 12 Halsbury's Laws (3rd Edn) 44-46, paras 62, 63, and for cases on the subject, see 18 Digest (Repl) 103-105, 879-896.

- f* For Crown privilege where disclosure of documents is contrary to public interest, see 12 Halsbury's Laws (3rd Edn) 53-55, para 73, and for cases on the subject, see 18 Digest (Repl) 139-142, 1256-1282.

Cases referred in opinions

- Admiralty Comrs v Aberdeen Steam Trawling and Fishing Co Ltd* 1909 SC 335, 18 Digest (Repl) 113, *497.
- g* *Birmingham and Midland Motor Omnibus Co Ltd v London and North Western Railway Co* [1913] 3 KB 850, 83 LJKB 474, 109 LT 64, CA, 18 Digest (Repl) 53, 409.
- Chantrey Martin & Co v Martin* [1953] 2 All ER 691, [1953] 2 QB 286, [1953] 3 WLR 459, CA, 18 Digest (Repl) 133, 1174.
- Crompton (Alfred) Amusement Machines Ltd v Comrs of Customs and Excise* [1971] 2 All ER 843.
- h* *Enthoven v Cobb* (1852) 5 De G & Sm 595, 64 ER 1259; *aff'd* (1852) 2 De GM & G 632, 19 LTOS 291, 17 Jur 81, 42 ER 1019, 18 Digest (Repl) 93, 766.
- Hopkinson v Lord Burghley* (1867) 2 Ch App 447, 36 LJCh 504, 18 Digest (Repl) 134, 1183.
- Jones v Great Central Railway Co* [1910] AC 4, 79 LJKB 191, 100 LT 710, HL, 18 Digest (Repl) 107, 917.
- i* *Longthorn v British Transport Commission* [1959] 2 All ER 32, [1959] 1 WLR 530, Digest (Cont Vol A) 491, 952b.
- Norwich Pharmacal Co v Comrs of Customs and Excise* p 943, ante, [1973] 3 WLR 164, HL.
- Ogden v London Electric Railway Co* (1933) 149 LT 476, [1933] All ER Rep 896, CA, 18 Digest (Repl) 112, 951.
- Reynolds v Godlee* (1858) 4 K & J 88, 32 LTOS 35, 70 ER 37, 18 Digest (Repl) 79, 633.

Seabrook v British Transport Commission [1959] 2 All ER 15, [1959] 1 WLR 509, Digest (Cont Vol A) 491, 952a. a

Watson v Cammell Laird & Co (Shipbuilders & Engineers) Ltd [1959] 2 All ER 757, [1959] 1 WLR 702, [1959] 2 Lloyd's Rep 175, CA, Digest (Cont Vol A) 490, 894a.

Whitehill v Glasgow Corpn 1915 SC 1015, 18 Digest (Repl) 113, *503.

Appeal

Alfred Crompton Amusement Machines Ltd appealed against an order of the Court of Appeal¹ (Lord Denning MR, Karminski and Orr LJ) dated 17th February 1972 allowing the appeal of the Commissioners of Customs and Excise against an order of Forbes J¹ dated 15th July 1971 whereby it was ordered that the commissioners file an affidavit specifying which of the documents contained in bundles A to G referred to in Part 2 of Sch 1 to an affidavit of documents, sworn by Sir Louis Petch, the chairman of the Board of Customs and Excise, on 23rd April 1971, were communications passing between the commissioners and their solicitors for the purpose solely of obtaining or giving legal advice or assistance, and that the commissioners produce immediately thereafter the remaining documents contained in bundles A to G. The facts are set out in the opinion of Lord Cross of Chelsea. b

Anthony Lincoln QC, S E Brodie and Mary Hogg for the appellants. c

The Solicitor-General (Sir Michael Havers QC), Gordon Slynn and J J Finney for the commissioners. d

Their Lordships took time for consideration.

4th July. The following opinions were delivered. e

LORD REID. My Lords, I would dismiss this appeal for the reasons given by my noble and learned friend, Lord Cross of Chelsea. f

LORD MORRIS OF BORTH-Y-GEST. My Lords, I have had the advantage of considering the speech prepared by my noble and learned friend, Lord Cross of Chelsea, and for the reasons which he gives I would dismiss this appeal.

VISCOUNT DILHORNE. My Lords, by the Purchase Tax Act 1963, purchase tax was chargeable on the wholesale value of the goods to which the Act applied. The wholesale value was by s 3 to be taken to be the price which, in the opinion of the commissioners, the goods would fetch on a sale made at the time the tax became due by a person selling by wholesale in the open market in the United Kingdom to a retailer carrying on business in the United Kingdom only if no tax were chargeable in respect of the sale and it were made in the circumstances specified in Sch 2 to the Act. g

If the trader desired to dispute the commissioners' opinion as to the wholesale value, he had within the prescribed time, or within such further period as might be allowed, to give notice requiring a reference to arbitration under s 36 (1) to the commissioners (s 36 (2)). h

The course of events in this case did not follow the pattern envisaged by the Act. Indeed, in the vast majority of cases it did not. In most cases the commissioners and the trader were able to reach agreement as to the wholesale value and tax was levied in accordance with the agreement and without the commissioners giving an j

¹ [1972] 2 All ER 353, [1972] 2 QB 102

a opinion under s 36 (2). In such cases the figure agreed on or a formula agreed on to determine the wholesale value were to be taken as expressing the commissioners' opinion of the value or their agreement that the formula would produce a figure which was in their opinion the value.

Only when agreement could not be reached, was it necessary for the commissioners to give a formal opinion and then the trader could, if he wished to dispute it, give notice requiring a reference to arbitration.

b In this case the appellants and the commissioners initially agreed a formula, the application of which would determine the wholesale value of the machines produced by the appellants. It was—

c 'the value basis of total selling price including service charge, less any freely available cash discount less the included purchase tax, less an allowance of 17½% to cover retailing and servicing, plus delivery and insurance.'

On 31st July 1967 the appellants' then solicitors wrote to the commissioners saying that they had advised the appellants that neither they nor the appellants' consultant accountant were satisfied that they were paying the correct amount and considered that the amount properly payable was less. They mentioned a reference to arbitration.

d The appellants, however, continued to pay the tax due under the 1964 formula and it was not until 11th September 1968 that their solicitors wrote asking the commissioners to treat their letter as formal notice under s 36 of the Act requiring a reference to arbitration. They had also mentioned a reference to arbitration in letters dated 1st and 2nd August 1968.

e It was clear, therefore, from 31st July 1967 that the appellants were challenging the correctness of the 1964 formula on the ground that it produced too high a figure for the wholesale value.

On receipt of this letter the commissioners investigated the matter and in so doing made use of their powers under s 24 (6) of the Act to obtain information from the appellants and also from persons concerned with the purchase of goods from them. As a result of the information they obtained, they came to the conclusion that the formula agreed in 1964 produced too low a figure. From the moment they received the letter of 31st July 1967, they anticipated that there would be a reference to arbitration.

f They did not give their formal opinion on the wholesale value until 8th December 1969. The appellants' solicitors' request that their letter of 11th September 1968 should be treated as notice requiring a reference to arbitration was therefore premature and inappropriate as were the mentions of a reference to arbitration in the letters of 31st July 1967, and 1st and 2nd August 1968.

g The letter of 11th September was, nevertheless, treated as notice requiring a reference and in their statement of claim the appellants challenged the commissioners' opinion and claimed a deduction of 17½ per cent or of 12½ per cent from the gross tax inclusive price of each machine sold by them in respect of after sales service and also a deduction of 33½ per cent or such percentage as the referee might find appropriate from their sale price exclusive of purchase tax in respect of a retailer's margin. The commissioners in their defence denied this and, for reasons it is not necessary to state, maintained that their opinion was correct.

h On discovery the commissioners objected to producing a large number of documents and, at the hearing of the appeal in this House, it was contended on their behalf that they were entitled to do so on two grounds (1) that the documents were protected by legal privilege and (2) by what is commonly, though inaptly, called Crown privilege.

i In respect of litigation, legal professional privilege cannot be claimed for documents which come into existence prior to the date when litigation can reasonably be anticipated. If here the commissioners had merely been asked to give their

opinion as the Purchase Tax Act 1963 required them to do and there had been no prior threats of arbitration, the commissioners could not have reasonably anticipated litigation until after 8th December 1969, when they gave their opinion and presumably not until the appellants had given notice requiring arbitration. But here the appellants made it clear that they wanted a reference to arbitration more than two years before the commissioners' opinion was given, and I agree with Lord Denning MR, Karminski and Orr LJ¹ and Eveleigh J² that, owing to the conduct of the appellants, the commissioners were entitled reasonably to anticipate litigation on receipt of the letter of 31st July 1967. As Karminski LJ said³:

'... there was a definite prospect of litigation between the parties from the end of July 1967. There was a faint possibility that the differences between the parties might be adjusted, but the probability of litigation between them was strong.'

Indeed, unless the commissioners were prepared to value the appellants' machines at less than the figure the 1964 formula produced, or the appellants abandoned their contentions, litigation was certain.

The commissioners from that date anticipated that there would be an arbitration. In the circumstances of this case that was a reasonable conclusion. The finding that from 31st July 1967 onwards the commissioners reasonably anticipated that there would be an arbitration is, in my opinion, crucial in relation to their claim for legal professional privilege.

The documents which the commissioners claim are covered by legal professional privilege, came into existence in the course of the investigation. They had a dual purpose, to enable the commissioners to form their opinion and for the use of their solicitors whose task it was to secure the material necessary for the arbitration, to advise thereon and to prepare the commissioners' case.

Where an event occurs which is likely to lead to litigation, e.g. an accident on a railway, it has long been established that reports made in anticipation of litigation and for the use of the defendant's solicitors are protected, and that the reports need not be made solely or primarily for the use of the solicitors (*Ogden v London Electric Railway Co*⁴; *Birmingham and Midland Motor Omnibus Co Ltd v London and North Western Railway Co*⁵). So the fact that the documents come into existence for a dual purpose does not deprive them of protection if one purpose is their use by solicitors when litigation is reasonably anticipated.

In this case there could not, however, be any litigation until after the commissioners had stated their opinion. Does that make any difference? I think not. If one accepts that on receipt of the letter of 31st July 1967 the commissioners were justified in anticipating that there would be litigation, then, in my view, it matters not that the foundation of that litigation, the commissioners' opinion, occurred much later. If it were otherwise, legal professional privilege could not apply to documents which come into existence when a *quia timet* action was contemplated.

I do not think that *Jones v Great Central Railway Co*⁶ is at all analogous. There a member of a trade union furnished his union with information to enable the union to decide whether to support an action by him for wrongful dismissal and whether to give him the assistance of their solicitor. It was held that the letters containing the information sent to the union by the member were not protected by legal professional privilege. In that case when the letters were written, litigation

¹ [1972] 2 All ER 353, [1972] 2 QB 162

² [1971] 2 All ER 843

³ [1972] 2 All ER at 382, [1972] 2 QB at 136

⁴ (1933) 149 LT 476, [1933] All ER Rep 896

⁵ [1913] 3 KB 850

⁶ [1910] AC 4

a was not anticipated. It might ensue but whether it did or not depended in the first place on the decision of the union. Here the documents in question came into existence after litigation was reasonably anticipated and for the use of the solicitors.

It is for these reasons that I am unable to agree with the opinion of my noble and learned friend, Lord Cross of Chelsea, which I have had the advantage of reading, on the first issue in this appeal. In my opinion, the documents in question are protected by legal professional privilege.

b With his observations on what may be called the Crown privilege issue, I entirely agree and have nothing to add.

In my opinion this appeal should be dismissed.

c **LORD CROSS OF CHELSEA.** My Lords, under s 1 (1) of the Purchase Tax Act 1963 purchase tax is charged on the wholesale value of chargeable goods which are purchased from or appropriated by persons required by the Act to be registered. Section 2 (1) provides that the wholesale value of any goods in respect of which tax is chargeable shall be taken to be the price which in the opinion of the commissioners the goods would fetch on a sale made at the time when the tax in respect of the goods became due by a person selling by wholesale in the open market in the United Kingdom to a retail trader carrying on his business in the United Kingdom only, if no tax were chargeable in respect of the sale and it were made in the circumstances specified in Sch 2. Section 36 provides that if any dispute arises as to the wholesale value of any goods then if the person accountable for the tax gives notice within the prescribed period requiring a reference to arbitration and deposits with the commissioners the amount of tax payable on the basis of their opinion the dispute as to value shall be referred to an arbitrator appointed by the Lord Chancellor whose decision shall be final and conclusive. Under the regulations made under the Act the registered wholesaler makes quarterly returns of his sales. References to arbitration are rare. In the vast majority of cases the wholesale value on which tax is chargeable is agreed between the taxpayer and the commissioners. When the commissioners accept a payment in respect of tax calculated in accordance with such an agreement they must, I think, be taken to be expressing their opinion that the wholesale value on which tax is being paid for the quarter in question has been correctly ascertained even though they do not say so in terms. A formal expression of their opinion is only required when the taxpayer disputes it and wishes the matter to be referred to arbitration.

d The appellants manufacture amusement machines which they sell through their 'sales' company, Alfred Crompton Ltd. They claim that in the main the sales are made directly to 'consumers'—i.e. to those who run amusement arcades or cafes and instal machines in them—and not to retailers who sub-sell them or hire them out to consumers. It follows, they say, that it is not right to treat the price at which they sell a machine as the 'wholesale price', but that some deduction should be made for it in respect of what is called the 'retailers' margin'. In 1964 the appellants and the commissioners agreed a formula by reference to which the purchase tax should be calculated. It was—

'total selling price including service charge, less any freely available cash discount less the included purchase tax, an allowance of $17\frac{1}{2}\%$ to cover retailing and servicing, plus delivery and insurance.'

j The appellants paid tax and the commissioners accepted tax calculated in accordance with that formula down to the end of the first quarter of 1967. It appears that in 1963, before the appellants started to trade and when the business was still carried on by Mr Crompton himself, a Mr Tuckwell, who was his consultant accountant, negotiated an agreement with the commissioners in respect of a machine called the 'Six-way' machine under which as well as the deduction of $17\frac{1}{2}\%$ per cent for the

retailer's margin Mr Crompton was allowed a further deduction of £135 per machine in respect of the 'servicing' of the machine after delivery. Mr Tuckwell had nothing to do with the negotiating of the 1964 agreement but later when he became consultant accountant to the appellants he took the view that the 1964 agreement was too favourable to the commissioners because it allowed no deduction for 'servicing'. So on 31st July 1967 the appellants' solicitor wrote to the commissioners a letter in the following terms:

'We enclose herewith the following:—(1) Form P.T. 11 relating to Alfred Crompton Amusement Machines Ltd. (2) Form P.T. 11 2/67 (A.D.P.) relating to Alfred Crompton Development Co. Ltd. (3) Cheque for £30,254.15.11d. drawn on Alfred Crompton Amusement Machines Limited. We have advised our Clients that neither we, nor the Companies Consultant Accountant, are satisfied that this is the correct amount payable, but consider that the amount correctly payable is, in fact, less. We should, therefore, be glad if you would consider this sum as paid to you by way of deposit. If an assessment has been made pursuant to the Finance No. 2 Act 1940 Section 21, we should be glad if you would regard this letter as a request for a reference to the Referee.'

The reference to s 21 of the Finance Act 1940 was clearly a mistake for s 36 of the Purchase Tax Act 1963. In fact, so far as I can see, there was no need for the appellants—at this stage—to have requested a reference or deposited the tax for the quarter ending 31st July calculated on the 1964 basis. All that they needed to have done was to say that they were no longer prepared to go on paying tax on the 1964 formula because it made no deduction for servicing and to have put in a return on what they claimed was the right basis. It was only if no agreement on the point could have been reached that they would have needed to invite the commissioners to give a formal opinion which they could challenge in arbitration proceedings. If they had taken that course the present dispute so far as it relates to the claim to 'legal professional privilege' might well never have arisen.

On receipt of the letter of 31st July 1967 the commissioners embarked on a prolonged investigation of the whole position in the course of which they invoked the powers given to them by s 24 (6) of the 1963 Act which runs as follows:

'Every person concerned with the purchase or importation of goods, or with the application to goods of any process of manufacture, or with dealings with imported goods, shall furnish to the Commissioners, within such time and in such form as they may require, such information relating to the goods, or to the purchase or importation of them, or to the application of any process of manufacture to them, or to dealings with them, as they may specify, and shall, upon demand made by any officer or other person authorised in that behalf by the Commissioners, produce any books or accounts or other documents of whatever nature relating thereto for inspection by that officer or person at such time and place as that officer or person may require.'

On 6th December 1968 they served on the appellants a notice under the subsection calling on them to produce for inspection, inter alia, all books accounts and other documents relating to machines which they had sold since 1st April 1967; but also—what is more important—they made enquiries of a number of those who had purchased Crompton machines and obtained from them documents and information relating to the terms on which they bought the machines and how they had dealt with them. It appears that this information from third parties was obtained 'voluntarily' in the sense that notices under the subsection were not served on them, but no doubt those concerned knew that the commissioners possessed statutory powers enabling them to compel its disclosure and the fact that no notices were served appears to me to be irrelevant.

a As a result of their investigation the commissioners—rightly or wrongly—formed the opinion that the appellants ought not to be treated as wholesalers supplying directly to consumers but as wholesalers supplying to retailers. Accordingly, in their formal opinion which they gave on 8th December 1969, they fixed the wholesale value for the purpose of purchase tax of the appellants' machines sold from 1st April 1967 to 31st December 1968, on the basis that the appellants were not entitled to any deduction either in respect of retailers' margin or in respect of after sales service. The appellants disputed the correctness of this opinion and the matter was duly referred to arbitration. The amount of tax in dispute is some £100,000. b In their statement of claim delivered on 19th March 1970, the appellants maintained their contention that they sold in the main to consumers and provided an after sales service the cost of which should be taken to be included in the price, and claimed a deduction of 33½ per cent for retailers' margin and of 12½ per cent for the after sales service. c By their defence delivered on 16th April 1970, the commissioners denied that the appellants supplied machines directly to operators or that they provided an after sales service. One of the reasons which they gave as justifying their opinion as to value ran as follows:

d '5 (h) In determining the wholesale value of the said chargeable goods as set out in their said opinion the [commissioners] were entitled to and did rely upon the gross tax inclusive prices shown in the current price List of Alfred Crompton Limited and the discounts allowed by Alfred Crompton Limited on sales by the Company of chargeable goods sold or transferred to that company by the [appellants] to customers in the United Kingdom who were, in respect of the transactions taken into account by the [commissioners], in the equivalent position to a retailer.' e

The appellants asked, *inter alia*, for the following particulars under para 5 (h).

f '(b) Of the alleged sales by Alfred Crompton Ltd., of chargeable goods to customers in the United Kingdom who were, in respect of the transactions taken into account by the [commissioners], in the equivalent position to a retailer, identifying and giving full particulars of each and every sale, customer and transaction referred to; stating how and to what extent each of the alleged transactions was taken into account by the [commissioners]; and stating what is meant by the allegation that the said customers were in the equivalent position to a retailer and the facts and matters relied on in support of this allegation in relation to each such customer.'

g This request was answered as follows:

h '(b) Inquiries made by the [commissioners] in relation to sales of Alfred Crompton Limited of the said machines have disclosed in particular cases the fact that certain of the customers of Alfred Crompton Limited were purchasing the said machines from, and with the knowledge of, Alfred Crompton Limited for the purpose of resale to individual end users of the same and it is these transactions upon which the [commissioners] rely as alleged. Full details of the said transactions are contained in the records of Alfred Crompton Limited i.e. the order files and invoices and will appear on discovery herein.'

j In their list of documents served on 5th June 1970, the commissioners claimed privilege for a large number of documents on the ground in some cases of legal professional privilege and in others of what used to be called 'Crown privilege'. On a summons taken out by the appellants Eveleigh J¹, on 8th March 1971, held that privilege had not so far been properly claimed and directed the commissioners, if they

wished to maintain their claim, to file a further affidavit which would show with greater particularity what privilege was claimed for what sorts of document and on what grounds. As a result of that order the commissioners disclosed a number of documents for which they had previously claimed privilege and, on 23rd April 1971, Sir Louis Petch, their chairman, swore a further affidavit claiming privilege for the documents enumerated in Part 2 of the schedule, which was in the following terms:

(a) Communications between the [commissioners] and their solicitor in his professional capacity and instructions to and opinions of and documents settled by Counsel for the purpose of obtaining or giving legal advice or assistance: and

(b) (i) Communications passing between the [commissioners] their officers, servants and agents and [commissioners'] solicitor when arbitration between the [appellants] and the [commissioners] was contemplated or pending, the same having been prepared sent or received confidentially for the purpose of obtaining for or furnishing to the said solicitor information or evidence to be used in such arbitration, or information as to the evidence which could be obtained, or otherwise for the use of the said solicitor, to enable him to conduct, and/or advise the [commissioners] their officers servants or agents in relation to, the said arbitration: and

(ii) Memoranda, notes, minutes, correspondence, reports and schedules passing between the [commissioners] and their officers servants and agents and between the [commissioners] officers servants and agents at a time when arbitration between the [appellants] and the [commissioners] was contemplated or pending, the same having been prepared sent or received confidentially for the purpose of obtaining or furnishing information and/or evidence with reference to and for the purposes of the said arbitration.

(c) Orders, invoices, confidential price lists, credit note, extracts from ledgers, correspondence between third parties, agreements between third parties and information supplied to the [commissioners] by persons other than the [appellants] relating to the purchase and sale of amusement machines manufactured by the [appellants] at a time when arbitration between the [appellants] and the [commissioners] was contemplated or pending the same having been obtained and received by the [commissioners] confidentially for the purpose of obtaining information and/or evidence with reference to and for the purpose of the said arbitration.'

The members of the Court of Appeal inspected the documents referred to in 2 (b) (ii) and (c), which are described by Lord Denning MR as follows¹:

'On inspecting these documents in 2 (b) (ii) it appears that they are all internal memoranda within the department itself made in the course of their investigations. There are instructions issued by senior officers to the staff about the methods to be employed. There are many schedules prepared by the staff showing the prices charged for machines. There are many minutes of meetings which were had by the staff of the commissioners with the staff of the company, or its accountants and solicitors. There are memoranda containing comments on the attitude and conduct of the company and its advisers... Our inspection of the documents in bundle 2 (c) shows that they are all documents which emanated from third parties. Cromptons used to supply machines to third parties (who were retailers), and these retailers supplied them to the operators in the arcades. These third parties issued invoices to their customers, including Crompton machines, and price lists including them, also hire-purchase agreements and so forth. All of these documents were material in the investigation as to "wholesale value", because they would go to show the retailers' margin.'

¹ [1972] 2 All ER at 378, 380, [1972] 2 QB at 131, 133

a It was common ground before us that the documents listed in 2 (a) are the subject of legal professional privilege. The commissioners claim that the documents listed in 2 (b) and (c) are also entitled to privilege on the same ground. Alternatively that their disclosure would be contrary to the public interest. The case for saying that they are covered by legal professional privilege is set out in para 16 of the affidavit of Mr Fletcher, a principal in the valuation division, sworn on 6th October 1970, and b para 15 of a second affidavit sworn by him on 13th May 1971. At the time when the first affidavit was sworn the commissioners were not yet claiming that legal professional privilege applied to the documents in 2 (c) but, although by the time that the second affidavit was sworn the claim had been extended to the 2 (c) documents, para 15, which is substantially to the same effect as para 16 of the earlier affidavit, appears still to relate only to the 2 (b) documents. What is said may be summarised as follows. When the commissioners received the letter of 31st July 1967, they took c the view that any opinion which they might express as to value would be disputed by the appellants and referred to arbitration—a view which was, in fact, confirmed by the repeated references to arbitration in subsequent correspondence. Accordingly, the valuation department at once acquainted the legal department with the facts of the case and the investigation leading up to the giving of the formal opinion as to value was conducted under the supervision of that department. The legal officers d of the commissioners gave advice as to the nature of the material to be collected and methods to be employed. All of the documents in question were prepared in the knowledge, and had as one of their important purposes, that they would in due course be the subject of advice from the legal officers in connection with the arbitration and would be used by such officers in preparing the commissioners' case in the arbitration.

e The grounds for the claim that the disclosure of the 2 (b) and (c) documents would be contrary to the public interest are contained in a certificate by Sir Louis Petch given on 6th October 1970, and an affidavit sworn by him on 14th May 1971, which repeats and somewhat amplifies them. The grounds alleged in respect of the 2 (b) documents are, briefly stated, (1) that such documents or some of them disclose the f methods of enquiry adopted by the commissioners in cases of this kind, (2) that such documents or some of them make reference to information obtained from some traders with regard to the trading practices of other traders—in particular those of the traders whose affairs are being investigated—that such information is sometimes discreditable to the trader concerned and that if it were known that it was liable to be disclosed the informants would no longer give the information and in any case the commissioners' staff would hesitate to receive it or comment on it, (3) that many of g the 2 (b) documents contain or are based on the information contained in the 2 (c) documents and that if it is contrary to the public interest that the latter be disclosed it must follow that the former should not be disclosed. The grounds on which privilege is claimed for the 2 (c) documents are, briefly stated, as follows: (1) that h the commissioners are not entitled to disclose documents and information obtained by them pursuant to the powers conferred on them by s 24 (6) of the 1963 Act, (2) even if the commissioners are entitled to disclose such documents and information it would be contrary to the public interest that they should do so because such material is confidential in character, that it would cause general resentment if it were known that information of this sort obtained by the exercise of compulsory powers was liable to be disclosed to other persons including trade competitors of the informant, i that traders hereafter asked for information of this sort would be tempted to withhold it and that the good relations which usually exist between the commissioners and their officers, on the one hand, and the traders with whom they deal, on the other, would be impaired.

The appellants advanced these claims to privilege by a summons issued on 15th June 1971 which came before Forbes J¹ who rejected both claims. His grounds for

rejecting the claim to legal professional privilege were, (a) that in this field salaried legal advisers are not in the same position as solicitors practising on their own account, (b) that litigation cannot be anticipated before a cause of action has arisen and the mere fact that the commissioners thought that it was most unlikely that the appellants would accept their opinion did not mean that they were anticipating litigation within the meaning of the rule, (c) that in any case the information in question was obtained and the documents in question came into being in order to enable the commissioners to fix the wholesale value correctly and that the fact that the information and documents were to be submitted to the legal department to prepare the commissioners' case in the arbitration was so subsidiary a purpose that it could be disregarded. As regards the public interest claim he held that the commissioners had power to disclose the material in question and that the public interest would suffer far more damage by non-disclosure than by disclosure.

The commissioners appealed from the decision of Forbes J¹ to the Court of Appeal², who allowed the appeal. Counsel appear to have failed to make it clear to the court, or at all events to Lord Denning MR, that the claim to legal professional privilege extended to the 2 (c) documents as well as to the 2 (b) documents. Lord Denning MR held (1) that the 2 (b) documents were covered by legal professional privilege: (2) that the 2 (c) documents were not covered by Crown—i.e. 'public interest'—privilege but (3) that there was a general ground of privilege—not peculiar to the Crown—applicable to documents entrusted in confidence by a third party to the person from whom discovery of them is sought. Karminski and Orr LJ³ agreed with the judgment of Lord Denning MR—though the former at any rate appreciated that legal professional privilege was being claimed for the 2 (c) documents as well as for the 2 (b) documents and thought that this claim was justified.

It will be convenient to deal first with the ground on which Lord Denning MR upheld the claim to privilege with regard to the 2 (c) documents—a ground which we were told had not been relied on by the commissioners in argument. It is clear that in general a party cannot object to produce a document not covered by legal professional privilege because the information contained in it was imparted to him in confidence. In *Chantrey Martin & Co v Martin*³ the Court of Appeal approved the statement of the general principle in *Bray on Discovery*⁴ which runs as follows:

'The mere fact that the giving of the discovery will involve a breach of confidence as against some third person or in any way affect or prejudice his interests does not constitute of itself an independent objection to giving the discovery, a disclosure under the compulsion of the court being for this purpose distinguished from voluntary disclosure out of court.'

What Lord Denning MR is saying in the section on his judgment headed 'An alternative ground of privilege' is, I take it, that the general principle is subject to the exception that, as he puts it⁵—

'a party to litigation is not obliged to produce documents, or copies of documents, which do not belong to him, but which have been entrusted to his custody by a third party in confidence.'

Such an exception would be combining, if not confusing, two quite different considerations—the property in the document and the confidential nature of its contents—and I do not believe that it exists. Until the rules of the court were changed in

¹ [1972] 2 All ER 353

² [1972] 2 All ER 353, [1972] 2 QB 102

³ [1953] 2 All ER 691 at 696, [1953] 2 QB 286 at 294

⁴ (1885), p 206

⁵ [1972] 2 All ER at 380, [1972] 2 QB at 134

- a 1964 a party from whom discovery was sought though he had to disclose the existence of documents which were in his custody but which belonged wholly or partly to a third party could not be ordered to produce such documents for inspection. That rule had nothing to do with the confidential nature of the contents of the documents: it applied to all documents whether confidential or not. Further, as Bray¹ points out, it was no protection against an order for inspection of a copy of the document
- b (unless that too belonged to the third party) or against the disclosure of the contents of the document in answer to interrogatories. Even if the rules had remained unaltered I would not have thought that the commissioners could have taken an objection based on property in this case since we were told that the 2 (c) documents are photostats of the originals and presumably they belong to the commissioners; but in any case, as I have said, under the new rules there is no longer a distinction
- c between the obligation to disclose the existence of documents and the obligation to produce them for inspection². If once any objection based on property is out of the way there seems to be no logic in this alleged exception to the general rule. Privilege cannot be claimed for a letter written in the strictest confidence by a third party to the party from whom its discovery is sought: see *Hopkinson v Lord Burghley*³; but such a letter might contain a summary of the contents of some document in the hands of a third party. Why, then, should a different rule apply if the document
- d itself is handed over in confidence?

- The only authority which lends any support to the view that privilege might be claimed on the ground of 'confidence' in the latter case is *Enthoven v Cobb*⁴, which is discussed at length by Bray⁵. There two people—H and C—were suing E on similar causes of action in separate proceedings. C obtained from H a case to and opinion of counsel which H had taken for use in her proceedings on the under-
- e standing—express or implied—that C might take copies and use them for the purpose of his proceedings but not otherwise. Obviously E could not have compelled H to disclose these documents to him in the action H v E but he contended—unsuccessfully—that he could compel their disclosure by C in the action C v E. Parker V-C⁶ based his judgment partly on the ground that legal professional privilege applied
- f as much in C's action as it would have applied in H's action since the documents were procured by C so that he could submit them to his legal advisers and partly on the ground that H had a property interest in the copies as well as the originals. In the Court of Appeal in Chancery⁷, Knight Bruce LJ said that he agreed with the judgment of Parker V-C⁶ but in his own judgment he used language which suggests that he may have thought that even if it was not a case of legal professional privilege and even if H had no property in the documents C could not be ordered to produce
- g them because H had entrusted them to him in confidence. The decision in the case may well have been right on the ground that the documents were the subject of legal professional privilege in C's hands, but if and so far as Knight Bruce LJ based his judgment simply on confidence I agree with Bray that his reasoning was wrong. The language used by Knight Bruce LJ in *Enthoven v Cobb*⁷
- h was relied on by Cairns QC in the passage in his argument in *Reynolds v Godlee*⁸ which is quoted by Lord Denning MR⁹ but it is not, with respect, right to say that Page-Wood V-C accepted the proposition as correct. He referred to it but

i (1885), p 206

2 See Supreme Court Practice (1973), vol 1, p 390, para 24/2/4

3 (1867) 2 Ch App 447

4 (1852) 5 De G & Sm 595; on appeal 2 De G M & G 632

5 Principles and Practice of Discovery (1885), pp 207, 208

6 (1852) 5 De G & Sm 595

7 (1852) 2 De G M & G 632

8 (1858) 4 K & J 88 at 89

9 [1972] 2 All ER at 381, [1972] 2 QB at 134, 135

he did not say that he agreed with it and he decided the case before him on the ground that the documents in question were the subject of legal professional privilege. The other case to which Lord Denning MR refers, *Watson v Cammell Laird & Co (Shipbuilders & Engineers) Ltd*¹, was also a case of legal professional privilege. In my judgment, if the commissioners are to succeed with regard to the 2 (c) documents it must be on the ground either of legal professional privilege or of public interest.

The Court of Appeal² held that Forbes J was wrong in holding that there was any distinction for the purpose of a claim to legal professional privilege between solicitors in private practice and salaried legal advisers and the appellants did not challenge that view in their appeal to this House. They did, however, submit that the commissioners ought not to have 'anticipated litigation' within the meaning of the rules as to legal professional privilege as early as 31st July 1967. There was not, so far as I can see, any need for the appellants to have requested a reference to arbitration at that stage. It may well be that the request was made *ex abundanti cautela* and that the appellants were hoping that they might obtain a reduction in the tax payable by a process of negotiation. But whatever may have been in their minds it does not lie in their mouth to complain that the commissioners on receipt of the letter formed the view that any value which they fixed would almost certainly be challenged and there was nothing in the subsequent correspondence to cause them to think otherwise. So even if the existence of privilege in respect of the 2 (b) (i) documents depends on the reference to arbitration having been anticipated when they were written (which I doubt) I think that the Court of Appeal² was right in holding that the claim was made out with regard to them as well as with regard to the 2 (a) documents.

The documents in 2 (b) (ii) and (c) appear to fall, in descending order of importance, under three heads: (i) Documents obtained from or containing information obtained from third parties by reason of the existence of the powers given by s 24 (6). (ii) Documents containing observations by members of the staff of the commissioners as to the fixing of the wholesale value made in the light of and often referring to the documents and information obtained from the appellants and from such third parties. (iii) Instructions as to the methods to be employed by the staff in conducting its investigations.

Head (iii) can be left out of account since the appellants made it clear that they had no wish to see any such instructions. The commissioners' case for claiming legal professional privilege with regard to the documents comprised in heads (i) and (ii) may be stated as follows: 'The documents were obtained or came into existence for two purposes—first to assist the valuation department of the commissioners in fixing the wholesale value of the machines and secondly to assist the legal department in upholding that valuation in the arbitration which it was anticipated would be called for. If they had been obtained or had come into being for no purpose other than that of being laid before the legal advisers of the commissioners to help them in presenting the commissioners' case in anticipated litigation they would clearly have been entitled to legal professional privilege and the cases show that the fact that they were obtained or came into existence for another purpose as well even though such other purpose was in fact the primary purpose makes no difference.' This argument was accepted by the Court of Appeal²—though Lord Denning MR thought that legal professional privilege was only being claimed for the 2 (b) (ii) documents. The most important of the many cases on this subject are summarised in the judgment of Havers J in *Seabrook v British Transport Commission*³. In that case—and the facts in several of the other cases were very similar—employees of

1 [1959] 2 All ER 757, [1959] 1 WLR 702

2 [1972] 2 All ER 353, [1972] 2 QB 102

3 [1959] 2 All ER 15, [1959] 1 WLR 509

- a the defendants in pursuance of routine instructions had made a report to head office of the circumstances of an accident which had occurred on the railway. There were several reasons why such reports were required. One was that the commission was under a statutory duty to report accidents to the Minister of Transport; another was so that the appropriate department might consider whether any disciplinary measures or changes in the methods of work were called for; yet another was that
- b in the event of a claim being made by the party injured the report could be laid before the commission's solicitor for his advice. Havers J pointed out that it was difficult—if not impossible—to reconcile all the cases, that the earlier cases tended on the whole to favour disclosure in such circumstances; but that after the approval of the judgment of Buckley LJ in *Birmingham and Midland Motor Omnibus Co Ltd v London and North Western Railway Co*¹ by Scrutton LJ in *Ogden v London Electric Railway Co*² it must be taken as established that the fact that the purpose of submission to the legal adviser was only one and may be not the most important of several purposes for which the report was prepared did not prevent it from being privileged. The *Seabrook* case³ was considered a few months later by my noble and learned friend, Lord Diplock—then Diplock J—in *Longthorn v British Transport Commission*⁴. There the commission had held an enquiry into the circumstances
- d of the accident before the plaintiff, who was one of their employees and gave evidence at the enquiry, issued his writ. In the action the commission claimed privilege for the report of the enquiry but the judge having looked at it held that it was not privileged because the enquiry was not to any appreciable extent held for the purpose of obtaining for or furnishing to the solicitor evidence or information to help him in defending any proceedings which the plaintiff might bring. In his judgment
- e he said that it was not necessary for him to decide to what extent the purpose of submission to the solicitors must be the main or substantial purpose of the coming into being of the document in question since he was satisfied that the mere fact that it was a purpose however insubstantial could not found a claim for privilege; but reading the judgment as a whole it is, I think, fair to conclude that my noble and learned friend viewed the trend of the decisions since 1913 with some distaste and that he inclined to prefer the judgment of Hamilton LJ in the *Birmingham* case¹
- f to that of Buckley LJ.

- One day it may be necessary for this House to consider the point but in my judgment it does not arise for decision in this case. In the *Ogden*² and *Seabrook*³ type of case the reports in question are obtained for two or more quite separate purposes. Here the two purposes for which the documents in question were obtained or came into existence were parts of a single wider purpose—namely, the ascertainment of the wholesale value in the manner prescribed by the Act. The first, and the sole immediate, purpose was to help the commissioners to fix what in their opinion was the true value; the second purpose was to help the solicitor, if the commissioners' opinion was challenged, to prepare their case for the arbitration. It was not—and hardly could have been—suggested that the mere fact that the commissioners would
- g know in every case that their opinion might be challenged would itself enable them to claim that such documents as are in question here would be the subject of legal professional privilege whenever in fact their opinion was challenged. What is said to make them privileged in this case is the fact that the commissioners happened to expect that there would be an arbitration and called in the solicitor to 'hold their hands' in the early stages. But, even so, in this case just as much as in cases in which
- h no arbitration was in fact anticipated the commissioners had to form their own opinion as to value on the evidence available to them, including these documents,
- j

1 [1913] 3 KB 850

2 (1933) 149 LT 476, [1933] All ER Rep 896

3 [1959] 2 All ER 15, [1959] 1 WLR 509

4 [1959] 2 All ER 32, [1959] 1 WLR 530

before any arbitration could take place. This feature of the case appears to me to distinguish it from the *Ogden*¹ or *Seabrook*² type of case and to make it analogous to *Jones v Great Central Railway Co*³. There a member of a trade union who thought that he had been unjustly dismissed by his employers furnished the union authorities (as required by the rules) with information in writing as to the facts of the case as he saw them in order to satisfy them that it was proper for them to sanction the employment of a solicitor to conduct the case and also for use by the solicitor in the conduct of the action if the employment of a solicitor was sanctioned. This House held that the letters in question were not the subject of legal professional privilege because the union authorities had themselves to consider them and act on them before the solicitor was employed to conduct the case. So here the commissioners had to form their own opinion as to value before the solicitor would use the documents for the purpose of defending their opinion in the anticipated arbitration.

I turn now to the question of 'Crown privilege' or rather privilege on the ground of 'public interest'. Sir Louis Petch first submits that the commissioners have no power to disclose documents obtained from or containing information obtained from third parties in pursuance of the powers conferred by s 24 (6) of the Act unless they have express statutory authority for so doing. Lord Denning MR⁴ rightly rejected this contention which your Lordships have held to be ill-founded in *Norwich Pharmacal Co v Comrs of Customs and Excise*⁵. But then Sir Louis says that even if they have power to do so the commissioners think that it is contrary to the public interest for them to disclose such documents or any other documents which contain references to the contents of documents obtained under s 24 (6) because such documents were obtained in confidence from the third parties concerned on the understanding that the commissioners would not disclose them to anyone else. Such disclosure, it is said, would be unfair to the third parties and would be harmful to the proper working of the department. So far as I can see the Court of Appeal⁶ did not deal with this argument at all. It is true that Lord Denning MR points out that the 2 (c) documents are documents of an ordinary character—invoices and so on—such as are normally disclosed by parties to litigation: but Sir Louis's objection to their disclosure is not based on their character but on the manner in which they were obtained. 'Confidentiality' is not a separate head of privilege, but it may be a very material consideration to bear in mind when privilege is claimed on the ground of public interest. What the court has to do is to weigh on the one hand the considerations which suggest that it is in the public interest that the documents in question should be disclosed and on the other hand those which suggest that it is in the public interest that they should not be disclosed and to balance one against the other. Plainly there is much to be said in favour of disclosure. The documents in question constitute an important part of the material on which the commissioners based their conclusion that the appellants sell to retailers. That is shown by the reply which the commissioners made to the request for particulars under para 5 (h) of the defence. Yet if the claim to privilege made by the commissioners is upheld this information will be withheld from the arbitrator. No doubt it will form part of the brief delivered to counsel for the commissioners and may help him to probe the appellants' evidence in cross-examination; but counsel will not be able to use it as evidence to controvert anything which the appellants' witnesses may say. It is said, of course, that the appellants cannot reasonably complain if the commissioners think it right to tie their own hands in this way. But if the arbitrator should decide against them the appellants may feel—however wrongly—

1 (1933) 149 LT 476, [1933] All ER Rep 896

2 [1959] 2 All ER 15, [1959] 1 WLR 509

3 [1910] AC 4

4 [1972] 2 All ER at 379, 380, [1972] 2 QB at 133, 134

5 Page 943, ante, [1973] 3 WLR 164

6 [1972] 2 All ER 353, [1972] 2 QB 102

a that the arbitrator was unconsciously influenced by the fact that the commissioners stated in their pleadings that they had this further evidence in support of their view which they did not disclose and which the appellants had no opportunity to controvert. Moreover, whoever wins it is desirable that the arbitrator should have all the relevant material before him. On the other hand, there is much to be said against disclosure. The case is not, indeed, as strong as the case against disclosing the name of an informer—for the result of doing that would be that the source of information b would dry up whereas here the commissioners will continue to have their powers under s 24 (6). Nevertheless, the case against disclosure is, to my mind, far stronger than it was in the *Norwich Pharmacal* case¹. There it was probable that all the importers whose names were disclosed were wrongdoers and the disclosure of the names of any, if there were any, who were innocent would not be likely to do them any harm at all. Here, on the other hand, one can well see that the third parties who c have supplied this information to the commissioners because of the existence of their statutory powers would very much resent its disclosure by the commissioners to the appellants and that it is not at all fanciful for Sir Louis to say that the knowledge that the commissioners cannot keep such information secret may be harmful to the efficient working of the Act. In a case where the considerations for and against d disclosure appear to be fairly evenly balanced the courts should I think uphold a claim to privilege on the ground of public interest and trust to the head of the department concerned to do whatever he can to mitigate the ill-effects of non-disclosure. Forbes J² was so impressed by those possible ill-effects, that he failed to appreciate how reasonable Sir Louis's objections to disclosure were and dismissed them with the remark³ 'We are not living in the early days of the Tudor administration.' I do not regard Sir Louis as a modern Cardinal Morton. His objections to e disclosure were taken in the interests of the third parties concerned as much as in the interests of the commissioners and if any of them is in fact willing to give evidence, privilege in respect of any documents or information obtained from him will be waived. In the result therefore I would dismiss the appeal—though not for the reasons given by the Court of Appeal⁴.

f **LORD KILBRANDON.** My Lords, I have had the advantage of reading the speech prepared by my noble and learned friend, Lord Cross of Chelsea. I agree with it and have therefore not prepared one of my own.

I would like, however, to add a word or two about the somewhat diverging trends of authority, on the question of discovery of documents said to have been prepared g for the purposes of litigation, which may be typified by the judgments of Buckley LJ in *Birmingham and Midland Motor Omnibus Co Ltd v London and North Western Railway Co*⁵ and of Havers J in *Seabrook v British Transport Commission*⁶, on the one hand, and those of Hamilton LJ in the *Birmingham* case⁵ and of Diplock J in *Longthorn v British Transport Commission*⁷ on the other. Like my noble and learned h friend, I prefer the approach of the latter to that of the former. In my opinion, any practice of 'blanket' classifying of documents, especially when they concern, as they normally do, claims arising out of accidents, is to be discouraged. In *Ogden v London Electric Railway Co*⁸ Scrutton LJ said this of the documents there in question:

j 1 Page 943, ante, [1973] 3 WLR 164
 2 [1972] 2 All ER 353
 3 [1972] 2 All ER at 370
 4 [1972] 2 All ER 353, [1972] 2 QB 102
 5 [1913] 3 KB 850
 6 [1959] 2 All ER 15, [1959] 1 WLR 509
 7 [1959] 2 All ER 32, [1959] 1 WLR 530
 8 (1933) 149 LT 476 at 478, [1933] All ER Rep 896 at 900

'Counsel for the respondent, as I understand, argues that they are not [that is to say, not prepared for solicitors] because they are reports made to a company to enable it to conduct its own business, namely, to carry on its business without accidents, without any regard to litigation. That may be so. It may be that that is part of the purpose of making the reports, but there is also the substantial purpose that if a writ is issued these are the materials that will be wanted by the solicitor conducting the litigation, and they are obtained for that purpose, among others, and as appears from the form at which we look—because the judge below has looked at these documents—the reports are made on a form headed: "For the information of the company's solicitors only". That is a most important heading, because if a man knows that he is making a confidential report to the solicitor he is much more likely to state accurately what has happened than if he is afraid that somebody presently seeing that report may take proceedings against him in respect of the statements that he has made, which may be defamatory.'

My Lords, I find this hard to accept. When one recollects the circumstances in which such reports are made, and the grade of employee who is commonly required to make them, it seems to me to be unreal to suggest that he will adjust the form and content or vary the candour of the report he is required to make according as the report on its face bears or does not bear that it will at an early stage, or at any stage, be submitted to his employer's solicitor. The point was raised in very similar circumstances before the Court of Session, where the practice in these matters is rather different, in *Whitehill v Glasgow Corpn*¹. The report in that case was made on a form which had as a printed heading: 'For the use of the Corporation solicitors to enable them to defend should litigation ensue.' In holding that the defenders were bound to produce the report, the Lord President observed²:

'These words cannot alter the character of the report which is made by the employee for the purpose of informing his employers of the accident, and made at the time.'

Such reports would be produced on the authority of *Admiralty Comrs v Aberdeen Steam Trawling and Fishing Co Ltd*³ per Lord Dunedin.

I agree with the order proposed.

Appeal dismissed.

Solicitors: *Needham & Grant* (for the appellants); *Solicitor, Customs and Excise.*

S A Hatteea Esq Barrister.

¹ 1915 SC 1015

² 1915 SC at 1017

³ 1909 SC 335 at 340

a **G v G (practice: transfer of applications)**

FAMILY DIVISION

DUNN J

30th MARCH, 3rd APRIL 1973

b *Husband and wife – Property – Practice – Related applications – Desirability of applications being heard together – Married Women's Property Act 1882, s 17 – Matrimonial Proceedings and Property Act 1970, ss 2, 4.*

c The husband and wife were married in 1969 and the matrimonial home was bought in their joint names. In 1972 the wife was granted a decree of divorce under s 2 (1) (a) of the Divorce Reform Act 1969. She applied (1) for a declaration under s 17 of the Married Women's Property Act 1882 that the matrimonial home was owned by her absolutely by reason of her contribution to the purchase price, (2) alternatively for an order under s 4 of the Matrimonial Proceedings and Property Act 1970 that the property be transferred to her, and (3) for an order under s 2 of the 1970 Act for a lump sum payment and for periodical payments for herself and the child of the family. In the s 17 proceedings the husband sought a declaration that the matrimonial home was their joint property, and an order for the sale of the property and the equal division of the proceeds of sale between the parties; in the s 4 proceedings he raised an issue of the wife's conduct, which he alleged drove him to commit adultery. The wife applied to the registrar to have the applications transferred to a judge. He refused and she appealed.

e **Held** – The appeal would be allowed; the s 17 application was not merely academic for under s 4 of the 1970 Act the court had neither the power to declare the legal or equitable interests of the spouses nor the power to order a sale of a property and, since the evidence in relation to a s 17 application might well be relevant to, and affect the outcome of, an application under the 1970 Act, it was convenient, and also desirable where an issue arose in the s 17 proceedings, for the two related applications to be heard by a judge at first instance so that there might be a single channel of appeal, i.e. to the Court of Appeal; accordingly an order would be made transferring the wife's application to a judge of the Family Division (see p 1189 e and h to p 1190 c, post).

g Per Dunn J. Registrars should be slow to refuse to transfer applications for ancillary relief to a judge where an issue of conduct is raised unless the parties have agreed that conduct is irrelevant to any order likely to be made under the 1970 Act or it is plain to the registrar that it will not materially affect such an order (see p 1189 c, post).

h **Notes**

For transfer of applications for ancillary relief, see Supplement to 12 Halsbury's Laws (3rd Edn) para 404.

For summary proceedings as to property between husband and wife, see 19 Halsbury's Laws (3rd Edn) 898-902, paras 1488-1494.

i For financial provision on granting of decree of divorce and matters to be considered by court in exercising its powers, see Supplement to 12 Halsbury's Laws (3rd Edn) para 987A, 1-4.

For the Married Women's Property Act 1882, s 17, see 17 Halsbury's Statutes (3rd Edn) 120.

For the Divorce Reform Act 1969, s 2, see 40 Halsbury's Statutes (3rd Edn) 770.

For the Matrimonial Proceedings and Property Act 1970, ss 2, 4, see *ibid* 800, 802.

Case referred to in judgment

Wachtel v Wachtel [1973] 1 All ER 829, [1973] Fam 72, [1973] 2 WLR 366, CA. a

Appeal

This was an appeal by the wife from the order of Mr Registrar Holloway on 22nd February 1973 dismissing her application to have transferred to a judge her applications (i) under s 17 of the Married Women's Property Act 1882 for a declaration that the former matrimonial home was owned by her absolutely and (ii) under ss 2 and 4 of the Matrimonial Proceedings and Property Act 1970 for the transfer of the former matrimonial home to her, for a lump sum payment and for periodical payments for herself and the child of the family. The appeal was heard in chambers but judgment was given in open court. The facts are set out in the judgment. b

Betty Knightly for the wife. c

F S Phillimore for the husband.

Cur adv vult

3rd April. **DUNN J** read the following judgment. This case which was in chambers raised a point of practice of general importance, especially in divorce registries, and I therefore adjourned the case to open court for judgment. d

The point arises in this way. The former wife, whom I shall call 'the wife' has applied under s 17 of the Married Women's Property Act 1882 for a declaration that the former matrimonial home, a freehold property, is owned by her absolutely. She has also applied under ss 2 and 4 of the Matrimonial Proceedings and Property Act 1970 for orders that that property be transferred to her and for a lump sum payment, and also for periodical payments to herself and the child. She applied to the registrar for directions including a direction that both her applications be transferred to a judge. The registrar gave directions but refused to transfer the application to a judge on the ground that there was not likely to be any issue in the s 17 proceedings, and that the only issues likely to arise were those in the applications under ss 2 and 4 of the Matrimonial Proceedings and Property Act. Against that refusal the wife now appeals. e

The material facts are short and may be shortly stated. In May 1967 the house was bought in the joint names of the husband and wife, who were then living together unmarried. A child had been born to them on 21st March 1967. On 31st May 1969 they married. On 31st August 1970 the husband left the wife, and she and the child are still living in the former matrimonial home together with her son by a former marriage. On 4th July 1972 the wife was granted a decree nisi under s 2 (1) (a) of the Divorce Reform Act 1969, adultery having been proved between the husband and the second respondent. The decree was made absolute and the husband has now married the second respondent. They are living together at a house in Portsmouth. That house is in their joint names and they are buying it on mortgage. In her affidavit in the s 17 proceedings the wife says that the former matrimonial home is wholly owned by her by reason of her contribution towards the purchase price. Alternatively she asks under s 4 of the Matrimonial Proceedings and Property Act 1970 for a transfer of the husband's share to her. The husband asks in the s 17 proceedings for a declaration that the former matrimonial home is the joint property of husband and wife, and he asks for an order for the sale of that property and that the proceeds of sale be divided equally between them. In the s 4 proceedings the husband raises an issue of the wife's conduct which he alleges drove him to commit adultery. The wife denies that her conduct contributed to the breakdown of the marriage, and alleges that it was caused wholly by reason of the husband's adultery and desertion. f

So far as the issue of conduct is concerned r 80 (1) of the Matrimonial Causes Rules g

a 1971¹ provides that where an application for ancillary relief giving rise to a contested issue of conduct is transferred from a divorce county court to the High Court the application shall be heard by a judge of the High Court. There is no similar provision in the rules relating to applications for ancillary relief commenced in the High Court which give rise to a contested issue of conduct, and registrars have a discretion under r 78 (2) of the Matrimonial Causes Rules to refer any such application to a judge for his decision. This rule should however be read in the context of r 80 (1).

b Since the decision of the Court of Appeal in *Wachtel v Wachtel*² there will be many cases, perhaps the majority of cases, in which the conduct of either party will not materially affect the order which the court will make under s 4 or indeed under s 2 of the Matrimonial Proceedings and Property Act 1970. Nonetheless registrars should be slow to refuse to transfer applications for ancillary relief to a judge where an issue of conduct is raised, unless the parties agree that conduct is irrelevant to any order likely to be made under the Act, or unless it is quite plain to the registrar that conduct will not materially affect such an order. But this appeal does not rest primarily on that ground. Counsel for the wife drew my attention to the different channels of appeal from orders made by registrars under the Married Women's Property Act 1882 on the one hand and under the Matrimonial Proceedings and Property Act 1970 on the other. She referred me to the Practice Direction³ made on 29th January 1971. So far as is material that direction is in these terms:

c 'It sometimes happens that applications under s 17 of the Married Women's Property Act 1882 and applications of ancillary relief in matrimonial causes ... are heard about the same time. The evidence on one application is often relevant to the other application or applications, and the outcome of the Married Women's Property Act 1882 application usually affects the other application or applications. It would be convenient for all the applications to be heard by the same tribunal and, in the event of appeals, for the appeals to be heard by the same tribunal. This would happen if the related applications were heard by a judge at first instance with appeal to the Court of Appeal. Where all applications are in the High Court, the applications are normally heard at present by a registrar at first instance, with appeal to a judge in an application for ancillary relief ... and to the Court of Appeal in an application under the Married Women's Property Act 1882. But it is open to the registrar to refer all such applications to a judge for hearing at first instance; an ancillary relief application can be referred under Matrimonial Causes Rules 1968⁴, r 78 (2) as amended by the Matrimonial Causes (Amendment No 3) Rules 1970⁵ and a Married Women's Property Act application ... can be referred under RSC Ord 32, r 12 It is suggested that judges and registrars dealing with related applications under the Married Women's Property Act 1882 ... and for ancillary relief which arise at the same time should give consideration to the desirability of providing for hearing by the same tribunal by reference, retention or transfer as may be convenient in particular cases.'

d Despite the wide powers over matrimonial property which are now vested in the court by s 4 of the Matrimonial Proceedings and Property Act 1970, s 17 proceedings are by no means academic. Section 4 gives the court no power to declare the existing legal and equitable interests of the spouses in property, the ascertainment of which may well be necessary before any order varying those interests can properly be made. And s 4 gives the court no power to order the sale of a property, although a similar result may indirectly be obtained in many cases by ordering a lump sum payment under s 2. But in the majority of cases in order that the court may make full use of the powers vested in it so as to do justice between the parties in property

¹ SI 1971 No 953

³ [1971] 1 All ER 895, [1971] 1 WLR 260

² [1973] 1 All ER 829, [1973] Fam 72

⁴ SI 1968 No 219

⁵ SI 1970 No 1349

and financial matters, it will be desirable for there to be applications under s 17 as well as under ss 2 and 4. Where this is done, as in this case, it will generally be desirable regardless of whether or not an issue of conduct is raised, for both applications to be transferred to a judge for the reasons given in the practice direction to which I have just referred.

In many cases the parties may agree that there is no issue in the s 17 proceedings. In that event an order can be made by consent in those proceedings and the registrar can deal with the s 4 application with an appeal to the judge. But if, as here, an issue arises in the s 17 proceedings, either as to the interests of the respective parties in the property or as to whether or not the property should be sold, then the registrar should normally transfer both applications to a judge so that there is a single channel of appeal. In this case there are issues both as to the interests of the parties in the matrimonial home and whether it should be sold. In those circumstances this appeal will be allowed and there will be an order that both applications should be transferred to a judge in the Family Division.

Appeal allowed.

Solicitors: *Vickers & Co* (for the wife); *Kingsford, Dorman & Co* (for the husband).

R C T Habesch Esq Barrister.

Race Relations Board v Applin and another

COURT OF APPEAL, CIVIL DIVISION

LORD DENNING MR, BUCKLEY AND STEPHENSON LJJ

3rd, 4th, 13th APRIL 1973

Race relations – Discrimination – Unlawful discrimination – Provision of goods, facilities and services – Discrimination by person concerned with provision of goods etc to a section of the public – Section of the public – Local authority – Children in care of local authority – Persons registered with local authority as suitable foster parents – Local authority fostering children in their care with foster parents in exercise of statutory duty – Foster parents refusing to accept coloured children – Whether foster parents providing facilities to a section of the public – Whether local authorities or children a ‘section of the public’ – Race Relations Act 1968, s 2 (1).

Race relations – Discrimination – Unlawful discrimination – Discrimination against person seeking to obtain or use goods, facilities or services – Discrimination on ground of colour – Discrimination against one person on ground of another person’s colour – Foster parents – Local authority fostering children with foster parents in exercise of statutory duty – Foster parents refusing to accept coloured children – Whether children or local authority ‘seeking to obtain’ facilities provided by foster parents – Whether refusal to accept coloured children discrimination against local authority ‘on ground of colour’ – Race Relations Act 1968, ss 1 (1), 2 (1).

Race relations – Incitement – Incitement to unlawful discrimination – Incitement not limited to advice, encouragement or persuasion – Incitement including threats and bringing of pressure – Pressure brought on foster parents of children in local authority care to accept white children only – Race Relations Act 1968, s 12.

Mr and Mrs W were registered with certain local authorities as suitable foster parents. Children were placed by the authorities with Mr and Mrs W in the exercise of the

- a* authorities' statutory duty to put out children in their care to foster parents or otherwise provide for their welfare. Mr and Mrs W undertook to care for and bring up the children as they would a child of their own; the children fostered with them lived with them as members of their family, being provided with a nursery, toys and a garden. Mr and Mrs W took only four or five children at a time into their home or, in an emergency, up to seven. The children stayed a short time only, usually for two or three weeks. Mr and Mrs W were only paid their expenses and did not make a profit out of fostering. They could refuse to take a child but so long as they had room they had in fact never done so. In particular they never refused a child on the ground of colour; 60 per cent of the children fostered with them were coloured children. In 1970 Mr and Mrs W moved to another house where they hoped to extend their fostering work. During August 1971 an organisation called the 'National Front', acting through its branch and area organisers, the defendants, brought pressure on Mr and Mrs W to foster white children only. They sent a circular to local residents which referred to the enlargement of Mr and Mrs W's house as a foster home 'for largely non-British children' and accused them of making 'malicious and disgraceful attacks' on their neighbours. They wrote to Mr W urging him to tell the authorities that he would accept only white children. They endeavoured to whip up the neighbours' resentment and opposition, and to intimidate Mr and Mrs W by organising a public meeting at which the first defendant read extracts from the circular and the second defendant made a speech attacking Mr and Mrs W. The Race Relations Board brought proceedings in the county court against the defendants alleging that the acts done by them in August 1971 were in breach of s 12^a of the Race Relations Act 1968, being deliberate incitement of Mr and Mrs W to act unlawfully under s 2^b of the Act by refusing to provide fostering facilities on the ground of colour; the board sought a declaration that the defendants' acts were unlawful under ss 2 and 12, and an injunction restraining them from deliberately inducing or inciting any other person to do an act which was unlawful under the 1968 Act. The county court judge dismissed the board's claim on the ground that although there was incitement within s 12 in respect of the circular, there was no incitement of Mr and Mrs W to unlawful discrimination under s 2 because Mr and Mrs W were not concerned with the provision of facilities or services to a section of the public within s 2 (1). The board appealed. At the date of the hearing of the appeal the acts done by the defendants in August 1971 had not been repeated and they had since ceased to be members of the National Front.

- g* **Held** – (i) Mr and Mrs W were concerned with 'the provision to . . . a section of the public . . . of facilities' within s 2 (1) of the 1968 Act. They provided 'facilities' in that they provided the children with accommodation, entertainment, recreation and the other things which the children needed for their welfare (see p 1195 h and j, p 1197 f and p 1198 g, post). Furthermore those facilities were provided by Mr and Mrs W to a 'section of the public' since they were provided, as part of a statutory scheme, to all the children who happened to be in the care of the local authorities; it was immaterial that only a few of the children would be able to avail themselves of the facilities; the whole group of potential foster children was the relevant 'section of the public' for the purposes of s 2 (1). Alternatively the facilities were provided to the local authorities who (per Buckley LJ, Lord Denning MR and Stephenson LJ dubitante) themselves constituted a 'section of the public' (see p 1196 d and e, p 1197 f and p 1198 j to p 1199 c, post).

- j* (ii) If they had insisted on fostering white children only Mr and Mrs W would have been discriminating against persons 'seeking to obtain or use' the facilities provided by them within s 2 (1) of the 1968 Act. The coloured children in need of fostering were persons seeking to obtain or use the facilities in that the local authorities, acting

a Section 12 is set out at p 1194 h, post

b Section 2, so far as material, is set out at p 1195 a and b, post

in the place of their parents, were seeking to obtain the facilities on the children's behalf. Alternatively, if the local authorities were the persons 'seeking to obtain' the facilities Mr and Mrs W would have been discriminating against them 'on the ground of colour', within s 1 (1)^c of the 1968 Act; s 2 (1) applied to discrimination against a body corporate such as a local authority and the definition of discrimination in s 1 (1) was wide enough to cover the case where A discriminated against B on the ground of C's colour (see p 1196 f to j, p 1197 f and p 1199 e to h, post).

(iii) Accordingly it would have been unlawful discrimination under ss 1 and 2 of the 1968 Act for Mr and Mrs W to have stipulated with the local authorities that they would foster white children only (see p 1197 c f and j to p 1198 a, post).

(iv) The defendants had 'incited' Mr and Mrs W, within s 12 of the 1968 Act, to discriminate unlawfully. The word 'incite' in s 12 was not limited to advice, encouragement or persuasion of another to do an act but included threatening or bringing pressure to bear on a person. Accordingly the defendants, by bringing pressure to bear on Mr and Mrs W to take white children only, had 'incited' them to do so within the meaning of s 12. It followed that, since it would have been unlawful discrimination under the Act for Mr and Mrs W to take white children only, it was, by virtue of s 12, unlawful for the defendants to incite them to do so. The appeal would therefore be allowed and a declaration granted that the defendants' acts in August 1971 were unlawful by virtue of ss 2 and 12 of the 1968 Act; an injunction against the defendants would, however, be refused as there had been no repetition of the acts for 20 months (see p 1194 j and p 1197 d f g and j to p 1198 a, post).

Re A B (an infant) [1954] 2 All ER 287 and *Charter v Race Relations Board* [1973] 1 All ER 512 applied.

Per Lord Denning MR. I would not, as at present advised, consider children fostered by private arrangement or children adopted under the Adoption Acts as 'a section of the public'. They are the subject of personal selection or approval like the members of a social club. That element is so important that they cannot be regarded as 'a section of the public' (see p 1197 a and b, post).

Notes

For discrimination on racial grounds in the provision of goods, facilities and services, see Supplement to 7 Halsbury's Laws (3rd Edn) para 1280, 1, 2.

For the Race Relations Act 1968, ss 1, 2 and 12, see 40 Halsbury's Statutes (3rd Edn) 105, 112.

Cases referred to in judgments

A B (an infant), *Re* [1954] 2 All ER 287, [1954] 2 QB 385, [1954] 3 WLR 1, 118 JP 318, 52 LGR 421, DC, 28 (2) Digest (Reissue) 940, 2432.

Charter v Race Relations Board [1973] 1 All ER 512, [1973] 2 WLR 299, HL; *rvsg sub nom Race Relations Board v Charter* [1972] 1 All ER 556, [1972] 1 QB 545, [1972] 2 WLR 190, CA.

Case also cited

London Borough of Ealing v Race Relations Board [1972] 1 All ER 105, [1972] AC 342, HL.

Appeal

At all material times Mr and Mrs Watson fostered children at their home at 61 Oakroyd Avenue, Potters Bar, Hertfordshire, for Barnet Borough Council, Haringey Borough Council and Hertfordshire County Council. The plaintiffs, the Race Relations Board, brought proceedings in the county court against the defendants, Peter W Applin and Kenneth Taylor, claiming a declaration that the acts referred to in para 4 of the particulars of claim were unlawful by virtue of ss 2 and 12 of the Race

^c Section 1 (1), so far as material, is set out at p 1196 h, post

- a* Relations Act 1968, and an injunction restraining the defendants, their servants or agents from deliberately inducing or inciting any other person to do an act which was unlawful by virtue of any provision in Part I of the 1968 Act. Paragraph 4 of the particulars of claim alleged that during August 1971 the defendants repeatedly acted in breach of s 12 of the 1968 Act by deliberately inducing and/or inciting Mr and Mrs Watson to act unlawfully, contrary to s 2 of the 1968 Act, by refusing or deliberately omitting, on the ground of colour, race or ethnic or national origins, to provide the facilities and services of child fostering at their home to persons seeking to obtain or use those facilities or services. The particulars of inducement or incitement given in para 4 were, as to the first defendant, Mr Applin, that he, his servants or agents published and distributed to the residents of Oakroyd Avenue a circular dated 5th August 1971, signed by him as branch organiser of the South Hertfordshire branch of the National Front organisation, deliberately inducing or inciting Mr and Mrs Watson to act unlawfully as aforesaid; that he, his servants or agents organised and advertised a public meeting, held on 26th August 1971 at Oakmere House, High Street, Potters Bar, with the purpose of deliberately inducing or inciting Mr and Mrs Watson to act unlawfully as aforesaid; that he, his servants or agents on or about 25th August 1971 published and distributed to the residents of Oakroyd Avenue an undated open letter, signed by him, so as deliberately to induce or incite Mr and Mrs Watson to act unlawfully as aforesaid. The particulars given in para 4 as to the second defendant, Mr Taylor, were that he wrote and sent two letters, dated 9th and 16th August 1971, deliberately inducing or inciting Mr and Mrs Watson to act as aforesaid; he participated in organising and advertising the meeting of 26th August and at that meeting made a speech deliberately inducing or inciting Mr and Mrs Watson to act as aforesaid. The trial judge, his Honour Judge Ruttle, in a reserved judgment given on 25th July 1972, gave judgment for the defendants holding that there was incitement within the meaning of s 12 of the 1968 Act in respect of the circular dated 5th August but not in respect of the meeting of 26th August; but that the incitement proved against the defendants was not incitement of Mr and Mrs Watson to do an unlawful act since Mr and Mrs Watson were not concerned with the provision of facilities or services to a section of the public within s 2 of the Act. The plaintiff board appealed. The facts are set out in the judgment of Lord Denning MR.

J P Comyn QC and M J Beloff for the plaintiff board.

John Vinelott QC and Mark Potter for the first defendant, Mr Applin.

The second defendant, Mr Taylor, appeared in person.

Cur adv vult

- g* 13th April. The following judgments were read.

LORD DENNING MR. Mr and Mrs Watson have for 23 years fostered children in need of a temporary home. They do it from sincere and unselfish motives. They see it as a practical expression of their Christian faith. Normally they take four or five children at a time, but it may rise to seven on occasion. The children only stay for two or three weeks. Quite a number of the children are coloured. Just over half, about 60 per cent.

- h* In January 1970 Mr and Mrs Watson moved to 61 Oakroyd Avenue, Potters Bar in Hertfordshire. There they hoped to extend their good work. At first some of the neighbours objected. They said that the house was under covenant to be used for residential purposes only. But those objections were overcome. Soon afterwards, however, objections were made on another score. An organisation calling itself the 'National Front' complained that most of the children fostered by Mr and Mrs Watson were coloured children. The National Front acted through its branch organiser, Mr Applin, and its area organiser, Mr Taylor. These two gentlemen brought pressure on Mr and Mrs Watson to get them to take white children only. These were some of the things they did.

On 5th August 1971 Mr Applin sent a circular to the residents of Oakroyd Avenue. It referred to 'the enlargement of premises in Oakroyd Avenue for use as a foster home for largely non-British children'. It accused Mr and Mrs Watson of making 'malicious and disgraceful attacks' on their neighbours. It stated as a fact 'that immigrant parents because of their different standards and attitudes are quite prepared to let others take responsibility for their excess offspring'. In a letter to Mr Watson of 16th August 1971, Mr Taylor said:

'In answer to your question asking me if I am urging you to tell the local authorities that you will only except [sic] white children. YES I am, as I stated in my letter: "Charity Should Begin At Home." The number of immigrant parents who are only too ready to dump their unwanted offsprings onto the local ratepayers is a national scandal. Every week one sees advertisements in local papers and in shop windows concerning Immigrants who wish to Foster out their children. In my opinion, if we the indigenous population did likewise, there would be hell to play.'

On 26th August 1971 the National Front organised a public meeting at Potters Bar. Mr Applin read extracts from the circular. Mr Taylor said:

'While you have people such as Mr. Watson who delight in putting immigrants' welfare before their own people's, this process of turning more and more of British town and cities into coloured ghettos will continue.'

On 9th February 1972 the Race Relations Board issued proceedings in the county court claiming that the acts done by Mr Applin and Mr Taylor were unlawful and seeking an injunction.

It is not easy to apply the Race Relations Act 1968 to the situation before us, but I will try and explain it. It is quite clear that Mr and Mrs Watson were acting perfectly lawfully. They were fostering children without making any difference between them on the ground of colour. Mr Applin and Mr Taylor were bringing pressure to bear on Mr and Mrs Watson to get them to take white children only, and not coloured ones. That pressure did not succeed. Mr and Mrs Watson have resisted it. They have continued to take white and coloured children without making any difference. They continue so to take them. But, the point is this. Suppose the pressure had succeeded. Suppose that Mr and Mrs Watson had stipulated 'We will only take white children'. Would that conduct of Mr and Mrs Watson have been unlawful? If it would have been unlawful, then it was unlawful of Mr Applin and Mr Taylor to bring pressure to bear on Mr and Mrs Watson to do an unlawful act. This follows from s 12 of the 1968 Act, which says:

'Any person who deliberately aids, induces or incites another person to do an act which is unlawful by virtue of any provision of this Part of this Act shall be treated for the purposes of this Act as doing that act.'

If, therefore, Mr Applin and Mr Taylor 'incited' Mr and Mrs Watson to do an unlawful act, i.e. to take white children only, they are to be treated as themselves doing that act, even though the incitement did not succeed. Here I may mention a small point. Counsel for Mr Applin suggested that to 'incite' means to urge or spur on by advice, encouragement, and persuasion, and not otherwise. I do not think the word is so limited, at any rate in this context. A person may 'incite' another to do an act by threatening or by pressure, as well as persuasion. Mr Applin and Mr Taylor undoubtedly brought pressure to bear on Mr and Mrs Watson to take white children only, and thus 'incited' them to do so.

So the question is this: if Mr and Mrs Watson had stipulated: 'We will take white children only', and acted accordingly, would their conduct have been unlawful? This depends on s 2 (1) of the 1968 Act, which says:

a 'It shall be unlawful for any person concerned with the provision to the public or a section of the public (whether on payment or otherwise) of any goods, facilities or services to discriminate against any person seeking to obtain or use those goods, facilities or services by refusing or deliberately omitting to provide him with any of them or to provide him with goods, services or facilities of the like quality, in the like manner and on the like terms in and on which the former normally makes them available to other members of the public.'

b In order to see whether it would be unlawful for Mr and Mrs Watson to stipulate for white children only, I must state the nature of their fostering.

1. The children

c The children are allocated to Mr and Mrs Watson by three local authorities, the boroughs of Haringey and Barnet and Hertfordshire County Council. These local authorities are under a statutory duty to receive into their care any child who is lost, or whose parents have died, or are incapable of looking after the child, or who have abandoned him: see s 1 of the Children Act 1948. Having received such a child into their care, the local authority are under a statutory duty to put him out with foster parents or otherwise provide for his welfare: see s 13 of the 1948 Act. When they put him out to foster parents, they must satisfy the Boarding-out of Children Regulations 1955¹. Under those regulations the local authorities must keep a register of the foster parents and of the children. They must make proper arrangements for the child to live in the dwelling of the foster parents as a member of the family. The foster parents have to give an undertaking that they will care for the child and bring him up as they would a child of their own.

e 2. The foster parents

f Mr and Mrs Watson are registered with all three local authorities as suitable foster parents. They can only take into their home four or five children at a time, though they have been known to go up to seven, if there is urgent need. In any particular case the welfare officer telephones and asks if they have room. It is often at night. Mr and Mrs Watson always accept if they can manage it. Then the welfare officer or a policewoman brings the child along. The children are only with them for a short time, usually two or three weeks. Mr and Mrs Watson make them at home in every way, with toys and playtime in the nursery and the garden. They make no profit out of it. They only get paid their expenses. They have the right to refuse a child if they think he would not fit in, or was otherwise unsuitable. But, in point of fact, they never refuse any child so long as they have room. In particular, they never refuse any child on the ground of his or her colour. It so happens that just over half are coloured, about 60 per cent.

'Facilities'

h The first question under s 2 is whether Mr and Mrs Watson are 'concerned with the provision to the public or a section of the public . . . of any goods, facilities or services'. It is plain that Mr and Mrs Watson are concerned with the provision of facilities for the welfare of the children. They provide them with everything the children need. But, counsel for Mr Applin suggests that that is not enough. Those facilities, he says, are provided for the children *after* they are already in the house; and that is not sufficient to satisfy the section any more than the facilities provided for the members of a club. I cannot accept this suggestion. Mr and Mrs Watson clearly provide facilities.

'A section of the public'

j The judge held that the facilities were not provided to a section of the public. He applied a test which I proposed in this court in *Race Relations Board v Charter*². But

¹ SI 1955 No 1377, as amended by SI 1965 No 654, art 4 (9)

² [1972] 1 All ER 556, [1972] 1 QB 545

I was wrong. The House of Lords¹ have said so. So, the judge is to be excused, although I am not. a

There are two sets of persons to be considered here: (i) the children; (ii) the local authorities. So far as the children are concerned, the facilities are clearly provided to them. They are provided to the children in the same way as facilities are provided to the residents in a hotel or to the lodgers in a boarding house.

So far as the local authorities are concerned, the facilities are also provided to them. The local authorities have the children in their care and stand in loco parentis to them: see *Re A B (an infant)*². They stand in a similar position to parents who send children to a school. The facilities for education are provided, not only to or for the school children themselves, but also to or for the parents who want their children to be educated. So here the facilities are provided to the local authorities. b

Considering first the children, do they constitute a 'section of the public'? The House of Lords have held that these are words of limitation and that 'public' is used in contrast to 'private': see *Charter v Race Relations Board*³. Counsel for Mr Applin suggests that the children when inside the house are members of a family, and that the provision of facilities to them is as much private as the provision of facilities to the members of a social club. He instanced also fostering by private arrangement, or adoption, which are clearly private. I cannot accept this suggestion. The large quota of children who are in the care of the local authorities are clearly a 'section of the public', coming as they do haphazard from the public at large. The provision of facilities is a provision to that section of the public, even though only a few can avail themselves of the facilities. It is like a boarding-housekeeper who takes in lodgers. The group of potential lodgers is a 'section of the public' even though only a few can avail themselves of the facilities. c

Considering next the local authorities, I have some doubt whether they can properly be regarded as a 'section of the public'. They are bodies corporate who are the guardians of the public interest, but they are hardly themselves 'a section of the public'. d

'Discrimination'

The next question is whether Mr and Mrs Watson, if they insisted that they would only take white children, would by so doing 'discriminate against any person seeking to obtain or use' those facilities. I think they would discriminate against the coloured children. Those children may be so young as to be unable themselves to '[seek] to obtain or use [the] facilities'. But the local authorities stand in loco parentis to them and can seek on their behalf. e

Alternatively, I think that, by insisting on white children, Mr and Mrs Watson would be discriminating against the local authorities themselves. Counsel for the plaintiff board put this test. Suppose two white women frequently bring coloured men into a public house. The innkeeper says to them: 'You cannot come in here again if you come with coloured men.' Counsel for the plaintiffs suggests that the innkeeper would be discriminating against the two women. I agree. Section 1 (1) of the Act says: f

'. . . a person discriminates against another if on the ground of colour . . . he treats that other . . . less favourably than he treats . . . other persons . . .'

That definition of discrimination is wide enough to cover the case of the two women. They are treated less favourably than other women on the ground of colour. Similarly in this case, Mr and Mrs Watson would discriminate against the local authorities on the ground of colour if they said: 'We will take white children only.' g

¹ See, sub nom *Charter v Race Relations Board* [1973] 1 All ER 512, [1973] 2 WLR 299

² [1954] 2 All ER 287, [1954] 2 QB 385

³ [1973] 1 All ER 512, [1973] 2 WLR 299

General

a We were referred to many of the other sections of the 1968 Act, but these did not seem to me to help much. We were also invited to consider the fostering of children by private arrangement. There are statutory provisions governing it. They are set out in the Children Act 1958. At the other end of the scale, we were invited to consider the adoption of children under the Adoption Acts. I would not, as at present advised, consider the children in these categories as a 'section of the public'. They are the subject of personal selection or approval like the members of a social club.

b This element is so important that they cannot be regarded as a 'section of the public'. It seems to me that the foster parents, fostering privately, or the adopting parents, as the case might be, could lawfully say: 'We will only have a white child.' But this case is different. In those cases the facilities are provided to the individual children as and when they become members of the family. In this case the facilities are provided to the large group of 'children in care' of the local authority. That group is a 'section of the public', even though only a few can avail themselves of it.

c In my opinion, therefore, it would be unlawful for Mr and Mrs Watson to stipulate with the local authority that they would take white children only. It would be unlawful discrimination on the ground of colour contrary to ss 1 and 2 of the 1968 Act. It was, therefore, unlawful for Mr Applin and Mr Taylor to incite Mr and Mrs Watson to take white children only by bringing pressure on them to do so.

d I would grant a declaration to this effect, but I would not grant an injunction. There has been no repetition for 20 months of the matters complained of. Mr Applin and Mr Taylor have both, we were told, ceased to be members of the National Front.

e I would pay tribute to the careful judgment of the judge, which has been most helpful. I would allow the appeal.

f **BUCKLEY LJ.** Having had an opportunity to read the judgment which has just been delivered by Lord Denning MR and that which Stephenson LJ is about to deliver, with both of which I agree, I do not feel it necessary to add anything except to say that, in my judgment, corporate bodies are as capable of constituting a class of members of the public as human beings are, and that in the present case Mr and Mrs Watson provide facilities and services to two sections of the public consisting of (1) children in the care of the three local authorities, and (2) the three local authorities, both of which consist of persons or bodies seeking to obtain or use those facilities and services.

g I would allow the appeal and make the declaration suggested by Lord Denning MR. I would not grant an injunction.

h **STEPHENSON LJ.** I agree that this appeal should be allowed. If the Watsons had yielded to the efforts of Mr Applin and Mr Taylor and had refused to foster coloured children, would they have been guilty of unlawful discrimination, contrary to s 2 (1) of the Race Relations Act 1968, as that subsection has been interpreted by the House of Lords in *Charter v Race Relations Board*¹? This seems to me to be the first question raised by this appeal. If the answer is Yes, the second is: did those efforts constitute incitement contrary to s 12 of the Act? If the answer again is Yes, the third is: can and ought the court to permit an injunction, and in what terms,

j in addition to the declaration prayed?

I have no doubt about any question but the first. On the second and third questions I have nothing to add to what Lord Denning MR has said. The defendants plainly incited Mr Watson to discriminate more than once, but equally plainly they have

not shown any intention to incite for 20 months, and I agree that no injunction should be granted. a

I also agree that the discrimination to which they incited the Watsons would have been unlawful and the plaintiff board is therefore entitled to the declaration which the judge refused to grant. As we are differing from him and the question is important and not, in my opinion, easy to answer, I shall put my answer to it in my own words. b

The question whether the discrimination would have been unlawful resolves itself into two questions, but not quite the same two as the judge posed. He asked himself:

'(1) Were the Watsons concerned with the provision of facilities or services? If so, (2) was such provision to a section of the public?'

This approach followed this court's approach in *Charter's* case¹; but it has been corrected by the House of Lords² since the judge gave his judgment. 'Facilities or service' are very wide words and it is not helpful to consider their meaning in isolation from 'the public or a section of the public' to which they have to be provided. These last are words of limitation. I said in *Charter's* case³: c

'The question is not whether . . . the club committee is concerned with some form of public or quasi-public activity in providing facilities, but whether the members and visitors to whom they provide them are a section of the public.' d

But the House of Lords corrected that by saying, as Lord Cross of Chelsea⁴ did, that only the 'public' provision as opposed to the 'private' provision of facilities and services was within the section. I therefore consider the first question to be: were the Watsons concerned with the provision of facilities or services to a section of the public? My second question is then one which is bound up with the question on which the judge did not find it necessary to express any view: if incitement had been successful would the Watsons have discriminated against any person seeking to obtain or use those facilities or services? e

In spite of counsel for the first defendant's rigorous submissions, I answer both questions in the affirmative. The Watsons were, and are, providing a valuable public service in fostering children in the care of the Barnet Borough Council, the Haringey Borough Council and the Hertfordshire County Council under the Children Act 1948, and the Boarding-Out of Children Regulations 1955. Many of the facilities or services they provide (and I think that they provide both) are like those given as examples in s 2 (2) of the 1968 Act: accommodation, entertainment, recreation, refreshment, even education. At the base of them all they are providing each foster child with a temporary home by taking him or her 'to live in their dwelling as a member of their family' to be cared for and brought up as they would a child of their own: see reg 1 and the form of undertaking set out in the schedule which foster parents are required to give by reg 20. In providing that home they are like parents adopting children under the Adoption Act 1958 or fostering them by private arrangement under the Children Act 1958—or indeed like natural parents bringing up their own children. But between those categories of parents and what they are concerned with providing for a few children and the Watsons and what they have provided for some 300 children in 23 years there are obvious important differences, as Lord Denning MR has indicated. Whereas the activities of all the others may be regarded as private, the Watsons are taking part in a statutory scheme and a public service. Their names and addresses as foster parents are entered in a register which a local authority is required by reg 11 to keep in respect of every child boarded out in their area. They have 'gone public' and they offer to three local authorities and the children f

¹ [1972] 1 All ER 556, [1972] 1 QB 545 g

² [1973] 1 All ER 512, [1973] 2 WLR 299

³ [1972] 1 All ER at 565, [1972] 1 QB at 561

⁴ [1973] 1 All ER at 531, [1973] 2 WLR at 321 h

a in their area in need of foster care the provision of their services to the children they in fact foster. Those children whom they foster are, in my judgment, a section of the public, and not disqualified from being so by their numbers or by their personal relationship to the Watsons, which led the judge to hold that they were not. (I share the doubts of Lord Denning MR whether the local authority are a section of the public.) If persons—private persons as distinct from public authorities or even voluntary organisations—are willing to foster children ‘for love’ and without payment, it may seem a private and domestic matter whom they foster and on what grounds they select those they undertake to treat as their own children. But in helping local authorities to carry out their statutory duty to care for children in their areas, public-spirited persons like the Watsons are performing a public service and will not be surprised to find that Parliament has made unlawful a discrimination which they themselves would seem to regard as wrong. But that discrimination is unlawful if it is—

b
c
d ‘against any person seeking to obtain or use those goods, facilities or services by refusing or deliberately omitting to provide him with any of them or to provide him with goods, services or facilities of the like quality, in the like manner and on the like terms in and on which the former normally makes them available to other members of the public.’

The words certainly suggest discrimination against an individual member of the public, as counsel for the first defendant contended; but after some hesitation I have come to the conclusion that counsel for the plaintiffs is right in submitting that there is nothing in their context to prevent them applying to a body corporate such as a limited company or a local authority. If it were necessary to apply s 19 of the Interpretation Act 1889, I would do so.

e The persons who seek to obtain or use the services which the Watsons are concerned with providing are the three local authorities who send them children to board and foster. The persons who obtain and use them are the foster children boarded out with the Watsons. If the position is as simple as that and that is a complete account of it, then it is necessary to decide (what counsel for the first defendant has conceded) that A can discriminate against B on the ground of C’s colour, race or ethnic or national origin. If that were necessary I would so decide in agreement with Lord Denning MR. But it is, in my opinion, unnecessary because on reflection I consider the position to be that the children in need of fostering as well as the local authority are persons seeking to obtain and use the Watsons’ child-fostering services. I see nothing in the fact that the children may not themselves seek fostering, or may even object to the home the Watsons provide, or in the fact that the local authorities are performing a statutory duty, which prevents the local authorities from seeking those services on the children’s behalf. The Children Act 1948 imposes on them a parental duty, and there is no need to decide the other question whether the Race Relations Act 1968 forbids discrimination against a corporation, because in discriminating against a local authority a foster parent would be discriminating also against the children in need of fostering.

h In my judgment therefore a refusal or a deliberate omission by the Watsons to foster children on the ground of colour would be discrimination against the children as well as against the local authorities and would contravene the statute.

i Appeal allowed. Declaration as prayed granted, that the acts referred to in para 4 of the particulars of claim were unlawful by virtue of ss 2 and 12 of the Race Relations Act 1968. Leave to appeal to the House of Lords refused.

Solicitors: Lawford & Co (for the plaintiff board); A E Hamlin & Co (for the first defendant, Mr Applin).

Wendy Shockett - Barrister.

R v Goodlad

COURT OF APPEAL, CRIMINAL DIVISION

LORD WIDGERY CJ, MACKENNA AND BEAN JJ

24th MAY 1973

Criminal law – Sentence – Suspended sentence – Fresh offence committed during period of suspension – Extension of period of suspended sentence – Imposition of immediate sentence of imprisonment for fresh offence – Undesirability of subjecting accused to immediate and suspended sentences at same time – Criminal Justice Act 1967, s 40 (1) (c).

When sentencing an accused during the operational period of a suspended sentence imposed on him for a previous conviction, the judge should in general avoid 'mixing' suspended and immediate sentences of imprisonment. Where, therefore, the judge is minded to impose an immediate sentence for the subsequent offence he should, as a general rule, activate the suspended sentence, either to run concurrently or consecutively, rather than extend the operational period of the suspended sentence under s 40 (1) (c) of the Criminal Justice Act 1967.

Notes

For the powers and duties of a trial judge when a further offence is committed during the operational period of a suspended sentence, see Supplement to 10 Halsbury's Laws (3rd Edn) para 922A, 2, and for cases on suspended sentences, see Digest (Cont Vol C) 222-224, 5364ha-5364ht.

For the Criminal Justice Act 1967, s 40, see 8 Halsbury's Statutes (3rd Edn) 606.

Case referred to in judgment

R v Sapiano (1968) 52 Cr App Rep 674, CA, Digest (Cont Vol C) 222, 5364hc.

Cases also cited

R v Baker (1971) 55 Cr App Rep 182, CA.

R v Butters, *R v Fitzgerald* (1971) 55 Cr App Rep 515, CA.

Appeal

On 24th October 1972 in the Crown Court at Sheffield before May J and a jury, Paul William Goodlad was convicted of causing grievous bodily harm contrary to s 20 of the Offences against the Person Act 1861. He was sentenced to 18 months' imprisonment and it was further ordered that a suspended sentence of six months' imprisonment imposed on the appellant on 25th May 1972 should run for a period of two years from 24th October 1972. By leave of James LJ the appellant appealed against sentence. The facts are set out in the judgment of the court.

W B Phillips for the appellant.

The Crown was not represented.

LORD WIDGERY CJ. On 25th May 1972 at Rotherham Borough Magistrates' Court this appellant Goodlad was convicted of two offences of burglary, and was sentenced to concurrent sentences of six months' imprisonment suspended for two years. On 24th October 1972 at Sheffield Crown Court he pleaded guilty to an offence of causing grievous bodily harm, and in relation to that offence he was sentenced by May J to 18 months' imprisonment, and I say at once that we have heard no word to suggest that there was anything wrong with that sentence so far as the offence of grievous bodily harm was concerned, because it was a serious case of grievous

a bodily harm and the appellant can regard himself as fortunate not to have received a heavier sentence in respect of it.

Having decided to sentence him to 18 months' imprisonment for the grievous bodily harm, the learned judge then had to decide what to do about the suspended sentence, because the grievous bodily harm was an offence committed during the operative period of that suspended sentence. What he said, and I take it from the transcript, was:

b '... I think that it would be in all the circumstances unjust to activate the suspended sentence, but I propose to make it run for a period of two years from today. For the present offence, making the sentence as lenient as I can, because this was a serious injury, you must go to prison for 18 months.'

c So in regard to the suspended sentence the learned judge was keeping it in suspense, but was increasing the operational period during which a further offence might give rise to the activation of that suspended sentence. Let it be said at once that the learned judge was within his rights in law in doing what he did. It is perfectly clear under s 40 of the Criminal Justice Act 1967 that whereas the ordinary course when a further offence is committed during the operational period of a suspended sentence is to activate that suspended sentence, the trial judge has certain alternatives, and the third alternative in s 40 (1) (c) is that he may by order vary the original order of a suspended sentence by substituting for the period specified therein a period expiring not later than three years from the date of the variation. That is exactly what he did, and there is no doubt whatever that what he did was within the strict letter of the law.

d The complaint therefore is not that the judge erred in law, but that he failed to follow what this court has laid down over the last few years as being the desirable practice in regard to the treatment of suspended sentences. What is submitted is that he should not have left the sentence in suspense, and added to the operational period, but should have activated it, the reason being that the court has generally set its face against a situation in which one man is subject to an immediate prison sentence and a suspended prison sentence at the same time.

e That the court has set its face against that kind of situation is perfectly clear from the reports. The first authority to which we have been referred is *R v Sapiano*¹. There the court was dealing with this problem, I think for the first time, and Lord Parker CJ, speaking in general terms of a sentence in which a suspended and an immediate sentence were imposed at the same time, said this²:

f 'The Court is satisfied that it is a wrong sentence, wrong in two respects, first that it is really against the spirit and intention of the Act, because the main object of a suspended sentence is to avoid sending an offender to prison at all; secondly, it is wrong because in many circumstances it just will not work.'

g We have therefore a clear statement of principle that when a judge is imposing sentences in respect of two offences, he should not mix up, as a learned Lord Justice subsequently described it, immediate and suspended sentences by imposing one type of sentence for one offence and another for the other; he should bear in mind that the purpose of the suspended sentence procedure is to avoid sending people to prison. He should make up his mind whether on the case as a whole prison is inevitable or not. If he thinks prison is inevitable he should pass immediate prison sentences in respect of both offences. If he considers that prison is avoidable he should deal with the offence by suspended sentences. That is the practice in the simple case where the judge is dealing with two offences at the same time.

j What of the present case where the judge is imposing a sentence for a new offence but has also to deal with a suspended sentence previously imposed? We think that

1 (1968) 52 Cr App Rep 674

2 (1968) 52 Cr App Rep at 675

the principle of endeavouring to avoid a mixing up of immediate and suspended sentences should be observed in this instance as well. In reaching that conclusion, we are mindful of the fact that under the terms of s 40 of the Criminal Justice Act 1967 a court dealing with a previous suspended sentence is required to activate that sentence unless one of the alternatives in the section is necessary in the interests of justice. Accordingly, it seems to us that a judge in the position of May J in the present case should have approached the problem of the suspended sentence with s 40 in mind, that is to say bearing in mind that an activation of the suspended sentence was *prima facie* what was required.

The second reason why we think that in general the principle enunciated by Lord Parker CJ in *R v Sapiano*¹ should apply to this kind of case is that the inconvenience, and indeed the impracticability, of working an immediate prison sentence with a suspended sentence arises as much in this kind of situation as it does where a judge imposes sentences of different kinds initially and on the same occasion.

Hence we think that the general practice to which I have referred should be reflected in the type of case before this learned judge as well. I would like to make it perfectly clear that it is not to be assumed that in no case can an immediate and a suspended sentence live together. To quote one example, if a man receives a suspended sentence for a relatively minor offence in January and then in March of the same year is convicted of a serious offence committed before the suspended sentence was imposed, then the court may have no alternative but to sentence him to an immediate term for the later serious offence notwithstanding that the undesirable mixing up will result. But in cases where that result can be avoided, we think in practice it should be avoided, and we think that the present is such a case. Accordingly, in our judgment if the learned judge had followed this principle, he would have decided in the present instance to avoid having a suspended and an immediate prison sentence working together; he would have avoided it by deciding to activate the suspended sentence, and in the view of this court he certainly would not have done injustice in the present instance if he had ordered that the six months' suspended sentence should take effect consecutively to the 18 months for the grievous bodily harm. Whether he would have done that or not if he decided to activate the sentence we do not know, but it is clear that we cannot do it, because the powers of this court are limited to imposing a sentence not more severe than that which was imposed in the courts below.

For those reasons, and despite the fact that the appellant may regard himself as a very lucky man, we have decided to allow this appeal against sentence, to activate the suspended sentence, and to order that it be served concurrently with the sentence of 18 months imposed in respect of the grievous bodily harm.

Appeal allowed; sentence varied.

Solicitors: Crehan, Tierney, Harthill & Co, Rotherham (for the appellant).

Jacqueline Charles Barrister.

a

Re Manisty's Settlement

Manisty and another v Manisty and others

CHANCERY DIVISION

TEMPLEMAN J

b 6th MARCH, 2nd MAY 1973

Settlement – Power – Intermediate power – Validity – Power conferred on trustees to nominate and add to a class of beneficiaries – Power exercisable in favour of anyone with certain exceptions – Whether valid.

- c** By cl 4 and 15 of a settlement made in 1971, the settlor conferred on the trustees for the time being, provided they included at least one trustee who was not a beneficiary, power at their absolute discretion to pay, apply, appoint or settle the trust funds for the benefit of any of the beneficiaries, the power being exercisable until the closing date, defined by cl 1 as the date of the expiry of the period of 79 years from the execution of the settlement, or such earlier date as the trustees declared.
- d** The original beneficiaries were defined by cl 1 as the two existing infant children of the settlor, his future children and remoter issue born before the closing date and his two brothers and their children and remoter issue born before the closing date. It was provided that every person who was for the time being a member of the excepted class should be excluded from the class of beneficiaries. The original excepted class defined by cl 1 comprised the settlor, the wife for the time being of the settlor, any other person or corporation settling property on the trusts of the settlement and the spouse of any such other settlor. Clause 4 (a) (iii) conferred on the trustees power by any deed or deeds revocable or irrevocable to declare that any person or persons, corporation or corporations or charity or charities (other than a member of the excepted class or one of the trustees) should thenceforth for a specified period (not extending beyond the closing date) be included in the class of beneficiaries, with the proviso that such deed should not take effect unless and until the same (or a memorandum stating the effect thereof) had been endorsed on the settlement. In 1972, by a deed of declaration, a memorandum of which was endorsed on the settlement, the trustees, in purported exercise of the power conferred on them by cl 4 (a) (iii) declared that there should thenceforth be included in the class of 'beneficiaries' as defined in the settlement, the settlor's mother and any person who should for the time being be the widow of the settlor. Doubts having arisen as to the validity of the power contained in cl 4 (a) (iii), and, consequently, as to the effectiveness of the 1972 declaration, the trustees took out a summons to determine whether the power was valid or not. It was argued on behalf of the original beneficiaries that the power to add further beneficiaries was invalid, because an intermediate power, i.e. a power exercisable in favour of anyone with certain exceptions, could not be conferred on trustees because of the principles of non-delegation, and uncertainty.
- g**
- h**

j **Held** – (i) The settlor was not precluded by the doctrine of non-delegation from conferring an intermediate power on his trustees since it was established that a testator, and a fortiori a settlor, could create powers of disposition exercisable by individuals or trustees without thereby infringing the rule against delegation (see p 1206 g and j, post).

(ii) The power conferred by cl 4 (a) (iii) was not invalid for uncertainty for the following reasons—

(a) A special power in favour of a class was valid if it could be said with certainty that any given person was or was not a member of the class; likewise an intermediate

power was valid provided that, having regard to the definition of the excepted persons, it could be said with certainty that any given individual was or was not an object of the power (see p 1207 b and c, post).

(b) A power could not be held to be uncertain merely because it was wide in ambit since the mere width of a power could not make it impossible for the trustees to perform their duty nor prevent the court from determining whether the trustees were in breach (see p 1207 h and p 1208 g, post).

(c) Neither could it be argued that an intermediate power was too vague in that it did not attempt to classify beneficiaries. The settlor was entitled to confer an absolute discretion on his trustees and trustees on whom an intermediate power had been conferred were not precluded from considering in a sensible manner whether and how to exercise the power. It was not necessary that the terms of the power should provide guidance to them on how to exercise the power; nor was it the case that only a special power in favour of a recognised class enabled the court to judge whether the trustees were in breach of duty. The court could not insist on a particular exercise of a special power; the only duty on which the court could insist was that the trustees should consider exercising the power and in particular consider a request from a person within the ambit of the power that the power should be exercised in his favour. Accordingly the duties of the trustees of an intermediate power were precisely similar to those of the trustees of a special power as were the rights and remedies of a person who wished the power to be exercised in his favour (see p 1209 c and g, p 1210 b and f to j and p 1211 c, post).

(iii) It followed therefore that, since there was no logical objection to intermediate powers and the court was not constrained by the authorities to strike down a power which a settlor, disposing of his own property under skilled advice, wished to confer, the power conferred on the trustees under cl 4 (a) (iii) of the settlement was valid (see p 1211 f and p 1213 g, post).

Re Park [1931] All ER Rep 633, *Re Gestetner (deceased)* [1953] 1 All ER 1150, *Re Abrahams' Will Trusts* [1967] 2 All ER 1175, *Re Gulbenkian's Settlement Trusts* [1968] 3 All ER 785, *McPhail v Doulton* [1970] 2 All ER 228 and *Re Baden's Deed Trusts (No 2)* [1971] 3 All ER 985 applied.

Notes

For powers in relation to trusts, see 30 Halsbury's Laws (3rd Edn) 210-213, paras 370-374, and for uncertainty in relation to powers, see *ibid* 213, para 375, and for cases on those subjects, see 37 Digest (Repl) 401-404, 1309-1332.

Cases referred to in judgment

Abrahams' Will Trusts, *Re*, *Caplan v Abrahams* [1967] 2 All ER 1175, [1969] 1 Ch 463, [1967] 3 WLR 1198, Digest (Cont Vol C) 803, 42a.

Baden's Deed Trusts, (No 2), *Re*, *Baden v Smith* [1972] 2 All ER 1304, [1973] Ch 9, [1972] 3 WLR 250, CA; affg [1971] 3 All ER 985, [1972] Ch 607, [1971] 3 WLR 475.

Blausten v Inland Revenue Comrs [1972] 1 All ER 41, [1972] 1 Ch 256, [1972] 2 WLR 376, CA.

Gestetner (deceased), *Re*, *Barnett v Blumka* [1953] 1 All ER 1150, [1953] Ch 672, [1953] 2 WLR 1033, 37 Digest (Repl) 411, 1400.

Gulbenkian's Settlement Trusts, *Re*, *Whishaw v Stephens* [1968] 3 All ER 785, [1970] AC 508, [1968] 3 WLR 1127, HL, Digest (Cont Vol C) 806, 1330b.

McPhail v Doulton [1970] 2 All ER 228, [1971] AC 424, [1970] 2 WLR 1110, HL, Digest (Cont Vol C) 805, 1324a.

Morice v The Bishop of Durham (1805) 10 Ves Jun 522, [1803-13] All ER Rep 451, 32 ER 947, LC Ct, 47 Digest (Repl) 47, 308.

Park, *Re*, *Public Trustee v Armstrong* [1932] 1 Ch 580, [1931] All ER Rep 633, 101 LJCh 295, 147 LT 118, 37 Digest (Repl) 403, 1328.

Cases also cited

- a* *Astor's Settlement Trusts, Re, Astor v Scholfield* [1952] 1 All ER 1067, [1952] Ch 534.
Jones, Re, Public Trustee v Jones [1945] Ch 105.

Adjourned summons

- This was an application by originating summons by the plaintiffs, Henry Francis Herbert Manisty (a brother of the first defendant, Edward Alexander Manisty, the settlor) and Mark Rider Cheyne (the present trustees of a settlement dated 20th December 1971 and made between the first defendant and the plaintiffs), whereby the plaintiffs sought the determination by the court of the question (a) whether the power expressed to be conferred on them as trustees of the settlement by cl 4 (a) (iii) thereof to add to the class of 'beneficiaries' as defined in the settlement was (i) valid or (ii) void for uncertainty or otherwise, and (b) if the power was valid, whether the deed of declaration dated 8th December 1972 made by the plaintiffs (i) operated to add to the class of 'beneficiaries' as defined in the settlement for the period specified in the deed, the settlor's mother, Charlotte Evelyn Stephens, the third defendant, and any widow for the time being of the settlor, or (ii) was ineffective for that purpose. The settlor's wife, Dinah Lake Manisty, was the second defendant, his infant children, Alexander Manisty and Louisa Manisty, were the fourth and fifth defendants, and his other brother, Michael Christopher Manisty, was the sixth defendant. The facts are set out in the judgment.

C H McCall for the plaintiffs.

R Cozens-Hardy Horne for the first, second, third and sixth defendants.

John Bradburn for the fourth and fifth defendants.

Cur adv vult

2nd May. **TEMPLEMAN J** read the following judgment. This summons challenges the validity of a power conferred on trustees to nominate and add to a class of beneficiaries.

- f* By the settlement dated 20th December 1971 the settlor, who is the first defendant, appointed his brother Henry and a chartered accountant, who are the two plaintiffs, to be the first trustees, and by cl 4, read with cl 15, conferred on the trustees, for the time being, provided that they include at least one trustee who is not a beneficiary, power at their absolute discretion to pay, apply, appoint or settle the trust funds for the benefit of any of the beneficiaries. The power is exercisable during a perpetuity period, that is to say, until the closing date defined by cl 1 as the date of the expiry of the period of 79 years from the execution of the settlement, or such earlier date as the trustees declare. The original beneficiaries were defined by cl 1 as the two existing infant children of the settlor, the future children and remoter issue of the settlor born before the closing date, the settlor's two brothers, Michael and Henry, and their children and remoter issue born before the closing date. It was provided that 'every person who is for the time being a member of the Excepted Class shall be excluded from the class of Beneficiaries'.

- g* The original excepted class defined by cl 1 comprised the settlor, the wife for the time being of the settlor, any other person or corporation settling property on the trusts of the settlement and the spouse of any such other settlor. Clause 4, as limited by cl 15, also authorised the trustees, if they include at least one trustee who is not a beneficiary, to delete any person or corporation from the beneficiaries, to add any person, corporation or class to the excepted class and at their absolute discretion to exercise the power which is now challenged, and which, comprising cl 4 (a) (iii), reads as follows:

'Power by any Deed or Deeds revocable or irrevocable to declare that any person or persons corporation or corporations or charity or charities (other

than a person or corporation who shall for the time being be a member of the Excepted Class or one of the Trustees) shall thenceforth and for such period as shall be specified in such Deed or Deeds (not extending beyond the Closing Date) be included in the class of Beneficiaries hereinbefore defined PROVIDED ALWAYS that any such Deed shall not take effect unless and until the same (or a memorandum stating the effect thereof) has been endorsed on this Settlement'.^a

Subject to the powers of disposition conferred on the trustees, and to a trust for accumulation for 21 years, the trust funds, which in the first instance consisted of policies of assurance on the life of the settlor, were settled by cl 3 (2) on such of the children of the existing children of the settlor as shall be living on the closing date, or shall previously attain the age of 21 years, or if there shall be no such grandchildren of the settlor then by cl 3 (3) on such of the existing children as attain 21.^b

By a deed of declaration dated 8th December 1972, a memorandum of which was endorsed on the settlement and dated 11th December 1972, the trustees, who included one person who was not a beneficiary, added to the beneficiaries the mother of the settlor and any person who shall for the time being be the widow of the settlor. The settlor's wife, who may become his widow, and the settlor's mother are the second and third defendants and appear by Mr Cozens-Hardy Horne to uphold the validity of the power to add beneficiaries and the validity of the deed of declaration which exercised that power.^c

The settlor's two existing infant children are the fourth and fifth defendants and they appear by Mr Bradburn to argue in the interests of all the original beneficiaries that the power to add further beneficiaries is invalid and the deed of declaration is ineffective. The sixth defendant is Michael, the brother of the settlor, and has taken no part in the argument.^d

The power to add beneficiaries and to benefit the persons so added is exercisable in favour of anyone in the world except the settlor, his wife, the other members of the excepted class for the time being and the trustees, other than the settlor's brother Henry who was one of the original beneficiaries. This is not a general power exercisable in favour of anyone, nor a special power exercisable in favour of a class, but an intermediate power exercisable in favour of anyone, with certain exceptions.^e

Counsel for the fourth and fifth defendants submits that an intermediate power cannot be conferred on trustees because of principles of non-delegation and uncertainty. The argument based on the principle of non-delegation stems from the proposition that a testator must not delegate to other persons the right to make a will for him. It is, however, established by authority that a testator, and a fortiori a settlor, may create powers of disposition exercisable by individuals or by trustees without thereby infringing any rule against delegation. If delegation is the vice then delegation to an individual is as bad as delegation to a trustee. But in *Re Park*¹ Clauson J held valid an intermediate power conferred by a testator on an individual to appoint to anyone in the world, except the donee of the power. If delegation is the vice then delegation to trustees by means of a special power is as bad as delegation to trustees by means of an intermediate power. But in *Re Gulbenkian's Settlement Trusts*² the House of Lords held valid a special power conferred by a settlor on trustees to benefit the settlor's son and his associates. To make assurance double sure, in *Re Abrahams' Will Trusts*³ Cross J held valid an intermediate power conferred by a testator on trustees to appoint to anyone in the world except the trustees, and he expressly rejected the argument based on the principle of non-delegation. I conclude that the settlor in the present case was not precluded by the doctrine of non-delegation from conferring an intermediate power on his trustees.^f

¹ [1932] 1 Ch 580, [1931] All ER Rep 633

² [1968] 3 All ER 785, [1970] AC 508

³ [1967] 2 All ER 1175 at 1183, 1184, [1969] 1 Ch 463 at 474-476

a The argument based on uncertainty is that the trustees are under a duty to consider from time to time whether and how to exercise their powers, and that they cannot perform that duty, and a court cannot judge the performance of that duty, if the power is too wide. An intermediate power, it is said, is wider than any special power and is practically unlimited, and is therefore too wide, uncertain and invalid.

b Invalidity, based on uncertainty, was the subject of *Re Gulbenkian's Settlement Trusts*¹, relating to special powers in favour of a class, and *McPhail v Doulton*², relating to discretionary trusts in favour of a class. Those authorities establish that such a power or trust is valid if it can be said with certainty that any given individual is or is not a member of the class. The principle of the rule thus established does not strike down an intermediate power provided that, having regard to the definition of excepted persons, it can be said with certainty that any given individual is or is not an object of the power. The principle for which counsel for the second defendant contends may be adopted from the summary of the effect of *Re Gulbenkian's Settlement Trusts*¹ to be found in the dissenting speech of Lord Guest in *McPhail v Doulton*³ where he said:

'In the case of a power it is only necessary for the trustees to know whether a particular individual does or does not come within the ambit of the power.'

d Counsel for the second defendant says, applying that principle to the present case, the definition of excepted class being certain, it follows that there is no uncertainty about the power.

e *Gulbenkian*¹ and *McPhail v Doulton*² also establish, or rather reiterate, the rule that trustees of a power must consider from time to time whether and how to exercise the power, for in the words of Lord Reid in *Gulbenkian*⁴:

f 'A settlor or testator who entrusts a power to his trustees must be relying on them in their fiduciary capacity so they cannot simply push aside the power and refuse to consider whether it ought in their judgment to be exercised. And they cannot give money to a person who is not within the classes of persons designated by the settlor: the construction of the power is for the court.'

In *McPhail v Doulton*⁵ Lord Wilberforce, referring to special powers, suggested:

g 'Any trustee would surely make it his duty to know what is the permissible area of selection and then consider responsibly, in individual cases, whether a contemplated beneficiary was within the power and whether, in relation to other possible claimants, a particular grant was appropriate.'

He added⁶, referring to special powers and to discretionary trusts in favour of a class, that 'in each case the trustees ought to make such a survey of the range of objects or possible beneficiaries as will enable them to carry out their fiduciary duty'.

h It is said that if a power is too wide the trustees cannot perform the duty reiterated in *Gulbenkian*¹ and *McPhail v Doulton*² of considering from time to time whether and how to exercise the power and the court cannot determine whether or not the trustees are in breach of their duty. In my judgment, however, the mere width of a power cannot make it impossible for trustees to perform their duty nor prevent the court from determining whether the trustees are in breach.

j

¹ [1968] 3 All ER 785, [1970] AC 508

² [1970] 2 All ER 228, [1971] AC 424

³ [1970] 2 All ER at 236, [1971] AC at 445

⁴ [1968] 3 All ER at 787, [1970] AC at 518

⁵ [1970] 2 All ER at 240, [1971] AC at 449

⁶ [1970] 2 All ER at 247, [1971] AC at 457

In *Re Gestetner (deceased)*¹, the trustees were given a power exercisable in favour of a class which excluded the settlor, his wife and the trustees and comprised four named individuals, the living and future descendants of the settlor's father and of an uncle of the settlor, the spouses, widows and widowers of those individuals and descendants, five named charitable bodies, former employees of the settlor or his wife and the widows and widowers of former employees of the settlor or his wife and any person who was for the time being a director or employee or former director or employee or the wife or husband or widow or widower of a former director or employee of Gestetner Ltd or of any company of which the directors for the time being included any one or more of the persons who were for the time being directors of Gestetner Ltd.

This was a special power exercisable over an enormous class, and the great majority of beneficiaries by number and category will never learn that they are objects of the power or fall to be considered by the trustees. If a director of Gestetner Ltd became a director of Woolworth or Unilever there would be added to the class of beneficiaries shop assistants throughout England and workers throughout the world. *Gestetner*² was approved in *Gulbenkian*³ and does not exhaust the ingenuity of settlors in creating classes and numbers of beneficiaries of immeasurable width.

The argument that a discretionary trust in favour of a recognised class can be too wide was considered in *Re Baden's Deed Trusts (No 2)*⁴, a decision which for present purposes must apply to special powers as well as to discretionary trusts. In *Baden (No 2)*⁴ it was submitted that a discretionary trust exercisable in favour of employees and former employees of a company and their relatives and dependants was void for uncertainty because it did not satisfy the test suggested in the judgment of Brightman J⁵, namely, that such a trust is—

'invalid if the class is so large or arbitrary that the trustees cannot reasonably estimate the membership, or know how to set about instituting enquiries which will reveal the membership, including the membership of its sub-classes or categories, and if the trustees cannot therefore properly discharge their duty to consider how the fund should be divided between the sub-classes or categories, and what further enquiries they should make.'

The suggested test only serves to illustrate how impossible it is to define the circumstances in which a recognised class may be said to be too wide. Brightman J rejected the test and held that the discretionary trust was valid, applying only the test established in *McPhail v Doulton*⁶ that a trust in favour of a recognised class is valid if it can be said with certainty that any given individual is or is not a member of the class. The decision of Brightman J in *Baden (No 2)*⁴ was affirmed by the Court of Appeal. I conclude from *Gestetner*², *Gulbenkian*³, *McPhail v Doulton*⁶ and *Baden (No 2)*⁷, that a power cannot be uncertain merely because it is wide in ambit.

An alternative argument against the validity of an intermediate power conferred on trustees is that a power which is not confined to individuals or to classes recognised by the court is too vague. An intermediate power which does not attempt to classify the beneficiaries but only specifies or classifies excepted persons is therefore, it is said, too vague. It is admitted that it may be difficult to define or describe those classes which would not be recognised by the court, and are therefore also too vague, but the example suggested by Lord Wilberforce in *McPhail v Doulton*⁸ of 'all the

1 [1953] 1 All ER 1150 at 1152, [1953] Ch 672 at 674

2 [1953] 1 All ER 1150, [1953] Ch 672

3 [1968] 3 All ER 785, [1970] AC 508

4 [1971] 3 All ER 915, [1972] Ch 607; *aff'd* [1972] 2 All ER 1304, [1973] Ch 9

5 [1971] 3 All ER at 990, [1972] Ch at 620

6 [1970] 2 All ER 228, [1971] AC 424

7 [1972] 2 All ER 1304, [1973] Ch 9

8 [1970] 2 All ER at 247, [1971] AC at 457

a residents of Greater London' is given as an instance of a class which would not be so recognised.

The submission that an intermediate power is too vague because the beneficiaries are not limited to specified individuals or recognised classes is in the final analysis based on the same reasoning as the attack on wide discretionary trusts which was rejected in *Baden (No 2)*¹. The argument is that an intermediate power where the

b beneficiaries are not limited to specified individuals or recognised classes precludes the trustees from considering in a sensible manner whether and how to exercise the power, and prevents the court from judging whether the trustees have surveyed the field of objects and have properly considered whether and how to exercise the power.

c Implicit in this argument are two assertions, first, that the terms of a special power in favour of recognised classes necessarily provide some guidance to the trustees with regard to the proper mode of considering how to exercise the power, and secondly, that the terms of a special power in favour of recognised classes enable the court to judge whether the trustees are in breach of their duty. In my judgment neither assertion is well founded.

d Some powers may give an indication of the expectations of the settlor. In *Gulbenkian*² it was plain that the trustees were expected to have regard to the best interests of Mr Nubar Gulbenkian. There are similar powers where all the beneficiaries are equal but some are more equal than others. But in *Gestetner*³ it was impossible to derive any assistance from the terms of the power, save that the trustees, it could be assumed, were expected to have regard to the considerations which might move the settlor to confer bounty on the beneficiaries. A similar expectation may be implied from an intermediate power, and in the present case if the settlement is read

e as a whole the expectations of the settlor are not difficult to discern. In *Gestetner*³ the terms of the power did not in themselves indicate how employees were to be compared with relations, charities, individuals and other classes of beneficiaries. The terms of the power in themselves did not indicate whether and on what grounds one employee might be considered, whether by reference to services rendered to

f *Gestetner Ltd* or to the settlor or by reference to age, health or any other criterion. The terms of the power did not in themselves indicate whether and on what grounds one relation out of many was to be considered, whether by reference to his proximity to the settlor, poverty, educational requirements or any other circumstances. The terms of a special power do not necessarily indicate in themselves how the trustees are to consider the exercise of the power. That consideration is confided to the absolute discretion of the trustees.

g The court cannot insist on any particular consideration being given by the trustees to the exercise of the power. If a settlor creates a power exercisable in favour of his issue, his relations and the employees of his company, the trustees may in practice for many years hold regular meetings, study the terms of the power and the other provisions of the settlement, examine the accounts and either decide not to exercise the power or to exercise it only in favour, for example, of the children of

h the settlor. During that period the existence of the power may not be disclosed to any relation or employee and the trustees may not seek or receive any information concerning the circumstances of any relation or employee. In my judgment it cannot be said that the trustees in those circumstances have committed a breach of trust and that they ought to have advertised the power or looked beyond the persons who are most likely to be the objects of the bounty of the settlor. The trustees

i are, of course, at liberty to make further enquiries, but cannot be compelled to do so at the behest of any beneficiary. The court cannot judge the adequacy of the

1 [1971] 3 All ER 985, [1972] Ch 607; *aff'd* [1972] 2 All ER 1304, [1973] Ch 9

2 [1968] 3 All ER 785, [1970] AC 508

3 [1953] 1 All ER 1150, [1953] Ch 672

consideration given by the trustees to the exercise of the power, and it cannot insist on the trustees applying a particular principle or any principle in reaching a decision. a

If a person within the ambit of the power is aware of its existence he can require the trustees to consider exercising the power and in particular to consider a request on his part for the power to be exercised in his favour. The trustees must consider this request, and if they decline to do so or can be proved to have omitted to do so, then the aggrieved person may apply to the court which may remove the trustees and appoint others in their place. This, as I understand it, is the only right and only remedy of any object of the power: see, for example, *Gestetner*¹, where Harman J said that the trustees— b

‘are not entitled entirely to release the power. That means that they are bound to consider at all times during which the trust is to continue whether or no they are to distribute any, and, if so, what, part of the fund, and to whom they should distribute it. To that extent I have no doubt that there is a duty on these trustees, and that a member of the specified class might, if he could show that the trustees had deliberately refused to consider any question of the want or suitability of any member of the class, procure their removal . . . there is no obligation on the trustees to do more than consider from time to time the merits of such persons of the specified class as are known to them, and, if they consider them meritorious, to give them something. The settlor had good reason to trust the persons whom he appointed as trustees, I have no doubt, but I cannot see that there is here such a duty as makes it essential for these trustees, before parting with any income or capital, to survey the whole field and consider whether A is more deserving of bounty than B. That is a task which is, and which must have been known to the settlor to be impossible, having regard to the ramifications of the persons who might be members of this class.’ c

Similarly, in the case of an intermediate power the settlor has no doubt good reason to trust the persons whom he appoints trustees. In my judgment the reasoning is parallel. d

The court may also be persuaded to intervene by removing the trustees if the trustees act ‘capriciously’, that is to say, act for reasons which I apprehend could be said to be irrational, perverse or irrelevant to any sensible expectation of the settlor; for example, if they chose a beneficiary by height or complexion or by the irrelevant fact that he was a resident of Greater London. e

A special power does not show the trustees how to consider the exercise of the power in a sensible manner and does not by its terms enable the court to judge whether the power is being considered in a proper manner. The conduct and duties of trustees of an intermediate power, and the rights and remedies of any person who wishes the power to be exercised in his favour, are precisely similar to the conduct and duties of trustees of special powers and the rights and remedies of any person who wishes a special power to be exercised in his favour. In practice, the considerations which weigh with the trustees will be no different from the considerations which will weigh with the trustees of a wide special power. In both cases reasonable trustees will endeavour, no doubt, to give effect to the intention of the settlor in making the settlement and will derive that intention not from the terms of the power necessarily or exclusively, but from all the terms of the settlement, the surrounding circumstances and their individual knowledge acquired or inherited. In both cases the trustees have an absolute discretion and cannot be obliged to take any form of action, save to consider the exercise of the power and a request from a person who is within the ambit of the power. In practice, requests to trustees armed f

¹ [1953] 1 All ER at 1155, [1953] Ch at 688 g

- a* with an intermediate power are unlikely to come from anyone who has no claim on the bounty of the settlor. In practice, requests to trustees armed with a special power in favour, for example, of issue, relations and employees of a company, are unlikely to come from anyone who has no claim on the bounty of the settlor, or has no plausible grounds for being given a benefit from property derived from the settlor. The only difference between an intermediate power and a special power for present purposes is that a settlor by means of a special power cannot be certain that he has armed his trustees against all developments and contingencies. A settlor who creates a special power exercisable in favour of issue, relations and employees may later regret that the trustees have no power to benefit adopted issue, widows and other persons outside the ambit of the power. Hence the recent popularity, as I am informed, of intermediate powers which arm the trustees with a weapon which will enable them to consider all developments, and all future mishaps and disasters.

- c* Logically, in my judgment, there is no reason to bless a special power which prescribes the ambit of the power by classifying beneficiaries and at the same time to outlaw an intermediate power which prescribes the ambit of the power by classifying excepted persons.

- d* It may well be that there are some classes of special power which will not be recognised by the court, but this possibility does not affect the validity of intermediate powers. The objection to the capricious exercise of a power may well extend to the creation of a capricious power. A power to benefit 'residents of Greater London' is capricious because the terms of the power negative any sensible intention on the part of the settlor. If the settlor intended and expected the trustees would have regard to persons with some claim on his bounty or some interest in an institution favoured by the settlor, or if the settlor had any other sensible intention or expectation, he would not have required the trustees to consider only an accidental conglomeration of persons who have no discernible link with the settlor or with any institution. A capricious power negatives a sensible consideration by the trustees of the exercise of the power. But a wide power, be it special or intermediate, does not negative or prohibit a sensible approach by the trustees to the consideration and exercise of their powers.

- f* If there is no logical objection to intermediate powers it remains to be considered whether the authorities, for historical or other reasons, forbid the conferment of intermediate powers on trustees. In *Morice v The Bishop of Durham*¹ a trust for 'such objects of benevolence and liberality as the trustee in his own discretion shall most approve' was held to be invalid and Lord Eldon LC said this:

- g* 'As it is a maxim, that the execution of a trust shall be under the controul of the Court, it must be of such a nature, that it can be under that controul; so that the administration of it can be reviewed by the Court; or, if the trustee dies, the Court itself can execute the trust: a trust therefore, which, in case of mal-administration could be reformed; and a due administration directed; and then, unless the subjects and the objects can be ascertained, upon principles, familiar in other cases, it must be decided, that the Court can neither reform mal-administration, nor direct a due administration.'

- j* The decision in that case does not touch the present controversy. In a trust where the objects are described by vague adjectives such as 'benevolent' and 'liberal' the trust breaks the rule that the trustees and the court must be able to determine with certainty whether a particular individual or a particular object is within the ambit of the power. Nor does an intermediate power break the principles laid down by Lord Eldon LC in the passage which I have read because, in relation to a power exercisable by the trustees at their absolute discretion, the only 'control' exercisable by the court is the removal of the trustees, and the only 'due administration' which

can be 'directed' is an order requiring the trustees to consider the exercise of the power, and in particular a request from a person within the ambit of the power. This control and direction may be exercised by the court in relation to a power, whether special or intermediate.

In *Re Park*¹ Clauson J held that an intermediate power exercisable by an individual was valid, but he said²:

'It is clearly settled that if a testator creates a trust he must mark out the metes and bounds which are to fetter the trustees or, as has been said, the trust must not be too vague for the Court to enforce, and that is why a gift to trustees for such purposes as they may in their discretion think fit is an invalid trust; there are no metes and bounds within which the trust can be defined, and unless the trust can be defined the Court cannot enforce it.'

If the object of metes and bounds is to enable the trustees and the court to determine whether an individual is or is not a beneficiary then an intermediate power satisfies that test. If the requirement of certainty is the same as that mentioned by Lord Eldon LC in *Morice v The Bishop of Durham*³ this passage from the judgment of Clauson J² does not affect powers, whether special or intermediate, where the only 'enforcement' allowed to the court is enforcement of the right of any person within the ambit of the power to require the trustees to consider the exercise of the power and his request. If the passage means more than this, it nevertheless does not in terms apply to powers, and even in relation to trusts may be required to be reconsidered in the light of the consequences of the decision of the majority of the House of Lords in *McPhail v Doulton*⁴.

In *Re Abrahams' Will Trusts*⁵ Cross J considered *Re Park*¹ and decided that an intermediate power exercisable by trustees was valid. Counsel for the fourth and fifth defendants points out that *Re Abrahams' Will Trusts*⁶ was decided before the decision of the House of Lords in *Gulbenkian*⁷, but it is plain that the judgment of Cross J⁶ is not inconsistent with *Gulbenkian*⁷ and he discussed the nature of a power and the duty of the trustees in words which anticipated both *Gulbenkian*⁷ and *McPhail v Doulton*⁸. The learned judge said⁹:

'It is not a trust imposed on them; it is a mere power. It is a fiduciary power given to them in the capacity of trustees and they cannot release it. They must retain it unless and until they exercise it, and consider from time to time whether they ought to exercise it.'

The learned judge clearly did not envisage that the trustees' function, to which he alluded in terms anticipating *Gulbenkian*⁷ and *McPhail v Doulton*⁸, would be difficult or impossible for trustees to carry out in connection with an intermediate power, and clearly did not envisage that the court would find any difficulty in carrying out its limited function with regard to the exercise by the trustees of powers.

In *McPhail v Doulton*¹⁰ Lord Wilberforce referred first to 'linguistic or semantic uncertainty which, if unresolved by the court, renders the gift void' and secondly to—

1 [1932] 1 Ch 580, [1931] All ER Rep 633

2 [1932] 1 Ch at 583, [1931] All ER Rep at 634

3 (1805) 10 Ves Jun at 539, 540, [1803-13] All ER Rep at 458

4 [1970] 2 All ER 228, [1971] AC 424

5 [1967] 2 All ER at 1184, [1969] 1 Ch at 474

6 [1967] 2 All ER 1175, [1969] 1 Ch 463

7 [1968] 3 All ER 785, [1970] AC 508

8 [1970] 2 All ER 228, [1971] AC 424

9 [1967] 2 All ER at 1184, [1969] 1 Ch at 474, 475

10 [1970] 2 All ER at 247, [1971] AC at 457

- a 'the difficulty of ascertaining the existence or whereabouts of members of the class, a matter with which the court can appropriately deal on an application for directions.'

Then he said this¹:

- b 'There may be a third case where the meaning of the words used is clear but the definition of beneficiaries is so hopelessly wide as not to form "anything like a class" so that the trust is administratively unworkable or in Lord Eldon LC's words one that cannot be executed.'

And he cited *Morice v The Bishop of Durham*². He continued¹:

- c 'I hesitate to give examples for they may prejudice future cases, but perhaps "all the residents of Greater London" will serve. I do not think that a discretionary trust for "relatives" even of a living person falls within this category.'

- d In these guarded terms Lord Wilberforce appears to refer to trusts which may have to be executed and administered by the court and not to powers where the court has a very much more limited function. Moreover, a capricious power exercisable in favour of 'residents of Greater London' may, as I have already outlined, well be uncertain. The settlor neither gives the trustees an unlimited power which they can exercise sensibly, nor a power limited to what may be described a 'sensible' class, but a power limited to a class, membership of which is accidental and irrelevant to any settled purpose or to any method of limiting or selecting beneficiaries.

- e Finally, in *Blausten v Inland Revenue Comrs*³, there are passages which are admittedly obiter to the decision of Buckley LJ, in which the learned Lord Justice accepted the validity of an intermediate power exercisable by trustees with the consent of the settlor but was clearly not disposed to accept the validity of an intermediate power exercisable by trustees at their sole discretion. The full consequences and implications of *Gestetner*⁴, *Gulbenkian*⁵, *McPhail v Doulton*⁶ and *Baden (No 2)*⁷ do not, however, appear to have been fully explored for the assistance of Buckley LJ and that is not surprising in view of the fact that the Court of Appeal reached its conclusions on grounds which did not involve a final pronouncement on the validity of intermediate powers.

- f In the result, I conclude that I am not constrained by authority to strike down a power which a settlor, disposing of his own property under skilled advice, wishes to confer on his trustees.

- g Declaration accordingly.

Solicitors: *Stephenson, Harwood & Tatham* (for all parties).

Jacqueline Metcalfe Barrister.

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1 [1970] 2 All ER at 247, [1971] AC at 457

2 (1805) 10 Ves Jun at 527

3 [1972] 1 All ER 41 at 50, [1972] 1 Ch 256 at 271

4 [1953] 1 All ER 1150, [1953] Ch 672

5 [1968] 3 All ER 785, [1970] AC 508

6 [1970] 2 All ER 228, [1971] AC 424

7 [1971] 3 All ER 985, [1972] Ch 607; *aff'd* [1972] 2 All ER 1304, [1973] Ch 9

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Wilkes and others v Gee

COURT OF APPEAL, CIVIL DIVISION
RUSSELL, STAMP AND ROSKILL LJJ
2nd, 3rd, 4th MAY 1973

Common land – Registration – Disputed claims – Jurisdiction – Commons Commissioner – Residual jurisdiction of High Court – Circumstances in which residual jurisdiction exercisable – Application for registration not made bona fide.

The defendant applied under the Commons Registration Act 1965 for the registration of certain land, including land belonging to the plaintiffs, as common land. The land was provisionally registered as common land. The evidence adduced by the defendant in support of his claim that the land was common land was of the most tenuous nature. At the time of the application the plaintiffs were negotiating for the sale of the land to the local authority who wished to build a much needed school thereon. Until the question whether the land was common land had been determined the negotiations could not be completed. However, although Commons Commissioners had been appointed under the 1965 Act to hear objections, it would be many months before the plaintiffs' objection to the defendant's registration would be heard. The plaintiffs therefore brought proceedings against the defendant in the High Court and moved for an order that the defendant 'do forthwith procure or concur in the removal' of the land from the commons register.

Held – On the assumption that, when once the statutory machinery for the determination of disputes had been set up, the court retained a residual jurisdiction, it could only exercise that jurisdiction in the most exceptional case, and only where it had been clearly shown that in making the application and subsequently refusing to withdraw it the applicant had been acting mala fide. The urgent needs of a possible or would-be purchaser were quite irrelevant. Although the evidence adduced by the defendant, on the hearing of the motion, that the land was common land was tenuous that was not sufficient to establish that his application had been made mala fide. Accordingly the motion would be dismissed (see p 1216 f, p 1217 f and g, p 1218 b to d, p 1219 d and f to j and p 1220 g, post).

Decision of Plowman J [1973] 1 All ER 226 affirmed.

Note

For effect of registration of rights of common, see Supplement to 5 Halsbury's Laws (3rd Edn) para 982A.

Case referred to in judgment

Cooke v Amey Gravel Co Ltd [1972] 3 All ER 579, [1972] 1 WLR 1310.

Interlocutory appeal

The plaintiffs, Michael Bruce Wilkes, Adrian Nicholas Wilkes, Colin Richard Burridge and Anthony John Burridge, appealed against the order of Plowman J¹ dated 21st November 1972 whereby he dismissed the plaintiffs' motion for an order that the defendant, Earnest Howard Valentine Gee, do forthwith procure or concur in the removal of the plaintiffs' land known as and situate at Sandford Pottery, Gorehill, Sandford, Wareham in the county of Dorset from the commons register kept by the Dorset County Council pursuant to the Commons Registration Act

¹ [1973] 1 All ER 226, [1973] 1 WLR 111

- a 1965, the plaintiffs' land having been registered thereon as common land pursuant to an application made by the defendant under unit no 721 and entry no CL309. The facts are set out in the judgment of Russell LJ.

Ian McCulloch for the plaintiffs.

Norman Primost for the defendant.

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RUSSELL LJ. This is an appeal from a decision of Plowman J¹ and it concerns the Commons Registration Act 1965. That is an Act which in broad terms provides a system for defining and ascertaining what lands are common land and what rights of common exist. The decision has to be made by a statutory tribunal consisting of persons appointed as Commons Commissioners, subject to appeal to the High Court on points of law.

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Broadly speaking, under the Act any person can apply to the registration authority for the register of common lands (the authority here being the Dorset County Council) for the registration of any land within the area of their authority as common land in general terms or as subject to specific rights of common. That application

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has to be supported by a statutory declaration by the applicant in which he avers that he verily believes it to be common land within the definition extracted from the statute which is reproduced on the reverse of the statutory declaration form. Provided the application is made in due and proper form, the registration authority registers it in respect of the whole of the land subject to the application under a particular number (in this case CL309), and that is known as a provisional registration.

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Provisional registration is not, it has been held², evidence of itself of the existence of any common rights or of the fact that the land when registered is common land. What follows under the machinery from a provisional registration is that, after notification to persons who appear to be concerned with the question whether it is common land or not, objections may be lodged against provisional registration:

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for example, by a person claiming to be the owner of any land within the provisional registration and in circumstances in which he wishes to contend, or contends, that it is not common land. When such an application is lodged, then the applicant for registration as common land is notified, and he is given an opportunity of withdrawing his application; and if he does withdraw the application, then the effect of that is, assuming his to be the only application in relation to the particular serial numbered land, that the registration has to be cancelled by the registration authority.

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If the applicant for registration does not so withdraw, then in due course the registration authority will refer the dispute—that is, the dispute between the applicant for registration, who asserts it to be common land, and the objector, who asserts that it is not common land—to a Commons Commissioner for solution.

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Now by statutory instrument³ under the Act cases arising under the Act are divided into what are referred to as 'first period cases' and 'second period cases', depending, broadly speaking, on when in time the application for registration or the objection (I forget exactly which) arose. All first period cases have some time since become referable by the registration authority to the Commons Commissioner. The second period cases, such as the one with which we are dealing now, have not yet become so referable by statutory instrument under the language of the relevant subsection of the statute, though enquiry at the appropriate sources shows that the present intention of the relevant government department is to issue a statutory

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instrument in May giving the reference date for second period cases as the end of July 1973. Some time, therefore, is bound to elapse after that date before the present

1 [1973] 1 All ER 226, [1973] 1 WLR 111

2 See *Cooke v Amey Gravel Co Ltd* [1972] 3 All ER 579, [1972] 1 WLR 1310

3 See the Commons Commissioners Regulations 1971 (SI 1971 No 1727), reg 6

dispute could be determined by the Commons Commissioner, because it is necessary for procedures such as advertisement and so forth to be followed. a

As appears from the report of the case below¹, the defendant applied for registration of a large area of land in the district of Wareham in Dorset as common land, and this substantial area was provisionally registered as common land. Included in the area were two parcels of land belonging to the plaintiffs. On the larger of those two parcels, the more easterly of them, there had been for many years an industrial use—I think from 1850 onwards—the use being for the most part connected with brick or pottery making. It is not so used at the moment. b

The plaintiffs objected to the registration in respect of those parcels of land, and though other applicants for registration of the area CL309, which includes these two parcels, have withdrawn—for example, the local parish council—the defendant has not withdrawn. There is some question whether another applicant has effectively withdrawn, but in the event I do not think I need concern myself with the details of that. c

Faced with the fact that some considerable time must elapse before this dispute can be determined by the Commons Commissioner, and seeking to follow certain precedents in the court, the plaintiffs issued a writ which was designed to compel the defendant to withdraw his registration application in respect of at least the plaintiffs' two parcels of land that I have mentioned, and in those proceedings the plaintiffs moved for an order on the defendant to do so. It is from the refusal by Plowman J¹ of such an order that the plaintiffs now appeal to this court. d

What the plaintiffs said, and say, is that they were well advanced in negotiation with the local authority (in fact, it so chanced also to be the same authority as the registration authority) to sell the larger of the two parcels or areas to that authority so that the authority could carry out its wish—and it is said to be an urgent wish—to build what is said to be a much needed school thereon. For this reason, the plaintiffs said that the determination was urgent and should not await the lapse of a good many more months, even from now onwards, before the dispute could be dealt with and adjudicated on by the Commons Commissioner. In that sense it is said that the matter is urgent. I would say at once that the urgent needs of a possible or would-be purchaser from the plaintiffs are to my mind quite irrelevant. If there be any relevant question of urgency, it relates in my view entirely to the desire of the plaintiffs to convert their land into money. They say, of course, that so long as the provisional registration remains they are unlikely to find a person wishing to build on this plot of land who will agree to buy it from them. Perhaps this might be said to be a particular example of a difficulty in the way of satisfying a would-be purchaser as to title—a difficulty which might of course exist in any case, quite apart from the Commons Registration Act 1965 and provisional registration thereunder—where people were asserting that in fact the vendor's land was common land, whether by shouting it in the market place or by writing to the local press. e

I should perhaps at this stage, to get them out of the way, mention two subsidiary points. The first is that as to the smaller of the plaintiffs' two areas, the more westerly one, there is no suggestion as a fact that a provisional registration is a stumbling block at the moment. There is no purchaser in view, and an order against the defendant now in respect of that area is not, I think, now sought. The other subsidiary point is that the defendant says that by some error on the part of the registration authority the provisional registration covers a part of the larger of the plaintiffs' two areas which was not included, or not intended to be included, in the defendant's application. The part is a wedge-shaped area which appears hatched on the exhibited plan and is labelled with the word 'error'. But that still leaves a substantial part of the plaintiffs' larger area which remains in dispute. So far as the wedge-shaped or hatched 'error' portion is concerned, I do not know, but I dare say in due course the defendant f

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a will seek to put it right, whatever the outcome of this case, and insofar as lies within his power, if appropriate, by a partial withdrawal in relation to that part.

We have had a good deal of discussion on whether there is any jurisdiction in the court to intervene in the way it is now suggested the court should intervene by, in effect, taking the matter out of the hands of the Commons Commissioner and deciding aye or nay whether the land said to be common land is common land.

b There have been cases in which as the result of intervention by the court the defendant, the applicant who procured the provisional registration as common land, has been ordered to take the steps necessary to procure the withdrawal of his application, and consequently the cancellation of the registration, under pain if he did not obey the order, it being in the nature of a mandatory injunction, of committal for contempt. Those cases had in fact asserted jurisdiction at times when no machinery for determination of disputes under the Act had been established, because no Commons Commissioner had been appointed.

c Insofar as there was any case after the appointment of the first Commons Commissioner on those lines, it does not appear to me that there was one in which the point of jurisdiction was contested. In this case of course the commissioners have been appointed: the first one was appointed, as I understand it, towards the end of 1971. So that the complete machinery envisaged by the Act now exists, and existed at the time when the writ was issued and when the motion came before Plowman J¹. There is quite plainly a difference between that situation and the situation when no such machinery existed.

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The only factor which is pointed to by the plaintiffs in this case lies in the fact that the date for referring this dispute, and, indeed, all other second period disputes, for adjudication by the Commons Commissioners has not yet arrived. It does not lie within the power of the registration authority—and so far as one can see, will not lie within the power of the registration authority—to refer this dispute to the Commons Commissioners until after July 1973.

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Whatever may have been the justification for asserting jurisdiction in the court in such matters as this when no machinery existed under the Act, I, for myself, much doubt whether there is jurisdiction now to do what is sought by the plaintiffs. The machinery is all there. The delays are involved because the Act and the government department entrusted with the working out of the statute considered it appropriate that there should be delay, and have provided in fact that second period cases shall not be dealt with by the Commons Commissioners until after a particular date. I, for my part, however, am prepared, as was Plowman J, to assume, without by any means deciding, that there is, at least as a technical matter, jurisdiction in a case such as this to make an order such as is sought by the plaintiffs. But in that case,

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g I entirely agree with Plowman J that this case is not one in which the jurisdiction should be exercised. It seems to me that this jurisdiction, if it exists still at this stage in the operation of the Act can only be one which can be properly exercised in the most extraordinary case.

In the first place, I find there is nothing extraordinary or remarkable in the fact that the plaintiffs want to sell and find it difficult to turn the land into money until the Commons Commissioner has settled the dispute in their favour, if in their favour it be ultimately settled. There must, I should have thought, be many such cases. That is simply the result of the legislation—legislation which, looking at the other side of the coin, while it might be thought hampering to the plaintiffs in their design to sell their land for the time being, on the other hand, when the procedures are gone through that are envisaged by the Act, if the plaintiffs are right, will mean that their situation will be far more certain than it would ever have been without this particular legislation; because once the Commons Commissioner decides that the land is not, as the defendant suggests, common land, then the Act provides, apart from an appeal on the question of law, that that finally determines the matter.

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So that whereas, on the one hand, some delay may be involved in the realisation of the property by persons in the position of the plaintiffs (and of course a delay would be amply justified if it is common land), nevertheless, on the other hand, in their favour, the Act will if they are right to some extent compensate them by making it abundantly plain that nobody can ever again raise the cry of 'common land' in respect of their property.

When I say that it seems to me, if the jurisdiction exists, at this stage it would only be in an extraordinary case, I, for my part, should have thought that it could only be in a case in which it was established beyond peradventure that the applicant for registration was at the time of the application, or has since become, other than bona fide in his suggestion that this is, or may turn out to be when the whole matter comes before the Commons Commissioner, common land. Tenuous though the evidence is of it being common land as the evidence now stands, as Plowman J¹ remarked, I do not see that it establishes such a total lack of bona fides on the part of the defendant as would justify the court in taking the matter out of the ordinary course and out of the hands of the Commons Commissioners, who in due course, or as the plaintiffs would think somewhat undue course, will determine the whole matter after full enquiry, and after the fact that they are going to enquire has been made public so that all who wish may come in and say their piece as to whether the land could be described as common land within any part of the definition of 'common land' in the Act.

What is said on behalf of the plaintiffs is that the evidence before the court at the moment is so clear that it cannot be common land that the court must really take it that the defendant is wholly lacking in bona fides in this matter. The industrial use I have mentioned is referred to. It is pointed out that according to the maps there is a large building, which is the pottery building, there—though let it be stated that it does not by any means occupy the whole of the land in question. It was suggested originally that it was entirely enclosed, but the evidence, about which there appears to be some dispute, suggests that certainly not to the north—and the rest of CL309 lies to the north—is there a visible boundary as between this and the rest of the property comprised in CL309. It may well be that the existence of the pottery building, with its foundations, is something which would preclude the continued existence (if any existed before) of any common rights, or of anything which could make that foundation site common land as defined. But, of course, there is more than the building. There is a statutory declaration exhibited to the affidavit of Mr Cake, solicitor for the plaintiffs, of a Mr Cecil Shaw. He says that he was a director of Sandford Pottery Co Ltd, who were the vendors to the plaintiffs, and that he had been since 3rd May 1922 well acquainted with three parcels of land which included the two portions in respect of which the plaintiffs object. He says:

'During such time [i.e. since 3rd May 1922] no person or persons have to my knowledge exercised or claimed any rights of common pasture way or sporting for such land or any part thereof and during the whole of such time until the Company sold the land in November 1968 [which was when it was sold to the plaintiffs] it has been in full free and undisturbed possession thereof for its own benefit and without any adverse claims . . . I depose of the above from my knowledge of the said land I being in almost daily attendance at the Company's Works which were situate on the part coloured Red and from having acted as a Director of the Company.'

Mr Cake said that he had inspected Sandford Pottery in 1972, and he described what he then found to be the condition of the boundaries. As I have said, evidence from the defendant suggests that the boundaries were not some few years before that inspection in the same condition, and more particularly to the northward, or, if I may loosely so describe it, the CL309 boundary of the larger of the two parcels.

a The defendant, of course, has by statutory declaration declared in support of his application that he verily believed the whole of the land in CL309, including these two parcels, to be common land. In his affidavit he describes his general occupation. He does not live very much in the district, though he has a house at Morden, Wareham. He says:

b 'I worked in different factories in south east Dorset before and after entering the travel business in 1957 and in particular in Sandford Pottery the area subject of the Plaintiff's application for about 3 months in 1949/50 where I first became aware of local contentions that the land there and adjacent was common . . .'

Then he points out that there had been provisional registration.

c It is said by counsel for the plaintiffs that if we were now sitting as, for example, Commons Commissioners, and this was all the evidence before us and all we knew, we would say that this is not to be defined as common land. In that he may well be right. I refer, in particular, to the arguments that have been addressed to us based on the statutory declaration and the argument based on the existence of the industrial use for these many years, and therefore the presumption of abandonment of any common rights that may have existed. The question remains, it seems to me, whether it is right to say, in view of the tenuousness of the actual evidence brought forward of this being common land, or if it had been common land the likelihood of it having been abandoned, that this shows that the defendant in his continued refusal to withdraw his application and the registration is not acting bona fide. I do not think it can rightly be said that, because on a motion of this kind this is all the evidence that is brought forward by the defendant, this is all the evidence he has got. There is no reason to justify a contention that a person is bound prematurely to produce the whole of the case which he hopes to adduce before the appropriate tribunal to decide this matter.

d Further than that, one does not know what evidence may emerge, not necessarily only from the defendant, but through the offices and efforts of the defendant, who has, as I should have mentioned, referred to a certain amount of research he has done, without deigning to give particulars. It seems to me that unless there is a very plain case of total lack of bona fides the court should not forestall any hearing by the Commons Commissioner in the due course of the working out of the machinery which has been established by Parliament. I am not prepared to say, more particularly in a case where the defendant has not been subject to any cross-examination, that he is acting in bad faith. I am not prepared to hold that the court should intervene in any case but a case of bad faith; nor am I prepared to hold that here a case of bad faith is established. Only in such a case would I think the court be justified in preventing (which is what is sought to be done) a hearing in the normal course by the Commons Commissioner of any dispute raised by provisional registration and an objection.

e In those circumstances, having dealt, I hope, in not too cavalier a fashion with the full arguments of counsel for the plaintiffs, I would dismiss the appeal.

f **STAMP LJ.** I entirely agree with all that Russell LJ has said, and I too would dismiss the appeal.

g **ROSKILL LJ.** I also entirely agree. I wish to add only a few words to Russell LJ's judgment. Section 5 (6) of the Commons Registration Act 1965 (I need not read the antecedent provisions either of that section or the previous sections) provides:

h 'Where such an objection is made, then, unless the objection is withdrawn or the registration cancelled before the end of such period as may be prescribed, the registration authority shall refer the matter to a Commons Commissioner.'

Pursuant to that and other provisions contained in the statute, the Commons Commissioners Regulations 1971¹ were duly promulgated. Regulation 6 of those regulations deals with the periods for settlement of disputes arising from objections to certain registrations. Regulation 6 (1) reads thus:

'For the purposes of section 5 (6) of the Act [that is the provision I have already read] . . . there is hereby prescribed, in relation to every objection to which this regulation applies, a period beginning with the date of the objection and ending with 17th December 1971.'

Regulation 6 (2) provides: 'This regulation applies to every objection to a first period registration', and then there are certain exceptions which are not material. Regulation 6 (3) provides:

'In this regulation "first period registration" means a registration made before 1st July 1968 and "second period registration" means a registration made after 30th June 1968.'

In other words, Parliament has empowered the Minister making those regulations to prescribe how objections to first period registrations shall be dealt with and when they shall be referred to the Commons Commissioners. But the present registration to which objection is made was a second period registration, and the relevant delegated legislation, comparable with reg 6 of the 1971 regulations, has not yet been promulgated. In other words, the time has not yet arrived when this objection to this second period registration can properly be referred to the Commons Commissioners.

Counsel for the plaintiffs has founded on that fact as a ground for contending that there is a legislative gap which deprives his clients of the opportunity of having the grievance which they claim to have referred to the Commons Commissioners. With respect to that argument, I think it is misconceived. Parliament has enacted that objections to second period registrations shall not be referred until after a certain event has happened, namely, the promulgation of the relevant delegated legislation.

By this motion the plaintiffs are seeking, as it were, to bypass that statutory provision and to say that this court should treat that condition precedent as having been fulfilled, or alternatively to ignore its existence. In my judgment, that is wrong. Like Russell LJ, I feel much doubt whether there is any jurisdiction in this court to entertain this motion, but I am content to assume, as did Plowman J², that jurisdiction exists. In such circumstances, as Russell LJ has already said, jurisdiction if it exists should only be exercised in the type of case cited by him, as, for example, where there is plain mala fides on the part of the defendant. What is said is that the evidence supporting this registration is, to quote Plowman J's phrase², 'so tenuous' that the court should infer mala fides on the part of the defendant. For my part, I draw no such inference. It may be that in the event the evidence supporting the registration will prove to be tenuous. The present evidence is undoubtedly tenuous. But the time has not yet come when the defendant has to make good his registration, and until that time comes I see no reason why he should be made or expected to put forward the whole of his evidence. I, too, would dismiss the appeal.

Appeal dismissed.

Solicitors: Church, Adams, Tatham & Co, agents for Dickinson, Manser & Co, Poole (for the plaintiffs); Ellis & Fairbairn (for the defendant).

S A Hatteea Esq Barrister.

¹ SI 1971 No 1727

² [1973] 1 All ER 226, [1973] 1 WLR 111

Note

R v Arron

COURT OF APPEAL, CRIMINAL DIVISION

SCARMAN LJ, MACKENNA AND MOCATTA JJ

19th JUNE 1973

Criminal law – Costs – Acquittal – Discretion – Appeal – Costs of successful appellant – Payment of costs out of central funds – Appellant legally aided – Criminal Appeal Act 1968, s 24 (1), (3) (as amended by the Criminal Justice Act 1972, s 39, Sch 3).

Notes

For payment of costs in criminal proceedings, see 10 Halsbury's Laws (3rd Edn) 546, 547, paras 1004, 1005.

For the Criminal Appeal Act 1968, s 24, see 8 Halsbury's Statutes (3rd Edn) 707.

For the Criminal Justice Act 1972, s 39, Sch 3, see 42 Halsbury's Statutes (3rd Edn)

132, 146.

Application for costs

On 5th October 1972 at Inner London Crown Court before his Honour Judge Figgis and a jury Michael Noel Arron was convicted of driving a motor vehicle on a road having consumed alcohol in such quantity that the proportion thereof in his blood exceeded the prescribed limit, contrary to s 1 (1) of the Road Safety Act 1967. He was granted leave to appeal against conviction and legal aid for counsel. On 19th June 1973 the Court of Appeal, Criminal Division, allowed his appeal and quashed the conviction. The appellant thereupon applied for an order that the costs of his appeal be paid out of central funds.

S C Desch for the appellant.

Ann Goddard for the Crown.

SCARMAN LJ. This successful appellant applies for an order for costs and he does so under s 24 (1) of the Criminal Appeal Act 1968 which I now read:

'The Court of Appeal may, when they allow an appeal against conviction or against a verdict of not guilty by reason of insanity or against a finding of disability, make an order for costs in favour of the appellant.'

Very recently, by Sch 3 to the Criminal Justice Act 1972, that section has been amended by the addition of a new subsection, which I now read:

'(3) An order for costs under this section in favour of any person is for the payment to him out of central funds of such sums as appear to the court to be reasonably sufficient to compensate him for any expenses properly incurred by him in the appeal or application (including any proceedings preliminary or incidental thereto) or in any court below.'

Very recently¹ a practice direction was issued by Lord Widgery CJ which stated:

'Although the award of costs must always remain a matter for the court's discretion, in the light of the circumstances of the particular case, it should be accepted as normal practice that when the court has power to award costs out of central funds it should do so in favour of a successful defendant, unless there are positive reasons for making a different order.'

In our view it would be an appropriate exercise of the court's discretion under s 24 (1) to grant to this appellant the costs of his appeal and accordingly we exercise our discretion under s 24 (1) and we direct, pursuant to s 24 (3), that these costs be paid to him out of central funds, the costs to be taxed by the registrar to this court. a

The only complication in the matter is that the appellant is legally aided. In the view of this court it is quite immaterial whether a successful appellant be legally aided or not. If in the relevant litigation the appellant is entitled to his costs, then an order will be made in the discretion of the court and following the practice direction, irrespective of the financing of his appeal whether it be private or public. There will be an order for the appellant's costs of the appeal, those costs to be taxed by the registrar. b

Order accordingly.

Solicitors: Registrar of Criminal Appeals (for the appellant); Solicitor, Metropolitan Police (for the Crown). c

Jacqueline Charles Barrister.

New Zealand Netherlands Society 'Oranje' Incorporated v Kuys and another d

PRIVY COUNCIL

LORD WILBERFORCE, LORD HODSON, LORD PEARSON, LORD DIPLOCK AND LORD SIMON OF GLAISDALE

22nd, 23rd, 24th, 25th JANUARY, 7th MARCH 1973 e

Fiduciary duty – Duty not to profit from position of trust – Society – Officer – Special arrangement displacing fiduciary duty – Incorporated society – Secretary undertaking to publish newspaper containing society's news – Society undertaking to guarantee purchase by members of 2,000 copies at 1s per copy for six months – Newspaper property of secretary – Secretary undertaking risk of financial loss – Whether secretary under duty to account to society for profits of newspaper – Whether special arrangement displacing fiduciary duty. f

In 1962 K joined a society which had been established to further the interest of the Dutch community in New Zealand. In 1963 he became its secretary. At that time the society began to publish a newsletter for the benefit of its members. K was the editor. The newsletter ceased publication in December 1966 because of financial difficulties. In 1966 K had acquired, out of his own resources, another Dutch newspaper which he later called the Windmill Post. On 5th January 1967 a meeting of members of the Dutch community was held and it was agreed to form a new society ('the society'). It was also agreed to produce a newspaper to be called the Windmill Post. It was agreed that the paper should be K's property; that the society should have the right to publish in it the society's news; that the society would guarantee for six months the purchase of the new paper at 1s per copy by 2,000 members; and that at the end of six months those terms, including the question whether the society would continue its support, would be renegotiated. The society was incorporated on 27th January as a non-profit making society. K was the unpaid secretary of the society and a member of the committee. The newspaper began publication in February. In June K and the society parted company and the society made plans to publish a rival newspaper under the same name. K obtained a perpetual injunction restraining the society from publishing, distributing or selling a newspaper under the name or style 'The Windmill Post' or any use of the words 'Windmill' or 'Post'. On appeal against that order it was contended by the society that K, by virtue of his position as secretary and a member of the committee of the society, was in a fiduciary position and had acquired the ownership of the newspaper while he held that position and by virtue of it; further that K could only be released from his g
h
j

- a accountability and allowed to retain the ownership of the paper for himself by an arrangement freely arrived at and after disclosure of all relevant matters.

Held – As an officer of an incorporated non-profit making society K had duties of trust and confidence placed in him; in particular he was subject to the strict obligation not to profit from his position of trust. The relationship of K and the society was such that there was at least the potentiality of a fiduciary relationship and if K, without any special arrangement, were to launch a newspaper there would at least be a case for saying that to claim or retain the benefit of it for himself would be a breach of fiduciary duty. However the circumstances, in particular the fact that K was to be the owner of the paper and was to undertake personally the risk of financial loss, in contrast to the society's limited commitments, were such as to establish a special arrangement between K and the society which displaced any potential fiduciary obligation on K to hold the newspaper on trust for the society. Since there was no evidence that any relevant matter relating to the establishment of the newspaper had not been disclosed to the society, the appeal would be dismissed (see p 1225 f and h, p 1226 c e f and h and p 1227 e f and h, post).

d Notes

For the duty on a person in a fiduciary position not to make a profit out of his trust, see 14 Halsbury's Laws (3rd Edn) 627, 628, para 1161.

For the fiduciary position of company directors, see 6 Halsbury's Laws (3rd Edn) 299, 300, paras 604, 605, and for cases on the subject, see 9 Digest (Repl) 516-521, 3398-3437.

e Cases referred to in opinion

Birtchnell v Equity Trustees, Executors and Agency Co Ltd (1929) 42 CLR 384.

Boardman v Phipps [1966] 3 All ER 721, [1967] 2 AC 46, [1966] 3 WLR 1009, HL, Digest (Cont Vol B) 732, 3295.

Tufton v Sporni [1952] 2 TLR 516, [1952] WN 439, CA, 25 Digest (Repl) 287, 925.

f Appeal

New Zealand Netherlands Society 'Oranje' Incorporated appealed against an order of the Court of Appeal of New Zealand (North P, Turner and Haslam JJ) dated 7th April 1971 dismissing an appeal against a judgment of Speight J dated 22nd December 1969 whereby he granted the respondents, Laurentius Cornelis Kuys and The Windmill Post Ltd, an injunction restraining the appellant from publicly distributing or selling a newspaper under the name and style of The Windmill Post or from using the words 'Windmill' or 'Post' or from using a large windmill device on the front page, and also dismissed the appellant's counterclaim for a similar injunction against the respondents. The facts are set out in the opinion of the Board.

- h B H Clark and T Lloyd (both of the New Zealand Bar) for the appellant.
R A Heron and J A Farmer (both of the New Zealand Bar) for the respondents.

LORD WILBERFORCE. This is an appeal from a judgment of the Court of Appeal of New Zealand affirming a judgment in the Supreme Court at Auckland of Speight J in favour of the present respondents. At the trial the learned judge granted the respondents, plaintiffs in the proceedings, a perpetual injunction restraining the appellant from publishing, distributing or selling a newspaper under the name or style of The Windmill Post or any use of the words 'Windmill' or 'Post' or from the use of the large windmill device on the front page. This was, in effect, relief against passing off, since the appellant was publishing a newspaper with the same title and device.

The litigation arises out of the existence and activities of the Dutch community of residents in New Zealand. To further their interests there was formed in 1949 the Netherlands Society 'Oranje' Incorporated (predecessor of and not to be confused with the appellant society). This was centred in Auckland, and may be referred to as the 'Auckland society'. The respondent Laurentius Cornelis Kuys joined this society in 1962: he became a member of its committee and in 1963 its secretary. In 1963 he started a group travel scheme whose purpose was to enable members to travel to the Netherlands at reduced rates. Also from 1963 the society published a newsletter for the benefit of its members called 'The Holland Bulletin', of which Kuys was the original editor. By the end of 1966 the Bulletin was in serious financial difficulties such that it could not continue in its then form and the last number in fact appeared in December 1966.

Kuys, previously to this, had desired to establish a national society of the Dutch in New Zealand and a proper newspaper on the lines of one published in Australia: this desire was shared by other members including Mr Dubois, the president of the society; but Kuys was told more than once that to do so was financially impossible. In 1966 Kuys acquired the only other Dutch newspaper, the 'New Zealand Hollander', for £100 which, as the judge held, came out of his own resources. He took on a partner, Mr I L Griffiths, not a member of the Auckland society, and some time in 1966 Kuys and Griffiths fixed on the name 'Windmill Post' as a trade name for the export and import of goods. Griffiths was aware of Kuys's desire to start a newspaper. Towards the end of 1966 contacts had been made by Kuys or Griffiths with printers and other newspapers with a view to calculating the cost of publication.

On 5th January 1967 there was a meeting of members of the Dutch community at the house of Mrs Hoeberigs, at which Kuys and Dubois were present. At the trial there was a radical disagreement between Dubois and others representing the appellant society on the one hand and Kuys and his witnesses on the other as to what was decided at this meeting. It is not disputed that it was agreed to form a new national society of the Dutch community in New Zealand—this became the appellant society which was incorporated on 27th January 1967. It is also not disputed that it was agreed to produce a newspaper to be called the Windmill Post. This was in fact produced first in February 1967 and later became the property of the second respondent, a company formed by Kuys and Griffiths. But there was a critical difference as to the terms on which the paper was to be administered.

The appellant's contentions, supported by the evidence of Dubois and one Renneberg, a committee member of the Auckland society and later treasurer of the appellant, were that it was agreed that the paper should be the property of the society, that Kuys should be the editor and publisher, that in the first place the society should not be under any financial responsibility for the paper but that the whole risk (of loss or profit) should be borne by Kuys who would look to sales and advertisements to make it pay; that for six months the society should guarantee purchases by its members of 2,000 copies at 1s per copy and finally that after six months the whole project should be reconsidered.

On his side Kuys's case was that, the former Bulletin being moribund, he, Kuys, should publish a new newspaper to be called 'The Windmill Post' which should be his property; that the society should have the right to publish in it the society's news; that the society would guarantee for six months the purchase of the new paper at 1s per copy by 2,000 members; finally that at the end of six months these terms, including the question whether the society would continue its support, would be renegotiated. (It will be noted that both versions refer to 'the society', in disregard of the fact that the appellant was not at the time in existence. It must be taken to mean the Auckland society and subsequently the appellant as its assignee. The expression 'the society' will be used hereafter in this sense.) The question which of these versions was correct was vital, and the entire case depends on it. Speight J heard evidence from persons present at the meeting. He also heard evidence from

a persons present at a later meeting held in March 1967 at which the arrangements made in January were reported and again discussed. There was evidence, which the judge accepted, that at this March meeting complaints were made as to the society's prospective liability for newspaper losses, so that attention was focused on the exact terms of the January arrangement. One of the witnesses, whose evidence the judge found to be acceptable, made a tape recording at the time of the March discussions which he transcribed in typescript.

b On this evidence, the learned trial judge accepted the evidence of Kuys and his witnesses and rejected that of the appellant society. He held that the newspaper was the property initially of Kuys and later of his assignee, the second respondent. It being proved that the appellant, who had parted from Kuys in June 1967, was seeking to publish a rival newspaper under the same name and emblem, he granted an injunction in the terms already mentioned. On appeal, the Court of Appeal, after reviewing all the facts, endorsed the judge's findings and affirmed his judgment.

c Before their Lordships, counsel for the appellant conceded, necessarily, that no attack was possible on the concurrent findings of primary fact in the courts below. But it was submitted that the judgment of Speight J was defective in law. The appellant, as defendant to the proceedings, had pleaded, it was correctly said, that d Kuys, by virtue of his position as secretary and member of committee of the society, was in a fiduciary position. He had acquired the ownership of the newspaper while he held this position and by virtue of it. Admittedly it would be possible for the society to release him from accountability and to allow him to keep the ownership for himself: but this could only be done by an arrangement freely arrived at after full disclosure of all relevant matters. There had not, it was said, been that full disclosure. Moreover, it was contended that Kuys's conduct in a number of respects e was such as, in any event, should disentitle him to the equitable remedy of injunction.

Their Lordships are in agreement with these contentions insofar as they stress the necessity to give consideration to the nature of the relationship between Kuys and the society and to the question whether that relationship imposed on him, in relation to the particular transaction under investigation, duties of a fiduciary character. f The obligation not to profit from a position of trust, or, as it is sometimes relevant to put it, not to allow a conflict to arise between duty and interest, is one of strictness. The strength, and indeed the severity, of the rule has recently been emphasised by the House of Lords (*Boardman v Phipps*¹). It retains its vigour in all jurisdictions where the principles of equity are applied. Naturally it has different applications in different contexts. It applies, in principle, whether the case is one of a trust, express or implied, of partnership, of directorship of a limited company, of principal and agent, g or master and servant, but the precise scope of it must be moulded according to the nature of the relationship. As Lord Upjohn said in *Boardman v Phipps*²:

'Rules of equity have to be applied to such a great diversity of circumstances that they can be stated only in the most general terms and applied with particular attention to the exact circumstances of each case.'

h The present case is concerned with an officer of an incorporated, non-profit making society. Kuys was not paid for his services but he was a trusted employee; and he was ready to agree that he had duties of trust and confidence placed in him. On the other hand the scope of his responsibility and the dividing line between that and his own personal interests were loosely defined. It appears from the evidence that he j was able to run a small insurance business of his own: also it appears that he was permitted a personal interest in the group travel service which he managed for the society. A person in his position may be in a fiduciary position quoad a part of his activities and not quoad other parts: each transaction, or group of transactions, must

1 [1966] 3 All ER 721, [1967] 2 AC 46

2 [1966] 3 All ER at 756, [1967] 2 AC at 123

be looked at. Their Lordships find support for this approach in the English Court of Appeal's judgments in *Tufton v Sperry*¹, particularly in that of Jenkins LJ, and in the High Court of Australia's judgment in *Birtchnell v Equity Trustees, Executors and Agency Co Ltd*². Dixon J said³:

'The subject matter over which the fiduciary obligations extend is determined by the character of the venture or undertaking for which the partnership exists, and this is to be ascertained, not merely from the express agreement of the parties . . . but also from the course of dealing actually pursued by the firm.'

This was said in the context of a partnership but the principle must be of general application.

It is, then, necessary to consider the relationship of Kuys and the society in regard to the publication of a newspaper. In their Lordships' opinion, there was at least the potentiality of a fiduciary relationship. The Auckland society had for several years published the newsheet called the *Holland Bulletin*—this was at the centre of its activity. Kuys was for some time the editor of the *Bulletin* and there is no doubt that he was so in his capacity as secretary. It was contemplated that in one form or another the new society, which became the appellant society, should be associated with a newspaper: its stated objects included taking over the publication of the *Holland Bulletin*. It was obvious and essential that any newspaper would largely depend for its viability on subscriptions by the society's members and that they would subscribe partly at least because it contained the society's news.

Another source of finance would be advertising, and there was evidence that the main likely clients, the airlines, were interested in supporting the society. Thus, in these circumstances, if Kuys had proceeded to launch a newspaper, without any special arrangement, there would be at the least a case for saying that to claim or retain the benefit of it for himself would be a breach of fiduciary duty.

On the other hand, what has already been said as to Kuys's position and responsibilities, left open the way for a special arrangement, and, equally, such an arrangement was, on the judge's findings, made. It was straightforward and, in the circumstances, reasonable. The *Bulletin* could not be carried on: to produce a newspaper obviously involved the risk of loss. The contract limited the society's commitment to the purchase of 2,000 copies at 1s each for six months. Kuys was to secure what advertising and other income he could to cover all outgoings and his own remuneration. He was not to come down on the society for any losses. As one witness said, he was not to cry on its shoulder. The newspaper was to be his for ill and for good.

There was much discussion at the trial as to what was to happen at the end of the period of six months. But the judge's finding (supported by the evidence) was that the reconsideration then to be given to the situation was limited to the amount, if any, of the society's support. That the ownership of the newspaper should revert to the society was certainly not agreed, and if it was not agreed, either, in terms, that the ownership should remain with Kuys, no other conclusion was possible from the terms which were agreed. There was therefore, in their Lordships' opinion, established a set of facts which would fully displace any potential fiduciary obligation on Kuys to hold the newspaper in trust for the society.

The learned judge did not in terms deal with the case in this way. He simply found the facts regarding the contract made in January 1967 and treated them as disposing of the case. Their Lordships would not disagree with the Court of Appeal, or indeed with the appellant's argument before the Board, that this somewhat telescoped approach may be open to criticism. But they also agree with the conclusions of the Court of Appeal, which were reached after a careful re-examination of the evidence, that the essential findings had been made. As was said by Turner J:

1 [1952] 2 TLR 516

2 (1929) 42 CLR 384 at 408

3 (1929) 42 CLR at 408

- a* '... I read the judgment, even though the words "fiduciary" or "dispensation" do not appear therein, as finding as a basic essential fact that the effect of the conversations of 5th January was to give Kuys a dispensation from the fiduciary duty which without that dispensation he might have owed.'

And North P said this:

- b* 'I agree that it might have been better if the learned judge had said in express terms that Mr Kuys had discharged the burden of showing that the fact that he was the secretary of the Auckland society and later of the national society did not in the circumstances require him to hold that he was trustee of the newspaper and its title for the society. Nevertheless, in result that is what I understand the learned judge really decided. I should add that on my own examination of the facts, I would undoubtedly have come to the same conclusion, for it is beyond my powers of credence to contemplate that Mr Kuys would have been willing to incur all the risks which everybody knows are attendant on commencing the publication of a newspaper and then be obliged to hand over the newspaper to the society at the end of six months if, as proved to be the case, he ceased to be secretary of the society.'

- d* On the main portion of this case their Lordships are in agreement with the Court of Appeal.

- The remaining points may be briefly dealt with. First, as to disclosure. Their Lordships entirely accept, as a matter of law, that if an arrangement is to stand, whereby a particular transaction, which would otherwise come within a person's fiduciary duty, is to be exempted from it, there must be full and frank disclosure of all material facts. But the appellant was quite unable to point to any matter relevant to the establishment of the newspaper or which, had it been disclosed, could have affected the society's decision that, on the facts found, had not been disclosed by Kuys. It is apparent from the judgments that even if the argument as to non-disclosure was advanced in the courts below it was not accepted. There are no grounds on which it can be accepted in this appeal.

- f* Secondly, as to the granting of an equitable remedy to the respondents. Their Lordships again endorse the validity of the maxim that seekers of equity must come with clean hands. A number of authorities, in various fields, were properly cited. But the appellant's argument, in this part of the case, fails on the facts. A large number of facts were ventilated at the trial, in an attempt to show that Kuys had been guilty of irregularities of various kinds in his management of the society's affairs. Some of these are, their Lordships understand, the subject of further litigation. Their Lordships do not find it appropriate to do more than endorse the opinions of the courts below that nothing, relevant to the transaction in question, of sufficient gravity, was established to entitle their Lordships to take a different view, on what is a matter of discretion, from the courts below. The one matter which was proved was the unjustified use in the respondents' newspaper of an emblem belonging to the society (a small windmill), but this was expressly excluded from the relief granted. In their Lordships' opinion the injunction granted should be upheld.

- h* Their Lordships will humbly advise Her Majesty that the appeal be dismissed. The appellant must pay the costs of the appeal.

- j* Appeal dismissed.

Solicitors: Wray, Smith & Co (for the appellant); Slaughter & May (for the respondents).

Heath and another v J F Longman (Meat Salesmen) Ltd

NATIONAL INDUSTRIAL RELATIONS COURT

SIR HUGH GRIFFITHS, MR J H ARKELL AND MR H BRIGGS

16th MAY 1973

Industrial relations – Unfair dismissal – Dismissal in connection with strike or other industrial action – Employee taking part in strike on date of dismissal – Date of dismissal – Time of dismissal – Dismissal on date of termination of strike – Dismissal after termination of strike – Whether employee taking part in strike ‘on the date of dismissal’ – Industrial Relations Act 1971, s 26 (1).

On 7th August 1972 the employees went on strike. They then consulted their union area organiser who advised them to return to work. The employees accepted that advice and on 8th August the employer was informed that the employees were willing to return to work. After receiving that information, and on the same day, the employer dismissed the employees. On a complaint of unfair dismissal by two employees, an industrial tribunal held that, by virtue of s 26 (1)^a of the Industrial Relations Act 1971, they were precluded from finding that the employees' dismissal was unfair since ‘on the date of dismissal’ the employees were taking part in a strike. The employees appealed.

Held – (i) Once an employer had been informed that a strike was over, he no longer required the protection afforded by s 26 of the 1971 Act. Accordingly, in s 26 (1) of the 1971 Act, the word ‘date’ should be construed as meaning ‘at the time’ so that if on any given date an employer was told that a strike was over, he was not free during the rest of that calendar day to dismiss those who had taken part in the strike, without the risk of it being held that he had acted unfairly in so doing (see p 1231 j to p 1232 a, post); dicta of Harman and Salmon LJ in *Trow v Ind Coope (West Midlands) Ltd* [1967] 2 All ER at 908, 909 applied.

(ii) Accordingly, the case would be referred back to the tribunal with a direction that s 26 of the 1971 Act was not applicable because the employees' dismissal had taken place after the employer had been notified that the strike was terminated (see p 1232 c, post).

Notes

For unfair dismissal, see Supplement to 38 Halsbury's Laws (3rd Edn) para 677B, 18-22; for the regard to be had to fractions of a day when computing a period of time, see 37 Halsbury's Laws (3rd Edn) 100-103, paras 178, 179, and for cases on the determination of priority of acts, see 45 Digest (Repl) 270, 271, 301-401.

For the Industrial Relations Act 1971, s 26, see 41 Halsbury's Statutes (3rd Edn) 2092.

Cases referred to in judgment

Campbell v Strangeways (1877) 3 CPD 105, 47 LJMC 6, 37 LT 672, 42 JP 39, 45 Digest (Repl) 270, 393.

Trow v Ind Coope (West Midlands) Ltd [1967] 2 All ER 900, [1967] 2 QB 899, [1967] 3 WLR 633, CA, Digest (Cont Vol C) 955, 250a.

Cases also cited

GKN (Cwmbran) Ltd v Lloyd [1972] ICR 214, NIRC.

Hill v C A Parsons & Co Ltd [1971] 3 All ER 1345, [1972] Ch 305, CA.

^a Section 26, so far as material, is set out at p 1230 f to c, post

a Appeal

This was an appeal by William Heath and Reginald Hammersley against the decision of an industrial tribunal (chairman R E Chapman Esq) sitting in Shrewsbury, dated 2nd February 1973, that the appellants' complaint of unfair dismissal against the respondents, J F Longman (Meat Salesmen) Ltd, be dismissed. The facts are set out in the judgment of the court.

b Colin Smith for the appellants.

Michael Hickman for the respondents.

SIR HUGH GRIFFITHS delivered the following judgment of the court. This is an appeal from a decision of an industrial tribunal sitting at Shrewsbury, dismissing, with some reluctance, the appellants' claims for compensation on the ground of

c unfair dismissal.

The appellants had both been employed for a number of years in an abattoir operated by the respondents. The first appellant had been in their employment for ten years, the second appellant for six years. It came to the knowledge of the two appellants that other abattoirs in the district paid overtime rate for work on Saturdays.

d The appellants were not paid overtime for work on Saturdays and this was a source of grievance to them. Their union representative took up the matter on their behalf and wrote a number of letters to the respondents' managing director, Mr Longman, seeking an interview in order to discuss the matter and to see if any settlement could be achieved. Mr Longman was not prepared to treat with the union on this matter and ignored the requests.**e Eventually, sometime towards the end of July 1972, a Mr Hankey, employed as a foreman by the respondents, had a meeting with Mr Longman in which he presented the men's point of view. Precisely what was said at that meeting does not appear clearly from the findings of the tribunal, but there is no doubt that the meeting took place to discuss whether or not the men should be paid overtime on Saturday. This much is clear—Mr Longman made it abundantly plain that he was not prepared to pay overtime and that the men could stop working when they had done their ordinary week's work, if they wished.****f As a result of that meeting the two appellants did not come in to work on the next two Saturdays. This upset Mr Longman, and on Monday, 7th August, he came into the rest room where the men were assembled and told them that if they did not work on the following Saturday they would be dismissed. The two appellants, and another man named Wilbraham, walked out and did not return to work that day, or the following day, or on the Wednesday. The tribunal found that the three men had in fact gone on strike in order to put pressure on Mr Longman to pay overtime. Such a finding was abundantly supported by the evidence and in particular the evidence of Mr Smallwood, the union area organiser (who was called to give evidence on behalf of the appellants), who told the tribunal that when the men had come to see him on the Tuesday he had asked them why they had stopped work and they told him, 'to put pressure on'.****h 'Strike' is defined in the Industrial Relations Act 1971, s 167 (1), in the following terms:****i '... "strike" means a concerted stoppage of work by a group of workers in contemplation or furtherance of an industrial dispute, whether they are parties to the dispute or not, whether (in the case of all or any of those workers) the stoppage is or is not in breach of their terms and conditions of employment, and whether it is carried out during, or on the termination of, their employment'.**

Counsel for the appellants has sought to persuade us that these men were not on strike. The first point he takes is that the tribunal ought not to have concluded that this was a concerted stoppage, because in fact it was a Mr Hattersley who walked first

out of the meeting and was then followed by the others. In the face of the evidence of the union representative, and taking into account all the other evidence, it is quite clear that the tribunal was entitled to regard this as a concerted stoppage of work by these three men and, furthermore, that its manifest purpose was to further their industrial dispute in regard to overtime payment. a

On the Tuesday the men went to see Mr Smallwood and he gave them good advice. They were advised that the action which they were taking was not the sensible course; that they should leave the matter in the hands of their union, and that they should return to work. The men decided to accept this advice and so they deputed one of their number—in fact Mr Wilbraham—to telephone to Mr Longman on the Wednesday and indicate that the men wanted to come back to work. The tribunal's findings are in the following terms: b

'... the following Tuesday ... they went to see Mr Smallwood, and told him what had happened. He told them very properly, very wisely, that they were adopting the wrong course of action, and that they should try to get back to work. They deputed one of their number Mr Wilbraham to make a telephone call to the respondents offering to go back to work. This Mr Wilbraham did on the Wednesday and on the Wednesday we are satisfied that Mr Wilbraham was told that all three were finished. We think that in fact they were dismissed on Wednesday 9th August when, through Mr Wilbraham, they were told that they were finished.' c

It is quite clear from those findings that the tribunal concluded that the dismissal was communicated to Mr Wilbraham after he had told Mr Longman that the men wanted to come back to work and when, so far as they were concerned, their strike action was over. Nevertheless the members of the tribunal concluded that by virtue of the terms of s 26 of the Industrial Relations Act 1971 they were constrained to find that the dismissal was not unfair, whatever they might think about the real merits of the case. Section 26 of the 1971 Act provides: d

'(1) The provisions of this section shall have effect in relation to an employee who claims that he has been unfairly dismissed by his employer, where on the date of dismissal he was taking part in a strike or in any irregular industrial action short of a strike. e

'(2) If the reason or principal reason for the dismissal was that the claimant took part in the strike or other industrial action, the dismissal shall not be regarded as unfair unless it is shown—(a) that one or more employees of the same employer (in this section referred to as "the original employer"), who also took part in that action, were not dismissed for taking part in it, or (b) that one or more such employees, who were dismissed for taking part in it, were offered re-engagement on the termination of the industrial action and that the claimant was not offered such re-engagement, and that the reason (or, if more than one, the principal reason) for which the claimant was selected for dismissal, or not offered re-engagement, was his having taken action to which the next following subsection applies. f

'(3) This subsection applies to any action on the part of the claimant which consisted of exercising, or indicating his intention to exercise, any of the rights conferred on him by section 5 (1) of this Act ... g

It appears to this court that the manifest overall purpose of s 26 is to give a measure of protection to an employer if his business is faced with ruin by a strike. It enables him in those circumstances, if he cannot carry on the business without a labour force, to dismiss the labour force on strike; to take on another labour force without the stigma of its being an unfair dismissal. h

That being the overall purpose, it would appear to be manifestly wrong, when an employer has been told that strike action has been called off, that he should nevertheless still be free to dismiss those who took part in the strike, without any risk of i

a finding that he was acting unfairly. This is a result which the members of this court would be anxious to avoid, unless the language of the section drove them to it.

However, the submission of the respondents is that the language of s 26 (1) does lead to the conclusion that these men were dismissed on a date when they were taking part in a strike. That they were dismissed because they took part in a strike appears to be clear, and the question is: were they at the date of the dismissal, within the meaning of s 26 (1), taking part in the strike? If 'date' in s 26 (1) is to be construed as 'calendar day', then clearly they were dismissed when on the date of dismissal they were taking part in a strike, because until such time as the employer was informed that the men were no longer taking part in any strike action, which did not take place until about midday on Wednesday, they must be considered as still on strike. So they were on strike for part of Wednesday. We cannot accept the submission of counsel for the appellants that some private agreement between those on strike which is not communicated to an employer suffices to terminate a strike. But once the men had telephoned and told the employer that they no longer wished to withdraw their labour, and wanted to come back to work, they had in our view clearly ceased to be on strike. They made no conditions, and in the context of this case it must have been apparent that they were accepting the advice of the union and were ceasing their own unofficial action. It is true that the men were not back at work, but the employer knew he was no longer under strike pressure and the men's absence had ceased to be in furtherance of an industrial dispute. The employer knew that as from the following morning he would have his work force back. Can it then be that he should then be free to dismiss them, without running the risk of its being considered unfair?

As a general rule it is an established principle of construction that where a statute refers to a day it should be construed as the whole day and not a fraction of the day. But there are exceptions. In a recent decision of the Court of Appeal, *Trow v Ind Coope (West Midlands) Ltd*¹, Harman LJ, in giving judgment, drew attention to such an exception. He said²:

"The law does not as a rule take account of fractions of the day unless there is some necessity for it, as for instance in the dog licence case (*Campbell v. Strangeways*³), and there is no such necessity here. That case turned on the fact that the dog licence was taken out during the day in question. It was therefore clear that during so much of that day as preceded the issue of the licence, the dog was not licensed. During the rest of the day the dog was licensed. It was therefore necessary to split the day into the period before and the period after the issue of the licence. To construe it otherwise would be to fly in the face of the facts because it was certainly true that during part of the day the dog was unlicensed and during the subsequent part of the day it was licensed. Accordingly, "date" in that case must mean "time", but in the absence of any such necessity, "date" and "time" are in contradistinction one from the other."

Salmon LJ, adverting to the same point, said in his judgment⁴:

'Ordinarily the law takes no account of fractions of a day unless there is some special reason for doing so, as there was, e.g., in *Campbell v. Strangeways*³.'

In this case there is a special reason for doing so. Once the employer is informed that the strike is over, he no longer requires the protection afforded by s 26. Accordingly, the word 'date' in s 26 (1) should be construed as 'at the time', so that if, on any given date, an employer has been told that the strike is over, he is not free during

1 [1967] 2 All ER 900, [1967] 2 QB 899

2 [1967] 2 All ER at 908, [1967] 2 QB at 921

3 (1877) 3 CPD 105

4 [1967] 2 All ER at 909, [1967] 2 QB at 923

the rest of that calendar day to dismiss the men who took part in it, without running the risk that an industrial tribunal will hold that he acted unfairly. It follows that the tribunal was not in fact constrained, as it felt, to apply the provisions of s 26 to this case and to hold that the dismissal was, by definition, fair. The tribunal expressed its conclusion as follows:

‘We are therefore driven back to the express provisions of s 26 which says that a strike in circumstances such as these shall not be regarded as unfair. Therefore, on that point of law, we find ourselves compelled to dismiss each of these applications, holding that, by virtue of s 26 the dismissal was not unfair . . . Had we been able to come to a conclusion on the merits of this case, as opposed to a strict legal finding, we might very well have come to a very different conclusion.’

This case will therefore be referred back to the tribunal, with an indication that s 26 was not applicable, because the dismissal, on their findings of fact, came after the employers were notified of the termination of the strike.

Before leaving the case we should deal with a further argument which was advanced by counsel for the appellants, the burden of which was that these men were dismissed, not on 9th August by the action of the employer, but on 7th August when, as he submits, the employer wrongly repudiated their contracts. This submission is based on what counsel for the appellants said the tribunal should have held happened at a meeting between the employer and the foreman, to which we have already referred, which took place about a fortnight before 7th August. Counsel for the appellants submits that the tribunal should have concluded that at that meeting there was a consensual variation of the men’s terms of employment, in that they were no longer required as a term of their contracts to work on Saturdays. Counsel for the appellants argues that as there had been that consensual variation, when the employer told the men on Monday that if they did not work next Saturday they would be dismissed, it was a repudiatory breach of their contracts, which they were entitled to regard as dismissal. We cannot accept that the tribunal was bound to come to this conclusion. Indeed, we think that the weight of the evidence points clearly against it. There was a running dispute between the employer and the employees whether or not the employees had to work Saturday overtime. It appears to us to be extremely improbable that Mr Longman would have made the concession for which counsel for the appellants contends. The short and sufficient answer is that the tribunal did not find that as a fact. The tribunal is charged with finding the facts, and, unless it can be shown that the evidence was so much one way that no reasonable tribunal could have disregarded it, it is not possible to interfere with its finding of fact. On this vital question the tribunal’s finding of fact reads as follows:

‘We are satisfied on the balance of the evidence before us that about a fortnight or so before 7th August there was a meeting between someone acting on behalf of the men, their foreman Mr Hankey and Mr Longman, in which Mr Longman said that he was not going to pay any overtime and if the men did not want to work overtime they need not do it and on the following two Saturdays each of these two applicants and Mr Wilbraham did not turn up for work.’

That is very far short of the finding of fact which counsel for the appellants has to establish before he can succeed on this alternative argument, which must fail.

This appeal, then, is allowed and the case referred for a hearing by a differently constituted tribunal.

Appeal allowed.

Solicitors: Rowleys & Blewitts, Manchester (for the appellants); Doyle, Devonshire, Box & Co, agents for Dennis, Grundy & Sherratt, Hanley, Stoke-on-Trent (for the respondents).

Gordon H Scott Esq Barrister.

a R v Sunair Holidays Ltd

COURT OF APPEAL, CRIMINAL DIVISION

STEPHENSON LJ, THESIGER AND MACKENNA JJ

8th, 18th MAY 1973

- b** *Trade description – False or misleading statement – Provision of services – Promise in regard to future – Prediction as to future facts – Statements incapable of being true or false at time made – Holiday brochure – Brochure issued in winter for following summer season – Brochure stating hotel had swimming pool – Swimming pool being built for summer season – Swimming pool not in fact completed by summer – Need to prove that statement meant hotel had swimming pool at time brochure issued – Trade Descriptions Act 1968, s 14 (1).*

- c** *Trade description – Document – Interpretation – False trade description or statement – Statement in document alleged to be false – Meaning of statement – Whether interpretation of document matter for judge or jury.*

- d** In 1969 the appellants, a firm of travel agents, published a travel brochure for 1970 relating to an hotel in Spain. The hotel was stated in the brochure to be new and very comfortable, with a swimming pool and modern restaurant. The food was stated to be good, with English dishes also available as well as special meals for children. Push chairs were also said to be for hire. The season began on 7th March 1970 and ended on 6th October. The owners of the hotel planned to improve it during the winter of 1969-1970. The upper floors of the hotel were to be reconstructed and a swimming pool built on the roof. When the hotel closed for the 1969-1970 winter season the builders went to work, but not as efficiently or quickly as had been hoped. Meanwhile, on 7th January 1970, B read a copy of the appellants' brochure and bought tickets for himself and his family from the appellants for a holiday at the hotel beginning on 27th May. When B got there he found that the swimming pool could not be filled with water because it had not been properly completed, push chairs were not available at the hotel, but could be hired from a nearby shop, and there were no special dishes for children. The appellants were charged on three counts of an indictment with recklessly making false statements in their brochure, contrary to s 14 (1) (b)^a of the Trade Descriptions Act 1968, namely, that the hotel had a swimming pool (count 1), that there were push chairs for hire at the hotel (count 2) and that the hotel provided special dishes for children (count 6).
- e** The jury were directed that it was for them to decide whether the services and facilities at the hotel were represented in the brochure as existing on 7th January (when B read the brochure), on 7th March (the earliest date for taking guests) or on 27th May (when B arrived); that having chosen the date, they should then consider whether any statement in the brochure was true at that date and if not, and they thought that the statement had been made recklessly, they should convict the appellants. The appellants were convicted on counts 1, 2 and 6 and appealed.

- h** **Held** – (i) Section 14 of the 1968 Act related to statements of fact which were either true or false at the time when they were made. A prediction or promise about the future could not be said to have been true or false at the time when it was made. Accordingly s 14 did not deal with forecasts or promises unless they contained by implication a statement of present fact (see p 1236 g to j and p 1239 g and h, post).

- i** (ii) It followed therefore that it was incumbent on the judge to direct the jury that, in the case of the swimming pool, if they construed the words in the brochure as relating to the future, they should acquit the appellants on count 1. Since he had failed to do so, and since it was not disputed that the statements which were

^a Section 14, so far as material, is set out at p 1235 e and f, post

the subject of counts 2 and 6 related to the future, the convictions should be quashed and the appeal allowed (see p 1241 d and e, post). a

Beckett v Cohen [1973] 1 All ER 120 applied.

Semble. The interpretation of a document in which a false trade description, or other false statement falling within the 1968 Act, is alleged to have been made is a matter for the jury and not the judge (see p 1240 c to e, post).

Notes b

For false and misleading statements as to facilities and services under the Trade Descriptions Act 1968, see Supplement to 10 Halsbury's Laws (3rd Edn) para 1314C, 3.

For the Trade Descriptions Act 1968, s 14, see 37 Halsbury's Statutes (3rd Edn) 959.

Cases referred to in judgment

Bambury v Hounslow London Borough Council [1971] RTR 1, DC. c

Beckett v Cohen [1973] 1 All ER 120, [1972] 1 WLR 1593, DC

R v Clarksons Holidays Ltd (1972) 57 Cr App Rep 38, CA.

Sunair Holidays Ltd v Dodd [1970] 2 All ER 410, [1970] 1 WLR 1037, 134 JP 507, DC, Digest (Cont Vol C) 1023, 1100b.

Case also cited d

Breed v Cluett [1970] 2 All ER 662, [1970] 2 QB 459, DC.

Appeal

On 9th October 1972 in the Crown Court at Woodford before his Honour Judge Mason QC and a jury the appellants, Sunair Holidays Ltd, were convicted on three counts (counts 1, 2 and 6) of an indictment alleging that they had recklessly made false statements as to the provision of services etc, contrary to s 14 (1) (i), (ii) of the Trade Descriptions Act 1968. The appellants were fined £4,000 on count 1, and £500 each on counts 2 and 6. An order to pay £150 towards the Crown's costs was also made against the appellants. The appellants appealed against both conviction and sentence. The main ground of appeal against conviction was that the judge had failed to direct the jury that the statements which were the subject of the counts constituted warranties and representations as to the future and not statements which fell within the meaning of s 14 of the 1968 Act. The facts are set out in the judgment of the court. e

Peter Pain QC and *David Prebble* for the appellants.

Anthony Scrivener for the Crown. f

Cur adv vult g

18th May. **MACKENNA J** read the following judgment of the court at the invitation of Stephenson LJ. Sunair Holidays Ltd, the appellants in this case, are a company selling package tours abroad. In the autumn of 1969 they published a brochure, 'Sunair Summer 1970' containing particulars of hotels in Spain, Italy and other countries in which they offered accommodation for the summer season of 1970. One of these was the Hotel Cadi at Calella on the east coast of Spain. Mr Bateman got a copy of Sunair's brochure from a travel agency in Romford some time after Christmas 1969, read it, chose the Hotel Cadi, and on 7th January 1970 bought tickets from Sunair for a Whitsun holiday at that hotel for himself and his family beginning on 27th May 1970. When they got to Calella in May they were dissatisfied with the hotel, and on their return to England Mr Bateman complained to the authorities who started criminal proceedings against Sunair. The proceedings were by way of an indictment containing six counts. Each count charged Sunair with making a false statement about the Hotel Cadi in the 1970 brochure contrary to s 14 (1) (b) of the Trade Descriptions Act 1968. In each case the statement was said to have been made on 7th January 1970, the date when Mr Bateman bought the tickets. h

a We shall quote the particulars of the six allegedly false statements, using in each case the words of the indictment:

Count 1 '... that the Hotel Cadi, Calella, had a swimming pool, whereas there was no swimming pool at the said hotel.'

Count 2. '... that there were push chairs for hire at the Hotel Cadi, Calella, whereas no push chairs were available.'

b *Count 3.* '... that the Hotel Cadi, Calella, had its own night club, whereas there was no such night club at the said Hotel.'

Count 4. '... that cots were available at the Hotel Cadi, Calella, whereas no cots were available.'

Count 5. '... that there was dancing every night in the discotheque of the Hotel Cadi, Calella, whereas there was no discotheque at the said Hotel.'

c *Count 6.* '... that the Hotel Cadi, Calella, provided good food with English dishes available as well as special meals for children, whereas no English dishes or special meals for children were available.'

d The case was tried at the Woodford Crown Court in October 1972 before his Honour Judge Mason QC and a jury. The judge held that there was no case for Sunair to answer on count 4, that relating to the cots. He left the other five to the jury, who convicted on counts 1, 2 and 6, those relating to the swimming pool, the push chairs and the food, and acquitted on counts 3 and 5, those relating to the night club and the discotheque. Sunair appeal against their convictions and against the fines imposed on them by the judge.

To explain the points of law raised by the appeal it is necessary to quote the relevant parts of s 14 of the 1968 Act:

e '(1) It shall be an offence for any person in the course of any trade or business—
(a) to make a statement which he knows to be false; or (b) recklessly to make a statement which is false; as to any of the following matters, that is to say,—
(i) the provision in the course of any trade or business of any services, accommodation or facilities; (ii) the nature of any services, accommodation or facilities provided in the course of any trade or business; (iii) the time at which, manner in which or persons by whom any services, accommodation or facilities are so provided; (iv) the examination, approval or evaluation by any person of any services, accommodation or facilities so provided; or (v) the location or amenities of any accommodation so provided.'

g Section 14 (2) (b) provides that a statement made regardless of whether it is true or false shall be deemed to be made recklessly, whether or not the person making it had reasons for believing that it might be false, while s 14 (4) provides that 'false' means false to a material degree.

h The two questions raised by this appeal can now be stated: (1) whether s 14, as the appellants now contend, is limited to representations of facts, past or present, or whether it includes assurances about the future, and, if the appellants' contention is right; (2) whether the jury's verdict on counts 1, 2 and 6, or any of them, can be upheld. Before we consider these two questions we shall quote those parts of the brochure which relate to the Hotel Cadi, and state a few of the facts about the hotel.

i 'Hotel Cadi, Calella. A new, very comfortable hotel in the centre of Calella and only about 20 yards from the beach. Luxurious lounge, with local decor, looks out on the sea. Well-stocked bar. *Swimming pool.* Modern restaurant: the food is good, with English dishes also available—as well as special meals for children. The friendly, informal Hotel Cadi also has its own night club; there is dancing every night in the discotheque. Lift to all floors. All bedrooms have a private w.c. and bath, and terrace. Cots also available. Push chairs for hire. Laundry service.'

The words 'swimming pool' were underlined in red. On the same page of the brochure particulars were given of the prices, including air travel, of a holiday at this hotel during a season beginning on 7th March and ending on 6th October, lower prices at the beginning and end of the season and higher in the middle. a

The hotel had been open during the summer of 1969, though apparently it had not been used that year by the appellants. It then had a room used as a discotheque and a night club, but no swimming pool. The owners of the hotel planned to improve it during the winter of 1969-1970. The upper floors at the rear of the hotel were to be rebuilt and a swimming pool was to be constructed on the roof. The room used for the discotheque and night club was to be enlarged. The hotel closed down for the winter and did not re-open until April or May 1970. In the meantime the builders went to work, but not as quickly or as efficiently as had been hoped. When the Batemans were at the hotel, the principal meals consisted of soup, chops, steaks or chicken, always served with chips, and ice-cream and mousses and the like for a pudding. The main dish is said to have been cooked in the Spanish style, presumably in oil. Children could have their meals an hour earlier than the adults, but there were no special dishes provided for them. By 27th May, the date when the Batemans arrived, the swimming pool had been built, but because of cracks or leaks it could not be filled with water. The discovery of these cracks and leaks and making them good took time, and this work was still being done while the Batemans were at the hotel. The larger room for the discotheque and the night club had not been finished, though the artistes who were to perform at the night club were at the hotel. Push chairs were not available at the hotel itself, though they could be hired from a shop in a neighbouring street. b

The appellants had made their contract with the owners of the hotel in April 1969. Under this the owners were to reserve accommodation for 130 of the appellants' customers at prices payable by the appellants and fixed by the contract. The appellants knew of the owners' intention to build a swimming pool. Because of the delay in the completion of the building work the appellants did not send any of their customers to the hotel until 27th May when the Batemans and others arrived. c

So much for the facts. We come now to the construction of s 14. The section deals with 'statements' of which it can be said that they were, at the time when they were made, 'false'. That may be the case with a statement of fact, whether past or present. A statement that a fact exists now, or that it existed in the past, is either true or false at the time when the statement is made. But that is not the case with a promise or a prediction about the future. A prediction may come true or it may not. A promise to do something in the future may be kept or it may be broken. But neither the prediction nor the promise can be said to have been true or false at the time when it was made. We conclude that s 14 does not deal with forecasts or promises as such. We put in the qualifying words 'as such' for this reason. A promise or forecast may contain by implication a statement of present fact. The person who makes the promise may be implying that his present intention is to keep it or that he has at present the power to perform it. The person who makes the forecast may be implying that he now believes that his prediction will come true or that he has the means of bringing it to pass. Such implied statements of present intention, means or belief, when they are made, may well be within s 14 and therefore punishable if they were false and were made knowingly or recklessly. But if they are punishable, the offence is not the breaking of a promise or the failure to make a prediction come true. It is the making of a false statement of an existing fact, somebody's present state of mind or present means. d

What we have said about s 14 agrees with the law of deceit, whether civil or criminal. In a civil action of deceit the plaintiff must prove that there was a false representation of fact as distinct from the failure to fulfil a promise: see Salmond on Tort¹. So it was with the old criminal law of false pretences: see Archbold's e

a Criminal Pleading, Evidence and Practice¹. So it is with the new s 15 (4) of the Theft Act. And so it is with s 14.

This section has been considered by the Divisional Court in several cases, of which we shall cite three. The first is *Sunair Holidays Ltd v Dodd*². In that case the present appellants had made a statement in their 1969 holiday brochure about the facilities they offered at a hotel in Majorca, 'all twinbedded rooms with private bath, shower, w.c. and terrace'. The hotel had some rooms with terraces and some without.

b Before issuing the brochure the appellants had made a contract with the hotel providing that their clients should be given rooms with terraces. A Mr Welling got the brochure from a travel agency, read it, and made a booking with the appellants for a holiday at this hotel for himself and his wife. When they got to Majorca the hotel management gave them a room without a terrace. The appellants were charged with having on 13th January 1969 recklessly made a false statement about the 'amenities of accommodation' provided at the hotel for Mr and Mrs Welling, 'namely, that such amenities did not accord with the description given in its 1969 holiday brochure'. It is not clear from the report what was the point of the date chosen by the prosecution, 13th January, whether it was the date when the brochure was issued to the travel agency, or when it was given by the agency to Mr Welling, or when he made the booking. The justices convicted and the Divisional Court set aside the conviction for these reasons given in the judgment of Lord Parker CJ³:

'It seems to me that the brochure was intended to convey and does convey to the prospective holidaymaker, that the twin-bedded rooms that we can offer you at this hotel have those amenities. Looked at in that way, that statement when it was made was perfectly true. This was not the typical case of a brochure advertising accommodation which did not exist, having a swimming bath that was not constructed, or of hotel accommodation where a hotel was not opened. At the time when the statement was made it was perfectly accurate that the accommodation that they were offering existed. Not only did it exist, but the appellants had a contract with the hotel—I need not go into it—whereby the only twin-bedded rooms which they kept available for the appellants, and were offering to the appellants' clients, were rooms with these amenities, including a terrace. Accordingly, when [the statement] was made, it was in my judgment completely accurate. Counsel for the respondent has rather faintly suggested that really this statement is a continuing statement, and that it existed when these couples arrived at the hotel. For my part I am quite unable to accept that. This is a statement made on 13th January or at some later date after the brochure had been shown to them, and they had accepted the offer contained in it, and nothing that happened after that can affect the matter one way or the other whether that statement was false and made recklessly.'

g Lord Parker CJ's refusal to treat the words about the hotel as a continuing statement, and in that way as one relating to the future, on the ground that its truth must be judged as at the date when it was made, gives some support to our reading of s 14.

h The second case is *Bambury v Hounslow London Borough Council*⁴. Bambury was the director of a company selling motor cars. A customer saw a Ford Cortina at the company's premises on which the word 'guaranteed' appeared. He negotiated for the purchase of the car with Bambury, who told him that the word 'guaranteed' meant that if anything went wrong with the car during the next three months the company would put it right, and that this guarantee would be recorded in a book.

i 36th Edn (1966), p 709, para 1945

2 [1970] 2 All ER 410, [1970] 1 WLR 1037

3 [1970] 2 All ER at 412, [1970] 1 WLR at 1041, 1042

4 [1971] RTR 1

The customer bought the car, receiving an invoice which contained a printed condition excluding the company's liability for faults. The car developed several faults, including one in the clutch. The company made good some of them, but pretended that there was nothing wrong with the clutch which eventually was repaired by another garage at a cost to the customer of £17. Bambury was charged with having recklessly made a statement which was false—

'as to the provision in the course of trade or business of a facility, namely, a guarantee to effect repairs to the car for three months from the date of purchase.'

The justices convicted, finding—

'that the defendant's statement as to provision of the guarantee was false and made recklessly by him either well knowing that it would not be or without caring whether or not it would be honoured.'

The conviction was upheld for the following reasons given by Lord Parker CJ¹.

'In my judgment the justices here came to a conclusion to which they were fully entitled to come. It is quite clear that by the words used to Mr Winslade the defendant was stating that his employers, the company of which he was a director, were assuming contractual obligations to repair the vehicle at any time within three months of the purchase . . . Two very minor matters were put right, but when a more substantial matter, namely, in regard to the clutch involving some £17 was involved, they did not put it right, despite the fact that a repair was necessary, but as the case finds, pretended that the fault did not exist. The fact that the contractual obligations were not complied with is consistent with one or other of two matters: one, a failure to perform their contractual obligations which they had entered into; or secondly, the fact that there never was an entering into of any contractual obligations at all. The justices, having regard no doubt to the finding that the company had not merely disputed that a repair was necessary, but knowing there was a repair needed, pretended it was not, found that the original statement that they were entering into contractual obligations was a false one. They might have come to a different conclusion, but in my judgment there was clearly evidence . . . that the original statement was false.'

Lord Parker CJ was distinguishing between a statement by Bambury that his company were undertaking an obligation to repair the car, which would be true or false at the time when the statement was made, and the undertaking itself, if one were given. Bambury would be liable under s 14 if the first alternative was the right one, and if the statement was untrue. That would be because he had made a false statement about an existing fact, namely his company's undertaking of an obligation. But he would not be liable on the second alternative, even if the company thereafter failed to perform the undertaking.

*Beckett v Cohen*² is the third case. There a builder had promised that he would build a garage within ten days and that it would be similar to an existing garage. He did not finish the garage in time, and the one he built was in some respects different from the existing garage. In respect of his failure to complete in time, he was charged with having made a statement, 'which was false as to the time at which a service, namely the building of a garage, would be provided'. In respect of the differences between the two garages, he was charged with having made a statement which was 'false as to the manner in which such a service would be provided'. The justices upheld the builder's submission that s 14 (1)—

¹ [1971] RTR at 6

² [1973] 1 All ER 120, [1972] 1 WLR 1593

a 'only covered false statements as to services which had already been provided or were currently being provided, whereas the informations referred to a service which "would be provided" and therefore fell outside the scope of s 14 (1) of the Act'.

The prosecutor's appeal was dismissed. This is what Lord Widgery CJ said¹:

b '... the argument for the respondent which the justices adopted, and which to my mind answers the whole case for the appellant, is that s 14 (1), under which the offence is charged, has no application to statements which amount to a promise in regard to the future, and which therefore at the time when they are made cannot have the character of being either true or false. [After quoting the section, he went on:] This section matches earlier provisions in the Act
c dealing with the sale of goods. The purpose of the earlier sections is to prevent persons when selling goods from attaching a false description to the goods, and in the same way s 14 is concerned as I see it, when services are performed under a contract, to make it an offence if the person providing the services recklessly makes a false statement as to what he has done. The section specifically refers to the reckless making of a statement which is false. That means
d that if at the end of the contract a person giving the service recklessly makes a false statement as to what he has done, the matter may well fall within s 14, but if before the contract has been worked out, the person who provides the service makes a promise as to what he will do, and that promise does not relate to an existing fact, nobody can say at the date when that statement is made that it is either true or false. In my judgment Parliament never intended or contemplated for a moment that the Act should be used in this way, to make a
e criminal offence out of what is really a breach of warranty.'

We accept the distinction drawn in this passage between statements of fact, past or present, and promises about the future, and agree with the view that s 14 deals with the first but not the second. A statement about the quality of a service already provided is a statement of past fact and is covered by the section. A statement
f of existing fact may also be covered, as, for example, if a hotel advertises that its services currently provided include the provision of afternoon tea; if that service is not being provided at the time when the statement is made an offence may be committed. A statement about existing facts would not cease to be within the section because the person making it warranted that it was true and that the facts would continue to exist in the future. In that limited sense the section can apply to warranties.
g But it does not apply to promises about the future unless, as we said earlier, the promise can be construed as an implied statement of a present intention or the like, in which case it may be that it is caught by s 14, as it would be by s 15 of the Theft Act 1968, which includes in its definition of deception false statements of present intentions.

In answer to the first question stated above, we hold that s 14 is limited to statements of fact, past or present, and does not include assurances about the future.
h It remains to consider the second question whether, on this reading of the section, the jury's verdict on counts 1, 2 and 6 or any of them can be upheld.

In the court below the prosecution contended that the words 'swimming pool' in the appellants' 1970 brochure meant that a swimming pool had already been built and was in existence on the date in January 1970, when Mr Bateman made his bookings. They seem to have contended in the alternative that the words meant
j that a swimming pool would be in existence on 7th March 1970 which was the earliest date given in the brochure for bookings at the Hotel Cadi. They contended that in either case the statement was false. The appellants contended that the words related only to the future and meant that a swimming pool would be in existence on 27th May 1970, when Mr Bateman's bookings took effect. Both parties seem to

have agreed that the words about push chairs, English dishes and special meals for children, related to the future in the case of this hotel which was not open in January 1970, when the statements about these matters were made. Neither party contended that if any of the statements related only to the future they were not caught by s 14. *Beckett v Cohen*¹ had not yet been decided, and the point which it established about the meaning of the section had apparently not occurred to counsel on either side or to the judge himself. The appellants' case was that the words about the pool, the chairs and the food all related to the future, and that the assurances on those matters were substantially fulfilled.

Other points of construction were raised by the appellants at the trial. What was meant by 'English dishes also available'? What was the meaning of 'special meals for children'? Did this mean special dishes or only special meal times? What was meant by 'Push chairs for hire'? Did this mean that there would be chairs for hire at the hotel itself, or would it be enough that there were chairs for hire in a neighbouring shop? Somebody had to construe the brochure to answer these questions of construction and the question whether the words about the swimming pool related to the present or the future. Both parties were agreed in the court below and before us that it was for the jury to construe the document as it would be in proceedings for libel. This was the view taken in the earlier case of *R v Clarksons Holidays Ltd*² and tacitly approved by this court to which the case was brought on appeal. Following this precedent we shall assume that this is the right course, observing only that if it is right statements in books on evidence which treat libel proceedings as the only exception to a rule that the construction of documents is for the judge may need to be revised: see Cross on Evidence³, and the article on Evidence in Halsbury's Laws of England⁴.

Treating the question of construction as one for the jury, the judge directed them as follows:

'You must ask first: "What do these statements mean?", beginning, as I suggest you should, by asking yourselves whether when [the appellants] made those statements they were representing to the people who read the brochure that the physical facilities, if I can so describe them, of the Hotel Cadi existed, as the prosecution suggest they were, on the date when Mr Bateman booked his holiday, namely, 7th January 1970; or were they representing that those facilities would exist on what was said to be the earliest possible booking date, 7th March 1970? . . . Or, third, [were the appellants] representing that those physical facilities would exist . . . when Mr Bateman arrived at the hotel, namely, 27th May? Those are the three possibilities.'

He returned to the point a little later:

'Of course, members of the jury, no one in their senses, perhaps, would want to go to swim in January there; and indeed many hotels, and indeed this hotel, were closed for the winter season. But the prosecution suggest that it might be important to clients or prospective clients reading the brochure to know whether or not the hotel was then completed, for they might, for example, not want to take the risk of booking for an uncompleted hotel; they might want to go to an hotel where, so to say, all the "gremlins" had been sorted out before they themselves took the plunge. And you are entitled to take the view, if you think it right, that those statements so made as to the physical facilities, namely, the swimming pool and the night club—counts 1, 3 and 5—were made in relation to 7th January 1970. The alternative view, as I have suggested, is

¹ [1973] 1 All ER 120, [1972] 1 WLR 1593

² (1972) 57 Cr App Rep 38

³ 3rd Edn (1969), pp 50, 51

⁴ 3rd Edn, vol 15, p 276, para 503

- a* that the statements were made in relation to 7th March when, so it is said, clients could book for the first time during the 1970 season. The third possibility is that the statements were made in relation to the time of Mr Bateman's arrival at the hotel. He, it is said, told Knights Travel Agency, and they knew full well, that he wanted a Whitsun holiday and that that should be a date which you should bear in mind. Which date you select is entirely a matter for you.
- b* The prosecution here say quite fairly that you should not select the earlier dates in relation to the push chairs and food, because clearly no one would suppose that they were saying that push chairs or food of any sort was available in January, because the hotel was then closed, and you may think the fair view so far as those items are concerned, namely, counts 2 and 6, would be to find that those statements were made, in truth and in fact, in relation to the date when Mr Bateman actually arrived, namely, 27th May. Go further, then, and
- c* in relation to the food and the push chairs consider the position on 27th May and, if your view is that the statements with regard to the swimming pool and the night club related also to the 27th May, consider the position as regards them also on that date.'

- What further direction ought the judge to have given the jury? If our reading of
- d* s 14 is right he should have told them, in the case of the swimming pool, that if they construed the words as relating to the future, which was the appellants' contention, they should acquit them on count 1, and that in any event, they should acquit them on counts 2 and 6 which both sides agreed related to the future. He did not do so, because this point had not been taken by the appellants. Instead he went on to direct the jury that having chosen the date to which any of these
- e* statements related, they should then consider whether it was true at that date, and if it were not and they found that it had been recklessly made they could convict the appellants. This was wrong.

- Counsel for the Crown in this court, asked, what did the appellants lose by the judge's failure to give the right direction on count 1? The answer is clear. They lost their chance of an acquittal on this count, which would have been their right
- f* if the jury construed the words about the swimming pool as relating to the future, as they may have done. We cannot uphold the conviction on this count, not knowing whether the jury construed the words as relating to 7th January, or whether they construed them as relating to 27th May and convicted the appellants only because they found that the swimming pool had not been completed by that date.

- Counsel for the Crown appeared to argue that even if s 14 were limited to state-
- g* ments of existing facts, the convictions on the three counts should still be upheld on the ground that the brochure impliedly represented that satisfactory arrangements had already been made by the appellants for the provision of these facilities or services in the future, and that such arrangements had not, in fact, been made on 7th January. This was not how the charges were framed in the indictment. It is not how the case was fought in the court below. It is not how the case was summed
- h* up by the judge. It is impossible to uphold these convictions on this or any other ground, and they must be quashed.

Appeal allowed: convictions quashed.

- j* Solicitors: Francis Basham & Co (for the appellants); John E Symons, Romford (for the Crown).

N P Metcalfe Esq Barrister.

Kamara and others v Director of Public Prosecutions

HOUSE OF LORDS

LORD HAILSHAM OF ST MARYLEBONE LC, LORD MORRIS OF BORTH-Y-GEST, LORD SIMON OF GLAISDALE AND LORD CROSS OF CHELSEA

1st, 2nd, 3rd, 4th, 7th MAY, 4th JULY 1973

Criminal law – Conspiracy – Indictable offence – Scope of offence – Agreement to do unlawful act – Tort – Trespass – Circumstances in which agreement to commit a tort indictable – Invasion of public domain – Intention to inflict more than purely nominal damage on victim – Agreement to enter and occupy building of High Commission of Sierra Leone.

Criminal law – Conspiracy – Indictment – Particulars of offence – Conspiracy to trespass – Necessity of alleging circumstances which render agreement indictable – Indictment Rules 1971 (SI 1971 No 1253), r 5 (1).

Criminal law – Unlawful assembly – Public place – Danger to peace and tranquillity of neighbourhood – Assembly inside building – Persons inside building put in fear – Whether necessary that assembly should be held in public place – Whether necessary to show that fear engendered outside building.

The appellants were students from Sierra Leone who held political opinions contrary to those of the political party in power in that country. In order to gain publicity for their grievances they agreed together to occupy the premises of the Sierra Leone High Commission in London. In pursuance of that agreement they went to the premises. The caretaker opened the door. The appellants entered, told the caretaker that he was under arrest and threatened him with an imitation firearm. He was then locked in a room and about ten other members of the staff were taken to the same room and locked in. Some were physically held or pushed but no actual blows were struck and there was no serious violence. The staff who saw the appellants' imitation gun thought that it was real. Eventually the police arrived and the staff were released. The appellants made no secret of their intention to take the premises over and that their object was to gain publicity for their grievances. The appellants were charged on an indictment which included two counts charging (1) conspiracy to trespass and (2) unlawful assembly. The particulars of the first count alleged that the appellants had 'conspired together and with other persons to enter as trespassers the High Commission of Sierra Leone in London'; the second, that the appellants had 'unlawfully assembled with intent to carry out a common purpose in such a manner as to endanger the public peace'. The appellants were convicted on both counts and appealed contending, *inter alia*, (i) that there was no such offence as conspiracy to trespass, and (ii) that an assembly inside a building could only be unlawful as endangering the public peace if it was shown that fear had been engendered in persons beyond the bounds of the building. The Court of Appeal^a affirmed the convictions holding, *inter alia*, that since an agreement to do an unlawful act was a conspiracy and the commission of a tort was an unlawful act, it followed that an agreement to commit any act of trespass was an indictable conspiracy. On appeal,

Held – The appeals would be dismissed and the convictions affirmed for the following reasons—

(i) Although the offence of conspiracy was not limited to agreements to commit acts which if committed by a single person would be punishable by criminal sanctions,

a it did not follow that any agreement or combination to commit a tortious act against an individual was indictable as a conspiracy. A combination, the execution of which necessarily involved only a technical infringement of the civil rights of others, would not necessarily be indictable. However, trespass or any other form of tort could, if intended, form the element of illegality necessary in conspiracy if either (a) execution of the combination invaded the public domain, e.g. where a trespass involved the invasion of a building such as an embassy or a publicly owned building, or (b) the combination necessarily involved, and was intended to involve, the infliction on its victim of something more than purely nominal damage, e.g. where the intention was to occupy premises to the exclusion of the owner's right, either by expelling him altogether or otherwise effectively preventing him from enjoying his property (see p 1252 h and j, p 1254 e and f, p 1257 f, p 1258 a and b, p 1259 b, p 1260 h to p 1261 d, p 1262 d e and g and p 1263 e and h, post); dictum of Lord Ellenborough CJ in *R v Turner* (1811) 13 East at 231 approved; dicta of Lord Denman CJ in *R v Jones* (1832) 4 B & Ad at 349 and of Willes J in *Mulcahy v R* (1868) LR 3 HL at 317 explained.

c (ii) The first count of the indictment had been drawn with sufficient particularity to ground a conviction for the offence charged since it disclosed that the property on which the trespass was to be committed was the High Commission of Sierra Leone (see p 1249 h and j, p 1262 d and e and p 1263 h, post).

d (iii) In order to prove that an assembly was unlawful it was not necessary to show that it had occurred in a public place. The essential requisite was the presence or likely presence of innocent third parties not participating in the illegal activities in question; it was the danger to their security which constituted the threat to public peace and the public element necessary to the commission of the offence. Accordingly, where an assembly had taken place in a building, it was not necessary, in proving the crime of unlawfully assembling in such manner as to disturb the public peace, to show that fear was engendered in persons beyond the bounds of the building; it was sufficient that rational and firm persons in the building had been frightened (see p 1247 j, p 1248 b to e and g h and p 1262 d to f, post); *Button v Director of Public Prosecutions* [1965] 3 All ER 587 applied.

e Per Lord Hailsham of St Marylebone LC. Under the Indictment Rules 1971, r 5 (1)^b, where an indictment charges conspiracy to trespass it is essential to state in the particulars of the offence the intention or other special circumstances which must accompany the trespass in order to render the agreement indictable (see p 1262 a to c, post).

f Per Lord Cross of Chelsea. An indictment charging as a criminal conspiracy an agreement to commit an act or acts which would not constitute a crime if done by a single person should always state with precision the circumstances on which the Crown relies as justification for treating the agreement as a criminal offence. It is for the judge to decide as a matter of law whether the circumstances alleged are sufficient to render the agreement to commit the act or acts in question a criminal offence (see p 1263 f and h to p 1264 a, post).

g Decision of the Court of Appeal sub nom *R v Kamara* [1972] 3 All ER 999 affirmed on different grounds.

Notes

For the meaning of conspiracy, see 10 Halsbury's Laws (3rd Edn) 310-314, paras 569, 570, and for cases on the subject, see 14 Digest (Repl) 121-129, 851-907.

j For unlawful assembly, see 10 Halsbury's Laws (3rd Edn) 585, 586, para 1089, and for cases on the subject, see 15 Digest (Repl) 787, 788, 7370-7393.

b Rule 5 (1), so far as material, provides: '... every indictment shall contain, and shall be sufficient if it contains, a statement of the specific offence with which the accused person is charged describing the offence shortly, together with such particulars as may be necessary for giving reasonable information as to the nature of the charge.'

Cases referred to in opinions

- Boots v Grundy* (1900) 82 LT 769, 15 Digest (Repl) 915, 8795. **a**
- Button v Director of Public Prosecutions, Swain v Director of Public Prosecutions* [1965] 3 All ER 587, 50 Cr App Rep 36, sub nom *R v Button, R v Swain* [1966] AC 591, [1965] 3 WLR 1131, 130 JP 48, HL, Digest (Cont Vol B) 189, 7360f.
- Churchill v Walton* [1967] 1 All ER 497, [1967] 2 AC 224, [1967] 2 WLR 682, 131 JP 277, 51 Cr App Rep 212, HL; *rvsg* sub nom *R v Churchill (No 2)* [1966] 2 All ER 215, [1967] 1 QB 190, [1966] 2 WLR 1116, CCA, Digest (Cont Vol C) 186, 893a. **b**
- Clifford v Brandon* (1809) 2 Camp 358, [1803-13] All ER Rep 771, 170 ER 1183, CP, 14 Digest (Repl) 128, 899.
- Crofter Hand Woven Harris Tweed Co Ltd v Veitch* [1942] 1 All ER 142, [1942] AC 435, 111 LJP 17, 166 LT 172, HL, 45 Digest (Repl) 534, 1175.
- Director of Public Prosecutions v Bhagwan* [1970] 3 All ER 97, [1972] AC 60, [1970] 3 WLR 501, 134 JP 622, HL; *affg* sub nom *R v Bhagwan* [1970] 1 All ER 1129, [1970] 2 WLR 837, CA, Digest (Cont Vol C) 20, 157g. **c**
- Gregory v Duke of Brunswick* (1843) 1 Car & Kir 24; *subsequent proceedings* (1844) 6 Man & G 953, 45 Digest (Repl) 196, 41.
- King v R* (1845) 7 QB 782, 14 LJMC 172, 5 LTOS 309, 9 Jur 833, 115 ER 683, 15 Digest (Repl) 1204, 12,234.
- Knüller (Publishing, Printing and Promotions) Ltd v Director of Public Prosecutions* [1972] 2 All ER 898, [1973] AC 435, [1972] 3 WLR 143, 136 JP 728, HL; *on appeal from* sub nom *R v Knüller (Publishing, Printing and Promotions) Ltd* [1971] 3 All ER 314, [1972] 2 QB 179, [1971] 3 WLR 633, 135 JP 569, CA. **d**
- Mogul Steamship Co v McGregor Gow & Co* (1888) 21 QBD 544; *affd* (1889) 23 QBD 598, 58 LJQB 465, 61 LT 820, 53 JP 709, 6 Asp MLC 455, CA; *affd* [1892] AC 25, [1891-94] All ER Rep 263, HL, 14 Digest (Repl) 123, 858. **e**
- Mulcahy v R* (1868) LR 3 HL 306, HL, 14 Digest (Repl) 123, 856.
- Poulterers' Case* (1610) 9 Co Rep 55b, 77 ER 813, sub nom *Stone v Walter Moore* KB 813, 14 Digest (Repl) 124, 861.
- Quinn v Leathem* [1901] AC 495, [1900-3] All ER Rep 1, 70 LJP 76, 85 LT 289, 65 JP 708, HL, 14 Digest (Repl) 123, 860.
- R v Aspinall* (1876) 2 QBD 48, 46 LJMC 145, 36 LT 297, 42 JP 52, 13 Cox CC 563, 14 Digest (Repl) 121, 853.
- R v Bassey* (1931) 22 Cr App Rep 160, CCA, 14 Digest (Repl) 129, 911.
- R v Blamires Transport Services Ltd* [1963] 3 All ER 170, [1964] 1 QB 278, [1963] 3 WLR 496, 127 JP 519, 61 LGR 594, 47 Cr App Rep 272, CCA, Digest (Cont Vol A) 339, 895a.
- R v Brailsford* [1905] 2 KB 730, [1904-7] All ER Rep 240, 75 LJKB 64, 93 LT 401, 69 JP 370, 21 Cox CC 16, DC, 14 Digest (Repl) 129, 909. **g**
- R v Bramley* (1946) 11 Journal of Criminal Law 36.
- R v Brittain* [1972] 1 All ER 353, [1972] 1 QB 357, [1972] 2 WLR 450, 136 JP 198, CA.
- R v Bunn* (1872) 12 Cox CC 316, 14 Digest (Repl) 128, 892.
- R v Daniell* (1704) 6 Mod Rep 99, 182, Holt KB 346, 1 Salk 380, 2 Ld Raym 1116, 87 ER 856, 14 Digest (Repl) 234, 1998.
- R v De Berenger* (1814) 3 M & S 67, [1814-23] All ER Rep 513, 105 ER 536, 15 Digest (Repl) 915, 8802.
- R v Druitt, Lawrence, Adamson* (1867) 16 LT 855, 10 Cox CC 592, 15 Digest (Repl) 917, 8808.
- R v Duffield* (1851) 5 Cox CC 404; *subsequent proceedings* sub nom *R v Rowlands* 5 Cox CC 466, 14 Digest (Repl) 134, 973. **j**
- R v Howell* (1864) 4 F & F 160, 14 Digest (Repl) 129, 919.
- R v Hunter* (1973) The Times, 18th May.
- R v Jones* (1832) 4 B & Ad 345, 110 ER 485.
- R v Kenrick* (1843) 5 QB 49, 1 Dav & Mer 208, 12 LJMC 135, 1 LTOS 336, 7 JP 463, 7 Jur 848, 114 ER 1166, CCR, 14 Digest (Repl) 130, 934.

- a** *R v Leigh* (1775) 1 Car & Kir 28n, sub nom *Macklin's Case* 2 Camp 372n, 14 Digest (Repl) 128, 898.
R v Levy (1819) 2 Stark 458, 14 Digest (Repl) 417, 4074.
R v Lewis (1869) 11 Cox CC 404, 15 Digest (Repl) 1179, 11,921.
R v Lynn (1788) 2 Term Rep 733, 1 Leach 497, 100 ER 394, 7 Digest (Repl) 594, 394.
R v Mears and Chalk (1851) 2 Den 79, T & M 414, 4 New Sess Cas 574, 20 LJMC 59, 16 LTOS 515, 15 JP 81, 15 Jur 66, 4 Cox CC 423, CCR, 14 Digest (Repl) 129, 917.
- b** *R v Newland* [1953] 2 All ER 1067, [1954] 1 QB 158, [1953] 3 WLR 826, 117 JP 573, 37 Cr App Rep 154, CCA, 15 Digest (Repl) 913, 8787.
R v Parnell (1881) 14 Cox CC 508, 14 Digest (Repl) 125, *486.
R v Peck (1839) 9 Ad & El 686, 112 ER 1372, sub nom *Peck v R* 1 Per & Dav 508, 8 LJMC 22, 14 Digest (Repl) 241, 2071.
- c** *R v Porter* [1910] 1 KB 369, [1908-10] All ER Rep 78, 79 LJKB 241, 102 LT 255, 74 JP 159, 22 Cox CC 295, 3 Cr App Rep 237, CCA, 14 Digest (Repl) 129, 908.
R v Rowlands (1851) 17 QB 671, 2 Den 364, 21 LJMC 81, 18 LTOS 346, 16 JP 243, 16 Jur 268, 5 Cox CC 466, 117 ER 1439, CCR, 14 Digest (Repl) 128, 891.
R v Seward (1834) 1 Ad & El 706, 3 Nev & MKB 557, 2 Nev & MMC 318, 3 LJMC 103, 110 ER 1377, 14 Digest (Repl) 130, 929.
- d** *R v Stephens* (1839) 3 State Tr NS 1189, 15 Digest (Repl) 788, 7384.
R v Sterling (1663) 1 Lev 125, 1 Sid 174, 83 ER 331, sub nom *Attorney-General v Starling*, 1 Keb 650, 14 Digest (Repl) 125, 871.
R v Turner (1811) 13 East 228, 104 ER 357, 14 Digest (Repl) 124, 863.
R v Vincent (1839) 9 C & P 91, 3 State Tr NS 1037, 173 ER 754, 14 Digest (Repl) 124, 865.
- e** *R v Warburton* (1870) LR 1 CCR 274, 40 LJMC 22, 23 LT 473, 35 JP 116, 11 Cox CC 584, CCR, 14 Digest (Repl) 125, 868.
R v Whitaker [1914] 3 KB 1283, 84 LJKB 225, 112 LT 41, 79 JP 28, 24 Cox CC 472, 10 Cr App Rep 245, CCA, 14 Digest (Repl) 129, 913.
R v Young (1784) 4 Wentworth's System of Pleading 219, 14 Digest (Repl) 129, 915.
Shaw v Director of Public Prosecutions [1961] 2 All ER 446, [1962] AC 220, [1961] 2 WLR 897, 125 JP 437, 45 Cr App Rep 113, HL, Digest (Cont Vol A) 339, 9194.
- f**

Appeal

Sheku Gibril Kamara, Unisa Sallia Kamara, Moulai Moubarack Kamara, Frederick Wosm Kamara, Joseph Adewole John, Henry Olufemi John, Joseph Bandabla Dauda, Bianca Benjamin and Mohamed Lahai Samura appealed with leave against the order of the Court of Appeal, Criminal Division¹ (Lawton LJ, Swanwick and Phillips JJ) dated 11th October 1972 dismissing their appeals against conviction at the Central Criminal Court before his Honour Judge McKinnon and a jury on 8th November 1971 on charges of conspiracy to trespass (count 1), unlawful assembly (count 2), and, in the case of the appellants Joseph Adewole John and Mohamed Lahai Samura, having an imitation firearm with intent to commit an indictable offence, contrary to s 18 (1) of the Firearms Act 1968 (count 3). The facts are set out in the opinion of

h Lord Hailsham of St Marylebone LC.

Sir Dingle Foot QC and Nigel Murray for the appellants.
 Michael Corkery and Alexander Millar for the Crown.

Their Lordships took time for consideration.

- j** 4th July. The following opinions were delivered.

LORD HAILSHAM OF ST MARYLEBONE LC. My Lords, the indictment which gives rise to the present appeal contains three counts. The first two counts,

¹ [1972] 3 All ER 999, [1973] 2 WLR 126

with which alone we are concerned, and which apply equally to all the appellants and to two other defendants who have not appealed, are in the following terms:

'FIRST COUNT

Statement of Offence
CONSPIRACY TO TRESPASS
Particulars of Offence

[The names of the appellants, 11 in number] on divers days between the 18th day of January 1971 and the 22nd day of January 1971 within the jurisdiction of the Central Criminal Court conspired together and with other persons to enter as trespassers the premises of the High Commission of Sierra Leone in London.

'SECOND COUNT

Statement of Offence
UNLAWFUL ASSEMBLY
Particulars of Offence

[The appellants] on the 21st day of January 1971 within the jurisdiction of the Central Criminal Court unlawfully assembled with intent to carry out a common purpose in such a manner as to endanger the public peace.'

There was a third count applying only to the appellants Joseph Adewole John and Mohamed Lahai Samura, of having an imitation firearm with intent to commit an indictable offence contrary to s 18 (1) of the Firearms Act 1968. We are not in this appeal concerned with this third count. No separate question has been certified or argued relating to it, and it has been agreed that its fate depends on the questions arising in respect of the first two. If, as the result of this appeal, either of the two convictions stand, the conviction on the third count stands also. But if both the other convictions are quashed, the conviction on the third count falls with them.

My Lords, I cull the facts which gave rise to the present proceedings, without exactly quoting it, mainly from the judgment of Lawton LJ who delivered the judgment of the Court of Appeal, Criminal Division¹.

The appellants are all students from Sierra Leone, and hold political opinions contrary to those held by the party in power there. Seeking to obtain greater publicity in this country for their grievances, in about January 1971 they and the two other defendants to the proceedings agreed together to occupy the premises of the Sierra Leone High Commission in Portland Place and hold a demonstration there. In pursuance of this agreement, at about 8.30 a.m. on 21st January 1971, they went to the premises and the caretaker opened the door. A number of them entered. One of the appellants told the caretaker that he was under arrest. Another threatened the caretaker with a toy pistol which he mistook for a genuine firearm. The caretaker was then locked in one of the rooms of the High Commission, and about ten more of the staff were brought into the same room and locked in. Some of these, including the caretaker, were physically held, or pushed. But no actual blows were struck, and thus, though there was clearly illegal force to persons, and to property, there was no serious violence, and no one was injured. Some at least of the staff were at first inclined to think that they were the victims of some kind of prank or practical joke, but they changed their minds when they saw the toy gun, which, like the caretaker, they thought was real. There was some interference with the telephone; in spite of this, or before it had been accomplished, the caretaker succeeded in telephoning the police. The appellants also used the telephone to communicate with the press and television networks in accordance with their general design, as a result of which they held a conference.

When the police arrived, the appellants told them there had been a coup in Sierra Leone, and gave them to understand that they were authorised by a supposed new regime to take over the High Commission premises. The result of this was that

a at first the police did not interfere. But later more police officers came, the imprisoned staff escaped, and the appellants were interviewed by the police. They made no secret of their intention to take the premises over and that their object was to gain publicity for their political grievances. They were charged with various offences and these charges finally ripened into the indictment which I have already described.

b Although the fact is not material to the decision of this appeal, it is fair to the appellants and to their co-defendants, none of whom received a custodial sentence, to stress, as did counsel appearing for them, that, though there was the degree of deception and of illegal force which I have described, they appear to have been reasonably careful to see that no one was seriously harmed, and their motives were not necessarily contemptible. They acted from a genuine sense of grievance. The father of
c at least one of them was, we were told, under sentence of death at the time of the alleged offence, and all appear genuinely to have believed that the government in power in their country, though recognised by Her Majesty's Government here, was arbitrary, tyrannical and unconstitutional. We, of course, are not concerned with these matters, and, whatever the result of this appeal, it is not possible to approve their actions. At the same time, the facts as stated enable us to approach their
d behaviour and their motives, if without endorsement, at least on the assumption that they acted sincerely, and, within certain limits, with restraint.

As the result of their proceedings the appellants appeared at the Central Criminal Court before Judge McKinnon. They pleaded not guilty, and after a trial lasting 11 days the jury returned a verdict of guilty on each of the three counts. From these convictions they have appealed. The main contentions on the part of the appellants are pure questions of law. On the facts some of them gave evidence that they
e thought they had a right to be on the High Commission premises, either because students were allowed to use the games or information rooms, or because it was said, by one or more of them, that the acting High Commissioner had given them permission to act as they did. I mention this because an attempt was made both in the Court of Appeal¹ and before your Lordships' House to impugn the learned judge's
f summing-up on various grounds connected with this defence. I need say no more about any of these points except that the Court of Appeal¹ was right to reject them, and I agree with their reasons for so doing. They raise no questions of general interest or importance.

In hearing, and dismissing, their appeal against conviction, the Court of Appeal¹ certified two points of law raised in the case as being of general public importance, and gave leave to appeal to the House of Lords. The two points so certified were:
g

'(1) whether an agreement to commit a trespass can be an indictable conspiracy and, if so, in what circumstances; (2) whether it is necessary in proving the crime of unlawfully assembling in such a manner as to disturb the public peace to show that fear was engendered in persons beyond the bounds of a building.'

h We are, of course, not limited to these questions, but, speaking for myself, in the absence of prejudice to the appellants I am not disposed to stray beyond them and, in the view which I have formed, only the former of them raises difficult problems. I deal, therefore, with the second question first. As to this, which is the only question relating to the second count, I share the view of the Court of Appeal¹ that the logic implicit in the decision in *Button v Director of Public Prosecutions*² (a case of affray)
i requires that we should come to an analogous decision in the present case in a sense adverse to the appellants. I also agree with Lawton LJ that such a decision would also be correct even if the matter were *res integra*. So long ago as 1824 (the year in which the eighth edition of Hawkins's Pleas of the Crown was published) unlawful

1 [1972] 3 All ER 999, [1973] 2 WLR 126

2 [1965] 3 All ER 587, [1966] AC 591.

assembly was grouped with, amongst other crimes, affrays, forcible entries and detainers, riots, threatening letters, and libels, in a chapter headed 'Offences against the Public Peace'. A similar classification is to be found in the more familiar Archbold¹. It was an essential part of the argument for the appellants that the public peace could only be broken in a public place. I agree with Lawton LJ when he said²:

'Both affray and unlawful assembly belong to the group of common law offences designed to uphold public order and to protect the public generally against lawlessness and disorder and in our judgment the same concepts should apply to both offences. As with affray, the public peace can be endangered by a rowdy, disorderly meeting just as much as if it is held inside a building as outside. In this case there was ample evidence that a number of persons inside were scared as well they might have been. The fact that no one outside was is of no importance.'

The appellants sought to rely on a number of cases in which unlawful assembly was defined by judicial authority by use of some such phrase as 'terror and alarm in the neighbourhood' (cf *R v Stephens*³, per Patteson J; *R v Vincent*⁴, per Alderson B). I agree with Lawton LJ⁵ that in those cases 'in the neighbourhood' must be read in the context as simply the equivalent of those nearby. I note that in the earliest definition at which I have looked, namely, that contained in the first edition of Hawkins⁶, the expression 'neighbourhood' is not used, but the expression is 'such circumstances of terror as cannot but endanger the public peace'. I consider that the public peace is in question when either an affray or a riot or unlawful assembly takes place in the presence of innocent third parties. It was accepted on behalf of the appellants that a riot can take place in enclosed premises, e.g. Dartmoor Prison. But an unlawful assembly is only an inchoate riot: see Russell on Crime⁷. When this was pointed out to him, counsel for the appellants was driven to argue that, if rioters in Dartmoor beat the warders inside the prison, they would be rioting, but they would not be guilty of an unlawful assembly unless the noise from inside the prison frightened some of Her Majesty's lieges outside the prison. I find this contention wholly unattractive. No doubt unlawful assembly differs from an affray, because, unlike affray, it implies a common purpose, and because, unlike affray, actual violence is unnecessary provided the public peace is endangered, but in my view it is analogous to affray in that (1) it need not be in a public place and (2) that the essential requisite in both is the presence or likely presence of innocent third parties, members of the public not participating in the illegal activities in question. It is their presence, or the likelihood of it, and the danger to their security in each case which constitutes the threat to public peace and the public element necessary to the commission of each offence. I therefore answer the second question certified by the Court of Appeal by saying that it is not necessary in proving the crime of unlawfully assembling in such manner as to disturb the public peace to show that fear was engendered beyond the bounds of the building. It follows that, in my view, the second count in the indictment must stand and therefore also the conviction on the third count, on which, for the reason I have given, no separate question arises.

The arguments affecting the first count are not to be dealt with so simply. They affect one of the most difficult and controversial branches of our criminal law, namely,

1 Criminal Pleading, Evidence and Practice (37th Edn, 1969), ch 15, p 1148

2 [1972] 3 All ER at 1007, [1973] 2 WLR at 134

3 (1839) 3 State Tr NS 1189 at 1234

4 (1839) 9 C & P 91 at 109

5 [1972] 3 All ER at 1006, 1007, [1973] 2 WLR at 134

6 Pleas of the Crown (1716) vol 1, c 65, s 9

7 12th Edn (1964), p 256

- a the law of conspiracy. From the very first the appellants have contended that the first count of the indictment discloses no offence known to the law; in the alternative, counsel for the appellants argued that conspiracy to trespass can only become an offence if committed maliciously or fraudulently. He argued that this was not the case here; alternatively, he argued that the first count was defective since either the statement or the particulars of the offence should have alleged malice or fraud
- b if this were to be relied on. Indeed, counsel for the appellants put his case extremely high. Despite a mass of judicial and textbook authority to the contrary, he argued that not merely was a conspiracy to commit trespass not an offence known to the law, but that no combination to commit a tort or other civil wrong is indictable as a crime, unless that tort or civil wrong be a crime if committed by a single person. If anyone had averred or decided the contrary, he argued, that was wrong, and, though the error might be an old one, he urged us to unmask it with all the courage which
- c your Lordships' House showed when dealing with affray in *Button's* case¹.

These questions on the first count the trial judge, his Honour Judge McKinnon, decided against the appellants on the comparatively narrow ground that, on the basis of the proposition in *Russell on Crime*², the indictment was properly drawn. The proposition reads:

- d 'A combination to violate without just cause private rights, contractual or other, in which the public has a sufficient interest is a criminal conspiracy if the violation of the private right is an actionable wrong.'

In applying this proposition to the facts of the present case, Judge McKinnon said:

- e 'Undoubtedly, trespass is an actionable wrong, and it seems to me that undoubtedly, as a matter of law, the public has a sufficient interest in maintaining the territorial integrity of a High Commission of a member of the Commonwealth when the High Commission is in London, and, therefore, any combination to enter the High Commission without just cause a combination arising by way of agreement would amount to a criminal conspiracy.'

- f He later directed the jury in accordance with this ruling. The Court of Appeal agreed with this reasoning, and, after referring to the terms of the Diplomatic Privileges Act 1964, Lawton LJ said³:

- g 'It follows that the accused's occupation of the High Commission's premises was more than an infringement of the High Commission's property rights. Their conduct called for action by the police in discharge of Her Majesty's Government's statutory duties. The public interest was clearly involved.'

- I too agree with this reasoning, and it follows that, if this were the only issue on the first count, the only question really to be decided is whether the indictment is properly drawn so as to support a conviction for this offence. In a sense this is so, since it turned out during the course of the discussion that counsel for the Crown only sought
- h to defend the form of the indictment in the view of the law which he urged on your Lordships on the basis that it identified the premises invaded as the embassy or high commission of a friendly power or member of the Commonwealth. Counsel for the appellants claimed that the indictment was insufficient, and that the statement and particulars of offence should be drawn so as to specify the class of trespass an agreement to commit which was alleged to be indictable. On this I agree with the
- i argument for the Crown and, even if I did not, since no prejudice to the accused is even arguably involved, I would not be in the least disposed to advise the House to exercise its discretion to consider matters outside the questions certified.

¹ [1965] 3 All ER 587, [1966] AC 591

² 12th Edn (1964), vol 2, p 1490

³ [1972] 3 All ER at 1002, [1973] 2 WLR at 130

But the Court of Appeal¹ did not confine itself to justifying the convictions on the basis solely of the ground contained in the ruling of the trial judge. Although counsel for the Crown urged the court, as he did also your Lordships, to take a more restrictive view of the law, the Court of Appeal¹ in effect decided that all agreements to commit a trespass were indictable without exception. The argument as developed by Lawton LJ was, in effect, that conspiracy is an agreement either to do an unlawful act, or to do a lawful act by unlawful means. Trespass is a tort and therefore an unlawful act. It follows that an agreement to commit a trespass is, by definition, a conspiracy, and therefore indictable. He did not hesitate to accept that such a definition would, at least in theory, open the door to indictments for trivial breaches of the civil law. For instance, if two tired wayfarers agree, without permission and without claim to a right of way, to take a short cut across another's land, they could, at least in theory, end up, on this argument, in the Crown Court on a charge of conspiracy, despite the contrary opinion expressed by Lord Ellenborough CJ in *R v Turner*², and I think by many others after him. Lawton LJ³ felt bound to pursue the logic of this reasoning 'no matter what absurd results can be envisaged if prosecutors and judges do not use common sense' and though recognising that this reliance on the common sense of prosecutors and judges might be unpalatable, he pointed out with complete accuracy that this situation is met with elsewhere in the criminal law.

Between these two extreme views, counsel for the Crown expounded an intermediate doctrine. According to his submission, there can be an indictable conspiracy to commit any tort, but only in certain circumstances, which he sought to categorise as being cases either (i) where the public interest is affected, or (ii) where the nature of the conspiracy is a matter of public concern. In the former category he would include the present case, where, for instance, there was a concerted invasion of a foreign embassy. He equated such an instance with other cases, for instance, where the combination involved infraction of the criminal law, or where the courts had decided that the agreement was to effect a public mischief, as for instance, in *R v Brailsford*⁴, *R v Porter*⁵, *R v Bassey*⁶, *R v Newland*⁷, *R v Bramley*⁸ (of the summing-up in which we were supplied with a transcript) briefly noticed in the *Journal of Criminal Law*.

In the latter category (that is, combinations to commit a tort where the nature of the combination is a matter of public concern) counsel for the Crown included (1) torts against individuals the execution of which include elements of fraud, as, for instance, *R v Kenrick*⁹, *R v Warburton*¹⁰, *R v Aspinall*¹¹, and many others too numerous to mention; (2) torts against individuals, the execution of which included the use of force. I do not think he cited any particular examples of this, unless the trade union cases were categorised under this head (cf *R v Duffield*¹², *R v Druitt*¹³, *R v Bunn*¹⁴). In a third group within his second category, counsel classified (3) torts the execution of which include a mental element which he described as an intent to injure or annoy.

1 [1972] 3 All ER 999, [1973] 2 WLR 126

2 (1811) 13 East 228 at 231

3 [1972] 3 All ER at 1004, [1973] 2 WLR at 131

4 [1905] 2 KB 730, [1904-7] All ER Rep 240

5 [1910] 1 KB 369, [1908-10] All ER Rep 78

6 (1931) 22 Cr App Rep 160

7 [1953] 2 All ER 1067, [1954] 1 QB 158

8 (1946) 11 *Journal of Criminal Law* 36

9 (1843) 5 QB 49

10 (1870) LR 1 CCR 274

11 (1876) 2 QBD 48

12 (1851) 5 Cox CC 404

13 (1867) 16 LT 855

14 (1872) 12 Cox CC 316

a In this he included such cases as *R v Levy*¹ and various statements by individual judges in a whole variety of cases, which I shall be discussing later.

It will be seen that both of the extreme views, namely, that contended for by counsel for the appellants and that adopted by the Court of Appeal², have manifest attractions from the point of view of simplicity. The intermediate view contended for by counsel for the Crown, indeed any view consistent with authority and intermediate between the two extremes, presents great difficulties of definition, principle and application. Some of these at least were summarised by Lawton LJ in supporting his own thesis, and, since I am not following that thesis in the present case, it is fair to him that I should quote the passage, which is as follows³:

c 'Before passing from this topic we would like to invite attention to the difficulties which would arise if there were any such limitations on the offence as suggested. If conspirators' intents had to be considered, judges and juries would almost certainly find themselves struggling with the casuist problems of greater or lesser evils, maybe with the same kind of results as were ridiculed by Pascal. If the public interest is to be considered, as counsel for the Crown suggested, who is to decide what it is? The judge? Or the jury? Are either competent? Should evidence be admitted on this issue? If not, why not? If the judge is to decide, he may well take the verdict from the jury; if the jury are to decide part of the law of conspiracy can be stated in four words: "salus populi, suprema lex". The commonly accepted opinion that trespass is an unlawful act to which Willes J's definition can be applied could produce absurdities; but so far in practice they have been avoided because of the common sense of those who are concerned with the administration of criminal justice; they pay heed to the maxim "de minimis non curat lex"—and not only in relation to the law of conspiracy. The clerk who uses one of his employer's envelopes for a personal letter may well be committing theft; but he is no more likely to be prosecuted for it than those who agree to take a short cut across a field are likely to be prosecuted for conspiracy to trespass.'

f I propose now to deal with this difficult problem under three separate heads, and then to state a conclusion in the form of a number of propositions. My three heads can be stated best as three questions: (i) is conspiracy limited to agreements to perpetrate conduct which if done by a single person would be punishable by criminal sanctions? And, if not, are agreements which involve the commission of a tort against individuals so limited? (ii) If conspiracies are not limited to conduct punishable by criminal sanctions, are all combinations the execution of which involves a tort or torts committed against individuals indictable as conspiracies? (iii) If all combinations involving tortious conduct are not indictable, is there any rational principle on which those which are indictable can be separated from those which are not? Before I seek to answer these questions I will enumerate one or two propositions about which there is no doubt, and which may act to some extent as a guide to help us through this complex discussion.

h (1) It is common ground that the *actus reus* in a conspiracy is the agreement to execute the illegal conduct, and not the execution of it. The crime is complete when the agreement is made. This proposition, first decided in 1611 in the *Poulterers' Case*⁴, is too familiar to require further authority.

j (2) In spite of this, *mens rea* is an essential ingredient in the crime of conspiracy. This *mens rea* consists in the intention to execute the illegal elements in the conduct contemplated by the agreement, in the knowledge of those facts which render the conduct illegal (cf *Churchill v Walton*⁵).

¹ (1819) 2 Stark 458

² [1972] 3 All ER 999, [1973] 2 WLR 126

³ [1972] 3 All ER at 1005, [1973] 2 WLR at 132, 133

⁴ (1610) 9 Co Rep 55b

⁵ [1967] 1 All ER 497, [1967] 2 AC 224

(3) It seems fairly clear that while a mistake of law is not a good defence, a sincere belief in a state of facts which if true would render the illegal conduct legal would be a good answer to any charge of conspiracy. For instance, if conspiracy to trespass be a crime, belief in a state of facts which would give rise to an enforceable right of way would be a defence. Equally, it would be a defence to a charge of conspiracy to defame by the publication of defamatory matter that the accused genuinely and without express malice believed in facts which would establish a privilege. On general principles in all these cases the burden would rest on the prosecution to exclude these defences, which I will describe as a claim of right made in good faith.

(4) Whether or not it be true that a combination to commit a tort is indictable, there are a number of torts which are not complete unless damage actually follows. It follows that, to be indictable, an agreement, the object of which is to commit any of these torts, must include an intention to inflict actual damage. Thus, apart from statute, agreement to be guilty of carelessness is not an agreement to do an act which is unlawful unless it be intended that damage should actually follow. The same must be true of various types of occupiers' liability, and of any case of torts involving strict liability, such as damage arising from cattle trespass, from an attack by the dog who has accomplished his traditional first bite, or from the keeping on one's land of animals *ferae naturae*, or from an agreement to publish, by word of mouth only, defamatory matter not actionable *per se*. In considering the question whether conspiracy to commit a tort is indictable it is not possible in principle to avoid the question of intention and, in particular, of intention as to damage. Incidentally, this must also be true of any action based on deceit since the tort consists in obtaining something valuable as the result of a false pretence.

(5) Trespass is actionable irrespective of the consequences of the trespass. But most of the trespasses, a combination to commit which are in practice under discussion as conspiracies, are either trespasses which are in fact also crimes as being a breach of the statutes of forcible entry and detainer (the latter of which offences is no less a breach of the statutes as the former) and if there are any which are not also breaches of some or all of these statutes they are, in fact, agreements not merely to infringe the rights of the victim, as by walking over his close without committing damage therein, but, as here, agreements which would involve something more than nominal damage, for example, actually to exclude him altogether from possession (cf per Lord Denman CJ in *R v Kenrick*¹) or at least so to use his land or his chattel as to deprive him of any effectual enjoyment of it or some part of it during the execution of the combination.

I now discuss the three main questions I have listed above.

(i) *Is conspiracy limited to agreements involving conduct which if done by a single person would be punishable as a crime?*

In my opinion, it is now far too late without legislation to establish, even were it otherwise desirable, that indictable conspiracy is limited to cases where the illegal elements in the action contemplated would be punishable as a crime if committed by a single individual. I base this view partly on the history of the matter, and partly on a multiplicity of judicial dicta and decisions to this effect.

The early history of conspiracy is dealt with in considerable detail in the well-known work on the subject by R S Wright² (later Wright J) now in its centenary year, to which we were referred in the course of argument. I have also referred to Holdsworth's *History of English Law*³. Both make it clear that from the first the law has never confined indictable conspiracy to agreements to do that which if done by one person would itself constitute a crime. It is clear that there always was some common law crime of conspiracy, since it is referred to both in Bracton and Britton,

¹ (1843) 5 QB at 62

² *Law of Criminal Conspiracies and Agreements* (1873)

³ Vol III, pp 401-407, vol VIII, pp 378-397

a though what it was is not at all plain, and, whatever it was, from the reign of Edward I the common law was supplemented or declared by a series of statutes, it being remembered that, in medieval days, a statute was often merely a way of advertising or emphasising a common law rule or providing additional methods of enforcement. The main subject-matter of the early conspiracies was what we would now call conspiracies to defeat or pervert the course of justice. They certainly included one tort, namely, that which we should now call malicious prosecution; indeed, it appears b that that tort itself was developed as an action on the case on the analogy of the writ of conspiracy and replaced it since it would apply even when there was only one defendant. In the early cases, and under the strict words of the statute (which applied both to the civil and the criminal remedies) the crime, like the tort, was only complete when not merely was the unlawful purpose executed but, in addition, the defendant c acquitted. As time went on, it appears that the criminal element tended to disappear and the tort to predominate in the use made of the statute in the common law courts. But in the *Poulterers' Case*¹ it seems to have been decided once and for all that the essence of the crime of conspiracy lay in the unlawful agreement and not in its execution, and the principle of this decision was taken over by the Court of King's d Star Chamber, and the principle has ever after remained undisputed. For some time the most frequent subject of conspiracies (other than those directly concerned with politics) continued to be concerned with the defeat or perversion of the course of justice, though various statutes between Edward III and Elizabeth I were directed against, for instance, treasonable combinations, combinations for breaches of the peace, and, with a strangely modern ring, combinations by merchants to disturb e the markets or prices, or to raise prices, and against corresponding combinations on the part of labourers to raise wages and alter hours. During the latter part of the 17th century and the 18th century, the law of conspiracy began to develop over a fairly wide scale. The odd case of *R v Sterling*², as explained by Holt CJ in *R v Daniell*³, testifies to the development of conspiracy to commit what would now be described as a public mischief, when the combination was directed, for instance, against the f revenue, and by the time of the publication of the first edition of Hawkins Pleas of the Crown⁴ the law had accepted some sort of obligation to protect in addition the rights of the individual against a conspiracy by two or more persons to prejudice an individual wrongfully, since Hawkins boldly, but as has been pointed out by textbook writers, too boldly, asserted that 'all confederacies whatsoever wrongfully to prejudice a third person are highly criminal at common law'. As I have just said, it has g been pointed out that the authorities cited in support of this proposition do not fully support it. Quite apart from all else, the statement must be inadequate if only because it gives no adequate account of the mental element in the crime of conspiracy, while the word 'wrongfully' so long as it remains undefined begs a number of difficult questions of definition. What is clear, however, is that by this time a number of acts which, if done by a person singly, would not be punishable, were h considered to become indictable conspiracies if two or more persons agreed to do them in combination and that these could include at least some combinations to effect a public mischief, and some at least to injure by means of tort. In its origin, therefore, the crime of conspiracy was not confined to what would be punishable in an individual. By the beginning of the 18th century it included, as it always had, an agreement to commit the tort of malicious prosecution. It included also certain combinations to effect a public mischief. It also included an ill-defined class of i combinations to effect unlawful prejudice to the individual.

1 (1610) 9 Co Rep 55b

2 (1663) 1 Lev 125

3 (1704) 6 Mod Rep 99

4 (1716)

These classes of case have existed more or less from the beginning up to and including the present day. In my view, all these types survive. I have already noticed statutory prohibition against merchants rigging the market. More modern examples of conspiracy to effect a public mischief, usually by fraud, of the same kind but not containing any reference to statute, are *R v De Berenger*¹, which was a case of conspiracy to affect the price of government funds by false rumours of Napoleon's death; *R v Aspinall*², which was a conspiracy to cheat and defraud prospective purchasers of shares by a false prospectus; *R v Lewis*³, which was a conspiracy to defraud the public by means of a mock auction in which the bidders were not genuine and bid only for the purpose of selling goods at inflated prices; *R v Brailsford*⁴, which was a conspiracy to obtain a passport (then only required, I believe, for travel to Imperial Russia) by means of false representations; *R v Porter*⁵, which was an agreement (without fraud) to indemnify against bail; *R v Bassey*⁶, which was an agreement to obtain admission as a barrister by divers fraudulent devices; *R v Newland*⁷, which was an agreement by fraud to divert goods from the export to the domestic market contrary to the policy of the regulations then in force, but without an actual breach of these regulations. Other examples of conspiracy to commit a public mischief which was not or may not have been otherwise criminal by means other than fraud include: *R v Young*⁸, which was a combination to remove a dead body, since the hearing of this case followed in the Court of Appeal in *R v Hunter*⁹; *R v Lynn*¹⁰, which was a conspiracy to bring about a marriage by violence, threats and contrivance; *R v Howell*¹¹, which was a conspiracy to procure a woman to become a prostitute; *R v Mears and Chalk*¹², to defile a girl of 15 years (not at that time criminal). I also consider that the so-called conspiracy to corrupt public morals is of this class: see *Kneller (Publishing, Printing and Promotions) Ltd v Director of Public Prosecutions*¹³; *Shaw v Director of Public Prosecutions*¹⁴. I have no hesitation myself in adding the present type of case to this list for the reasons stated by Judge McKinnon and Lawton LJ¹⁵ since this was a conspiracy to trespass by invading a foreign embassy or Commonwealth high commission and, with the Court of Appeal¹⁵, I consider that a public interest is directly involved in such an act. It will be seen that, in my view, this is not the only trespass capable of forming the basis of an indictment, but, subject, to any question about the adequacy of the indictment, it would alone justify conviction on the first count in this case. I do not regard the categories of conspiracy to effect a public mischief as closed, or even as capable of being closed, but extension should be very closely and jealously watched by the courts, owing to the difficulty of riding the horse of public policy and the danger of applying the subjective criteria of individual judges to the concept. See, for instance, the remarks of Bowen LJ in *Mogul Steamship Co v McGregor Gow & Co*¹⁶ where he says:

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- 1 (1814) 3 M & S 67
 - 2 (1876) 2 QBD 48
 - 3 (1869) 11 Cox CC 404
 - 4 [1905] 2 KB 730, [1904-7] All ER Rep 240
 - 5 [1910] 1 KB 369, [1908-10] All ER Rep 78
 - 6 (1931) 22 Cr App Rep 160
 - 7 [1953] 2 All ER 1067, [1954] 1 QB 158
 - 8 (1784) 4 Wentworth's System of Pleading 219
 - 9 (1973) The Times, 18th May
 - 10 (1788) 2 Term Rep 733
 - 11 (1864) 4 F & F 160
 - 12 (1851) 2 Den 79
 - 13 [1972] 2 All ER 898, [1973] AC 435
 - 14 [1961] 2 All ER 446, [1962] AC 220
 - 15 [1972] 3 All ER 999, [1973] 2 WLR 126
 - 16 (1889) 23 QBD 598 at 616

- a* 'In the application of this undoubted principle it is necessary to be very careful not to press the doctrine of illegal conspiracy beyond that which is necessary for the protection of individuals, or of the public ...'

He adds¹:

- b* '... it may be observed in passing that as a rule it is the damage wrongfully done, and not the conspiracy, that is the gist of actions on the case for conspiracy ...'

The danger of extending the doctrine of conspiracy at the present day is also well illustrated by the fate of the prosecution in *Director of Public Prosecutions v Bhagwan*², which is to be contrasted with *R v Newland*³. The former was an unsuccessful attempt by the Crown to extend the doctrine of public mischief to combination without fraud, but with clandestinity to do an otherwise lawful act in a field which had already been fully covered by statute law.

- c* But even if I were of the opinion that the whole history of the crime did not declare it to be otherwise, I would not find myself able to accept the appellants' submission that only combinations to do what was otherwise criminal are indictable as conspiracies. The whole weight of modern judicial authority to the contrary, especially in the field of combinations to commit a tort, is far too strong. I cull the following quotations almost at random: it would be possible to discover many more. Apart from the 'Denman Antithesis'⁴ (mentioned later) one of the first is that of Cockburn CJ in *R v Warburton*⁵: 'It is enough if the acts agreed to be done, although not criminal, are wrongful ...'

- e* As was pointed out by Barry J in *R v Parnell*⁶, the view of Cockburn CJ in *R v Warburton*⁵ was elaborated at length in the report of the Royal Commission of which he was chairman, from which Barry J quoted at length, concluding with the sentence in the report with which Barry J concurred⁷:

- f* 'The law has therefore, and it seems to us wisely and justly established that a combination of persons to commit a wrongful act with a view to injure another, shall be an offence, though the act if done by one would amount to no more than a civil wrong.'

Or again, Lord Brampton in *Quinn v Leatham*⁸ said:

- g* 'Much consideration of the matter has led me to be convinced that a number of actions and things not in themselves actionable or unlawful if done separately without conspiracy may, with conspiracy, become dangerous and alarming ...'
- In an earlier passage he had defined conspiracy as⁹:

- h* '... an unlawful combination of two or more persons to do that which is contrary to law, or to do that which is wrongful and harmful towards another person.'

In a widely known passage in his judgment of the Court of Appeal in the *Mogul* case¹, Bowen LJ had said, immediately before the passage I have just quoted:

- h* 'Of the general proposition, that certain kinds of conduct not criminal in any one individual may become criminal if done by combination among several, there can be no doubt.'

1 (1889) 23 QBD at 616

2 [1970] 3 All ER 97, [1972] AC 60; *affg* [1970] 1 All ER 1129, [1970] 2 WLR 837

3 [1953] 2 All ER 1067, [1954] 1 QB 158

4 In *R v Jones* (1832) 4 B & Ad 345 at 349

5 (1870) LR 1 CCR 274 at 276

6 (1881) 14 Cox CC 508 at 518, 519

7 (1881) 14 Cox CC at 521

8 [1901] AC 495 at 530

9 [1901] AC at 528

In the House of Lords' report of the same case, Lord Halsbury LC said words to the same effect¹:

'Intimidation, violence, molestation, or the procuring of people to break their contracts, are all of them unlawful acts; and I entertain no doubt that a combination to procure people to do such acts is a conspiracy and unlawful.'

In *Boots v Grundy*² Bigham J is reported as saying:

'No conspiracy is, in my opinion, known to the law which has not for its object the accomplishment of an unlawful act (not necessarily a criminal act) . . .'

In *R v Whitaker*³ Lawrence J said:

'To make a good count for conspiracy it is not necessary that the agreement should be an agreement to commit a crime; it is enough if it be an agreement to do an act which is unlawful or wrongful in the sense of tortious. At any rate this is so where the agreement is to do an act of fraud or corruption. There is authority for saying that an agreement to commit a mere trespass is not necessarily a misdemeanour. If that be law, as to which doubts have been expressed by eminent judges, it is clear that where the tort is one of fraud or corruption an agreement to commit it is a misdemeanour at common law.'

The learned judge went on to refer to *R v Warburton*⁴ and *R v Aspinall*⁵.

No doubt whatever is cast on these views by Viscount Simon LC in *Crofter Hand Woven Harris Tweed Co Ltd v Veitch*⁶, nor by Lord Reid in his minority judgment in *Shaw v Director of Public Prosecutions*⁷, where he said:

'Then there is undoubtedly a third class of act which an individual can do with impunity but a combination cannot. Perhaps the best known example is conspiring to injure a man in his trade if done without justification.'

And Lord Reid went on to refer to the *Mogul*⁸ and *Harris Tweed*⁶ cases. In *Crofter Hand Woven Harris Tweed Co Ltd v Veitch*⁹ Lord Simon LC had said:

'The question to be answered, in determining whether a combination to do an act which damages others is actionable even though it would not be actionable if done by a single person, is not: "Did the combiners appreciate, or should they be treated as appreciating, that others would suffer from their action?" It is: "What is the real reason why the combiners did it?" . . . The analysis of human impulses soon leads us into the quagmire of mixed motives, and, even if we avoid the word "motive," there may be more than a single purpose or object. It is enough to say that, if there is more than one purpose actuating a combination, liability must depend on ascertaining the predominant purpose. If that predominant purpose is to damage another person and damage results, that is tortious conspiracy.'

It is to be observed that Lord Simon LC was referring in terms not to criminal, but to 'tortious conspiracy', the first example I can find of a suggestion the conspiracy could be tortious, but not criminal. I do not think Lord Simon LC meant to suggest

1 [1892] AC 25 at 37, [1891-94] All ER Rep 263 at 268

2 (1900) 82 LT 769 at 772.

3 [1914] 3 KB 1283 at 1299

4 (1870) LR 1 CCR 274

5 (1876) 2 QBD 48

6 [1942] 1 All ER 142, [1942] AC 435

7 [1961] 2 All ER at 456, [1962] AC at 273

8 [1892] AC 25, [1891-94] All ER Rep 263

9 [1942] 1 All ER at 149, [1942] AC at 444, 445

- a** this except in one limited sense. The difference between tortious and criminal conspiracy is that conspiracy giving rise to an action for damages being an action on the case must (1) have been put into execution and (2) have given rise to actual damage, whereas in a criminal conspiracy, since the *Poulterers' Case*¹, the agreement, and not the execution of the agreement in whole or in part, is the 'gist of the indictment' or the actus reus (see per Lord Brampton in *Quinn v Leatham*²). Lord Simon LC, however, does in fact suggest that the object of a conspiracy may be illegal if it be to injure another even if the means are not individually tortious provided that this the 'predominant purpose' of the combination. It is not necessary to decide in the present case whether this be so though there are some authorities which can be quoted in this sense. Lord Halsbury LC said in the *Mogul* case³:

- c** 'I am unable to concur with the Lord Chief Justice's criticism⁴ (if its meaning was rightly interpreted, which I very much doubt) on the observations made by my noble and learned friend Lord Bramwell in *Reg. v. Druitt*⁵, if that was intended to treat as doubtful the proposition that a combination to insult and annoy a person would be an indictable conspiracy. I should have thought it as beyond doubt or question that such a combination would be an indictable misdemeanour.'

- d** There are also a number of decisions which support this view. Such for instance are *R v Levy*⁶, a combination to upset a woman in labour, although in that case the combination probably also involved nuisance or trespass, that does not appear to be the ground of decision. So also it has been said that a combination to ruin an actor by hissing him off the stage may be indictable (cf *Clifford v Brandon*⁷, per Mansfield CJ; *Gregory v Duke of Brunswick*⁸; *R v Leigh*⁹). What does emerge from this group of citations, including Lord Simon LC's speech in the *Harris Tweed* case¹⁰, is the possibility that the intention or object of those concerned in a combination may be an important factor in determining the question whether a conspiracy to do that which is unlawful, but not, if done by an individual, a crime, may play an important part in deciding whether a combination to injure an individual is indictable.

From this rather prolonged review I draw the following conclusions:

- f** (1) A combination to do that which is a crime, whether triable summarily (cf *R v Blamires Transport Services Ltd*¹¹) or on indictment, is an indictable conspiracy. Thus I have little doubt that a combination to commit trespass in such a manner as to break the statutes of forcible entry and detainer is a criminal conspiracy, and though this was not the course taken here, I have little doubt but that it could have been taken here, and could be taken in the vast majority of the squatting cases, or the 'sit in' cases, or many of the cases in which sports grounds are forcibly occupied or disrupted (cf *R v Bramley*¹² and the transcript of Stable J's summing-up to which we were referred, and which was briefly noticed in the *Journal of Criminal Law*). As to forcible entry and detainer, see Halsbury's *Laws of England*¹³, *R v Bramley*¹² (where the charges included one under the Statutes of Forcible Entry) and *R v Britain*¹⁴.

- h** 1 (1610) 9 Co Rep 55b
2 [1901] AC at 528, 529, [1900-3] All ER Rep at 14
3 [1892] AC at 38, [1891-94] All ER Rep at 269
4 (1888) 21 QBD at 551
5 (1867) 16 LT 855
6 (1819) 2 Stark 458
7 (1809) 2 Camp 358 at 369, 372, [1803-13] All ER Rep 771 at 773, 774
i 8 (1843) 1 Car & Kir 24
9 (1775) 1 Car & Kir 28n
10 [1942] 1 All ER 142, [1942] AC 435
11 [1963] 3 All ER 170, [1964] 1 QB 278
12 (1946) 11 *Journal of Criminal Law* 36
13 3rd Edn, vol 10, 590, 591, para 1100, 592, 593, para 1104
14 [1972] 1 All ER 353, [1972] 1 QB 357

(2) A combination to commit a public mischief can be indictable. The categories here are not closed, and I have no doubt that they include a combination to trespass on or occupy a foreign embassy or a Commonwealth high commission, the inviolability of which Her Majesty's Government are under an obligation to protect. I feel certain, too, that there are many other public buildings owned by the authorities in this country to which the same considerations would apply.

(3) A combination to commit a tortious act may be a crime, even if authority does not compel us to the view that all combinations to commit a tort are indictable. I now therefore come to consider the second question which I have proposed, namely: (ii) *If conspiracies are not limited to conduct punishable by criminal sanctions, are all combinations the execution of which involves the commission of a tort against individuals criminally punishable as conspiracies?*

In deciding that they were, Lawton LJ¹ rested heavily on what has become the classical definition of conspiracy which he cited from the advice of the judges in *Mulcahy v R*² given by Willes J:

‘A conspiracy consists . . . in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means.’

Clearly, this definition is wide enough to include combinations to commit any tort and perhaps any breach of contract, but I desire to say something of its history, since, although I accept the definition, I do not think, in the context in which it has been used in the past, it supports the weight which has been rested on it in the Court of Appeal.

This classical definition of conspiracy in fact owes its origin to Lord Denman CJ and not to Willes J in *Mulcahy v R*². In its original form it was known as ‘Lord Denman’s antithesis’ and appears first to have been used by Lord Denman CJ in 1832 in *R v Jones*³ for the purpose of making absolute a motion in arrest of judgment and again, for the same purpose in 1834, in *R v Seward*⁴. It was never intended, on the lips of Lord Denman CJ, either to confine the expression ‘unlawful’ to conduct which if committed by a single person would be criminal or to extend it to all conduct which, in any of the senses to which the vague term ‘unlawful’ can be applied, can be described as unlawful or illegal. In a later case, *R v Peck*⁵, Lord Denman CJ corrected counsel, who quoted it to him, with the words: ‘I do not think the antithesis very correct’ and in *King v R*⁶, he clearly explained the phrase by amending it and saying that he would wish to insert the phrase ‘at least’, presumably at the beginning. In each case where he used the phrase he was in fact protesting, as did the House of Lords in the *Mogul* case⁷, against attempts at extending the definition of conspiracy to cases where the acts involved in the combination involved *no* element of illegality in any sense whatsoever. In *Mulcahy v R*⁸ the advice of the judge was being given in the context of criminal law (in fact treason-felony) and, in the passage cited, a few lines below the actual quotation, Willes J shows that he had criminal sanctions very much in mind, though I would not accept any interpretation which would equate ‘unlawful’ in this context as synonymous with ‘criminal’. Whilst therefore the classical definition is extremely convenient, and will not, I hope, be superseded, it cannot, I think, bear the full weight sought to be placed on it by Lawton LJ in the present case when he said⁹:

¹ [1972] 2 All ER at 1003, [1973] 2 WLR at 131

² (1868) LR 3 HL 306 at 317

³ (1832) 4 B & Ad 345 at 349

⁴ (1834) 1 Ad & El 706 at 713

⁵ (1839) 9 Ad & El 686 at 690

⁶ (1845) 7 QB 782 at 788

⁷ [1892] AC 25, [1891-94] All ER Rep 263

⁸ (1868) LR 3 HL at 317

⁹ [1972] 3 All ER at 1004, [1973] 2 WLR at 131

a '... we feel bound to declare that the law is as stated by Willes J in *Mulcahy's* case¹, and if we apply the commonly held opinion that a tort is an unlawful act, it must follow that an agreement to trespass is an indictable conspiracy, no matter what absurd results can be envisaged if prosecutors and judges do not use common sense.'

b The Willes definition¹, or the Denman antithesis², does not mean that all acts which can be described as unlawful are indictable if done in combination. If it did, all illegal contracts, all acts which are in fact tortious however innocent or trivial, and all agreements in the execution of which contracts are broken, might be indictable at the prosecution of any individual, and not merely of the police. The authorities simply do not bear out that view.

c In addition to this, it is clear that there is judicial authority to the contrary effect. In *R v Turner*³, a night poaching case, Lord Ellenborough CJ is, as Lawton LJ⁴ points out, quoted as saying⁵:

d '... I should be sorry to have it doubted whether persons agreeing to go and sport upon another's ground, in other words, to commit a civil trespass, should be thereby in peril of indictment for an offence which would subject them to infamous punishment.'

e It is true that in *R v Rowlands*⁶ Lord Campbell CJ expressed the view referred to by Lawton LJ⁴ that *Turner's* case³ had been wrongly decided. But this, I think, was because he considered that the combination in *Turner*³ involved the commission of a crime or at least the use, or threat, of illegal force. I do not understand him as contradicting Lord Ellenborough CJ's opinion, but only his application of the doctrine in it to the facts of the case. However that may be, numerous textbooks and judges have continued either to quote *Turner*³ in this connection or at least to repeat in other words Lord Ellenborough CJ's apprehensions, and to say that they would be sorry to think that a stroll by two or more persons across somebody else's park without permission would necessarily subject the strollers to criminal sanctions. On the other side of the coin, I do not think anyone until now has seriously supposed that **f** Lord Ellenborough CJ intended to sanction the forcible expulsion of the true owner of a close and the occupation of it by trespassers, or the deliberate disruption of the owner's total enjoyment of his property as totally immune from criminal penalties. In this, at least, I have the authority of Lord Denman CJ himself in *R v Kenrick*⁷. Incidentally in that case Lord Denman CJ said plainly⁸:

g 'The whole law of conspiracy, as it has been administered at least for the last hundred years, [sc since 1743] has been thus called in question: for we have sufficient proof that during that period any combination to prejudice another unlawfully has been considered as constituting the offence so called.'

h I am for myself not prepared to say with complete confidence that Lawton LJ⁹ was wholly wrong in claiming that all combinations to commit trespass are therefore indictable. I am prepared to claim, for the reasons given above, that the authorities are not compelling and, since I share Lord Ellenborough CJ's reluctance, as expressed

i 1 (1868) LR 3 HL at 317

2 (1832) 4 B & Ad at 349

3 (1811) 13 East 228

4 [1972] 3 All ER at 1003, [1973] 2 WLR at 130

5 (1811) 13 East at 231

6 (1851) 17 QB 671 at 686

7 (1843) 5 QB at 62

8 (1843) 5 QB at 61

9 [1972] 3 All ER at 1004, [1973] 2 WLR at 131

in *R v Turner*¹, which I do not think has even been authoritatively overruled, to accept this conclusion, I turn to the third question I have proposed, namely:

(iii) *If combinations involving tortious conduct 'are not all indictable, is there any rational principle on which those which are indictable can be separated from those which cannot?*

In my view, there is such a principle, and, in my view, the rational principle can be deduced from the nature of the considerations which have led courts over centuries to decide that they must protect certain wrongs to individuals from acts done by a number which, had they been done by a single wrongdoer, would have given rise to a civil remedy only. A short statement of the case in this regard is contained in the speech of Lord Bramwell in the *Mogul* case²:

'It has been objected by capable persons, that it is strange that that should be unlawful if done by several which is not if done by one, and that the thing is wrong if done by one, if wrong when done by several; if not wrong when done by one, it cannot be when done by several. I think there is an obvious answer, indeed two; one is, that a man may encounter the acts of a single person, yet not be fairly matched against several. The other is, that the act when done by an individual is wrong though not punishable, because the law avoids the multiplicity of crimes: *de minimis non curat lex*; while if done by several it is sufficiently important to be treated as a crime.'

A fuller treatment of the same subject is to be found in the report of the Royal Commission on Criminal Law of which Cockburn CJ was chairman shortly after he was responsible for the decision in *R v Warburton*³. This was rather fully quoted by Barry J in *R v Parnell*⁴. The passage concludes:

'It is obvious that a wrongful violation of another man's right committed by many assumes a far more formidable and offensive character than when committed by a single individual. The party assailed may be able by recourse to the ordinary civil remedies to defend himself against the attacks of one. It becomes a very different thing when he has to defend himself against many combined to do him injury. To take the case by way of illustration, that of false representations made to ruin a man's business by raising a belief in his insolvency, such an attempt made by one might be met and repelled. It would obviously assume very different proportions, and a far more formidable character if made by a number of persons confederated together for the purpose, and who should simultaneously and in a variety of directions take measures to effect the common purpose. A variety of other instances, illustrative of the principle, might be put. The law has therefore, and it seems to us wisely and justly established that a combination of persons to commit a wrongful act with a view to injure another, shall be an offence, though the act if done by one would amount to no more than a civil wrong.'

I draw attention to the words 'with a view to injure another' in the last phrase of this quotation. This, coupled with the analysis of the matter with which I preceded the enquiry into these questions, seems to me to give the clue to the answer which we are seeking. Unlike many other torts, trespass is actionable as a civil wrong without proof of actual damage and without proof of any special intention. I do not believe that a combination, the execution of which necessarily involves only a technical infringement of the civil rights of others, is necessarily also indictable. The authorities do not constrain me to say that it is, and I share Lord Ellenborough CJ's¹ reported

1 (1811) 13 East at 231

2 [1892] AC at 45, [1891-94] All ER Rep at 272

3 (1870) LR 1 CCR 274

4 (1881) 14 Cox CC at 520, 521

reluctance to do so. On the other hand, a combination the execution of which has as its object not merely a tort or other actionable wrong, but also either the invasion of the public domain, or the intention to inflict on its victim injury and damage which goes beyond the field of the nominal is indictable, whether the object be achieved by trespass to land, goods or person, by ruin of the reputation through the defamation of character, by the commission of private nuisance, by some contrivance of fraud, by the imposition of force, or by any other means which is tortious. This is in fact the thread which has run through the law from *Hawkins Pleas of the Crown*¹ to Lord Simon LC's speech in the *Harris Tweed* case², although I do not necessarily indorse the view perhaps implicit in that speech that a combination to injure is necessarily indictable without some element involved in its execution otherwise inherently unlawful. I therefore answer the first of the questions certified by the Court of Appeal³ in the affirmative, but with a qualification. Trespass or any other form of tort can, if intended, form the element of illegality necessary in conspiracy. But in my view, more is needed. Either (1) execution of the combination must invade the domain of the public, as, for instance, when the trespass involves the invasion of a building such as the embassy of a friendly country or a publicly owned building, or (of course) where it infringes the criminal law as by breaching the Statutes of Forcible Entry and Detainer, the Criminal Damage Act 1971 or the laws affecting criminal assaults to the person. Alternatively, (2) a combination to trespass becomes indictable if the execution of the combination necessarily involves and is known and intended to involve the infliction on its victim of something more than purely nominal damage. This must necessarily be the case where the intention is to occupy the premises to the exclusion of the owner's right, either by expelling him altogether (cf per Lord Denman CJ in *R v Kenrick*⁴) or otherwise effectively preventing him from enjoying his property.

Though this latter supervening requirement was clearly satisfied here counsel for the Crown did not seek so to justify the conviction on the first count on this precise ground as count one of the indictment was not drawn so as to include specific reference to the elements recited above except, as has been seen, the invasion of the High Commission. The conviction on the first count can, therefore, only be sustained on the last and narrow ground.

My Lords, in the event, the appeal fails and must be dismissed. There are only two other matters which I wish to add. The first relates to the relative functions of judge and jury, the second to the form which future indictments should take. As to the first, I agree with Lawton LJ⁵ that there is objection in principle to the course adopted by Stable J in *R v Bramley*⁶ in leaving to the jury the question whether a combination is sufficiently a matter of public concern to come within the ambit of the criminal law. The summing-up should follow the established principles. The judge should direct the jury as to what element of fact if established to have been part of the agreement would be an invasion of the public field in either of the main ways I have described. The jury should be left to consider whether that element of fact was part of the agreement and was present to the minds of the accused in making the agreement as part of the action agreed on.

Secondly, as regards the indictment. This will now be governed by the Indictment Rules 1971⁷. We were told that the indictment in the present case was governed

¹ (1716)

² [1942] 3 All ER 142, [1942] AC 435

³ [1972] 3 All ER 999, [1973] 2 WLR 126

⁴ (1843) 5 QB at 62

⁵ [1972] 3 All ER at 1004, [1973] 2 WLR at 132

⁶ (1946) 11 Journal of Criminal Law 36

⁷ SI 1971 No 1253

by the old rules. I do not think it necessary that the statement of offence should include all the essential ingredients of the offences any more than was required by r 4 (3) of the old rules. But under the new rules it is essential to state as part of the particulars of offence the intention or other special circumstances which must accompany the trespass in order to render the agreement indictable. In the present case, apart from the particular public interest involved in the intention to invade a friendly embassy, this intention would have been to take possession of the premises and perhaps to imprison the occupants. In other cases it might be to disrupt or frustrate the particular use which the owner or occupier was making of the premises at the time or to prevent the owner or occupier from making use of the premises or a specified part of them at all. The only essential is that the particulars of offence should describe the essential elements of the offence in such a way as with the statement of offence to give reasonable information as to the nature of the charge (see rr 5 (1), 6 (a) and (b) with proviso).

For the above reasons, my Lords, I would dismiss this appeal.

LORD MORRIS OF BORTH-Y-GEST. My Lords, I have had the advantage of reading in advance the speech of my noble and learned friend on the Woolsack, and I am in agreement with it.

LORD SIMON OF GLAISDALE. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend on the Woolsack. I agree with it: and I therefore concur that the appeals should be dismissed.

LORD CROSS OF CHELSEA. My Lords, I have had the advantage of reading the speech prepared by my noble and learned friend, Lord Hailsham of St Marylebone LC, in which he sets out the facts and discusses fully the questions of law which arise on this appeal. I agree with him that the appeals should be dismissed and I have nothing to add to what he says with regard to the charge of 'unlawful assembly'. On the more difficult question of 'conspiracy to trespass' I would summarise my views as follows:

(A) An agreement by two or more to commit a trespass is not in itself a criminal offence even though the parties to it know that what they are agreeing to do will constitute a trespass. The dictum of Lord Ellenborough CJ to that effect in *R v Turner*¹ accords with common sense and I think that it was right in law. The reason why doubts as to its correctness have sometimes been expressed is that—as Lawton LJ says—lawyers have fallen into the habit of saying that a criminal conspiracy can be defined as 'an agreement to do an unlawful act or to do a lawful act by unlawful means'. That phrase, as my noble and learned friend points out, appears to have been coined by Lord Denman CJ in 1832 in his judgment in *R v Jones*² and was repeated or referred to by him in several later cases, i.e. *R v Seward*³, *R v Peck*⁴ and *King v R*⁵. If one reads what Lord Denman CJ said on those occasions it becomes clear that he did not intend the phrase to constitute a definition of a criminal conspiracy. What he was saying was not that any agreement to do an unlawful act or a lawful act by unlawful means constituted a criminal conspiracy but only that there could be no

1 (1811) 13 East 228 at 231

2 (1832) 4 B & Ad 345 at 349

3 (1834) 1 Ad & El 706 at 713

4 (1839) 9 Ad & El 686 at 690

5 (1845) 7 QB 782 at 788

a criminal conspiracy unless there was at least an agreement to do an unlawful act or a lawful act by unlawful means. It is to be observed that in *R v Kenrick*,¹ Lord Denman CJ accepted Lord Ellenborough CJ's dictum in *R v Turner*² as correct though he pointed out that if the object of the agreement had been not simply to 'sport' on the owner's land but to eject him from his property the agreement might well have amounted to a criminal conspiracy. Again the reason why Lord Campbell CJ in *R v Rowlands*³ said that *R v Turner*⁴ had been wrongly decided was not that he disagreed with the view that an agreement to commit a trespass was not 'per se' a criminal conspiracy but because the agreement alleged in *R v Turner*⁴ was if necessary to use force in the course of the trespass. It is true that in *Mulcahy v R*⁵ Willes J in delivering the opinion of the judges said that 'a conspiracy consists in the agreement of two or more to do an unlawful act or a lawful act by unlawful means' but the offence there charged was of 'feloniously conspiring to deprive the Queen of her style honour and royal name' and—as my noble and learned friend, Lord Diplock, pointed out in his speech in *Kneller (Publishing, Printing and Promotions) Ltd v Director of Public Prosecutions*⁶—it is clear from the next sentence that by 'unlawful' Willes J meant 'criminal'. He and his brother judges were not, I am sure, intending to say that every agreement by two or more persons to commit any unlawful act constituted a criminal conspiracy. Indeed, to say so would be absurd. Even in this

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d permissive age adultery is still, I suppose, an 'unlawful act' and it would certainly have been so regarded in 1868; but no one could seriously suggest that though adultery is not itself a crime the antecedent agreement to commit it constitutes a criminal conspiracy for which the parties are theoretically liable to be indicted.

(B) An agreement by several to commit acts which if done by one would only amount to a tort may constitute a criminal conspiracy if, as has been said, 'the public has a sufficient interest'—that is to say when the carrying into execution of the agreement would have consequences sufficiently harmful to call for penal sanctions. In the case of an agreement to trespass that might be the case—because, for example, of the nature of the property in which the trespass was to be committed or of the means to be employed in carrying out the trespass or of the object to be achieved by it.

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f (C) An indictment which charges as a criminal conspiracy an agreement by two or more to commit an act or acts which would not constitute a crime if done by a single person should always state with precision the circumstances on which the Crown relies as justification for treating the agreement as a criminal offence. Those who drafted the indictment in this case appear to have overlooked this requirement for although there may well have been various elements in the agreement which could

g have been relied on the only one disclosed by the wording of the indictment is that the property on which the trespass was to be committed was the High Commission of Sierra Leone. I have, however, no doubt that there is a 'public interest' in treating an agreement to trespass on premises of that character as a crime and although it is by luck rather than by judgment that the Crown scrapes home counsel for the appellants frankly conceded that on the facts of this case the point as to the form

h of the indictment, which was not mentioned in the certificate, was a technicality.

(D) It is for the judge to decide as a matter of law whether the circumstances alleged in the indictment are sufficient if proved to the satisfaction of the jury to render the

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1 (1843) 5 QB 49 at 62
2 (1811) 13 East at 231
3 (1851) 17 QB 671 at 686
4 (1811) 11 East 228
5 (1868) LR 3 HL 306 at 317
6 [1972] 2 All ER 898 at 920, 921, [1973] AC 435 at 476, 477

agreement to commit the act or acts in question a criminal offence. It follows that in my opinion the course adopted by Stable J in *R v Bramley*¹ was wrong.

Appeals dismissed.

Solicitors: *Scott, Clarke & Co* (for the appellants); *Director of Public Prosecutions*.

S A Hatteea Esq. Barrister.

Practice Direction

NATIONAL INDUSTRIAL RELATIONS COURT

Industrial relations – National Industrial Relations Court – Jurisdiction – Appeals from industrial tribunals – Court's jurisdiction limited to appeals on questions of law – Possibility of order for costs against appellant if appeal not involving question of law – Industrial Relations Act 1971, s 114 – Industrial Court Rules 1971 (SI 1971 No 1777), r 69.

Intending appellants are reminded that under s 114 of the Industrial Relations Act 1971 the jurisdiction of the court is limited to appeals on questions of law arising in any proceedings before, or arising out of any decision of, an industrial tribunal. If appeals which involve no question of law are instituted, the court may take the view that the appellant has been guilty of unreasonable conduct in instituting the appeal and make an order for costs or expenses against him pursuant to r 69 of the Industrial Court Rules 1971².

20th July 1973

JOHN F DONALDSON P

¹ (1946) 11 Journal of Criminal Law 36

² SI 1971 No 1777